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348 U.S.
Lab. Ct.

Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 467)

Supreme Court of the United States

OCTOBER TERM, 1953

No. 304

ELMER F. REMMER, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1953

CERTIORARI GRANTED NOVEMBER 16, 1953

No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes
Volume I
(Pages 1 to 448)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Appellee.

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In the United States District Court
for the District of Nevada

No. 12,177

UNITED STATES OF AMERICA

vs.

ELMER F. REMMER.

INDICTMENT

The grand jury charges:

That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $9,500.00 and that the amount of tax due and owing thereon was the sum of $2,570.00, whereas as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $33,734.61, upon which said net income he owed to the United States of America an income tax of $16,259.54.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C. Section 145(b).

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Second Count

The grand jury further charges:

That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who, during the calendar year 1944 was maried to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $9,500.00 and that the amount of tax due and owing thereon was the sum of $2,570.00, whereas as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of $33,734.60, upon which said net income there was owing to the United States of America an income tax of $16,259.54. In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Third Count

The grand jury further charges:

That on or about the fourteenth day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly

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attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $28,888.68, and that the amount of tax due and owing thereon was the sum of $13,072.02, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $37,-157.10, upon which said net income he owed to the United States of America an income tax of $18,-586.83.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Fourth Count

The Grand Jury further charges:

That on or about the fourteenth day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1945 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal

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Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $30,429.68 and that the amount of tax due and owing thereon was the sum of $14,074.29, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of $38,708.09, upon which said net income there was owing to the United States of America an income tax of $19,649.82.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Fifth Count

The grand jury further charges:

That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the

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sum of $11,244.79 and that the amount of tax due and owing thereon was the sum of $2,776.87, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $94,235.84, upon which said net income he owed to the United States of America an income tax of $61,341.68.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

Sixth Count

The grand jury further charges:

That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1946 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $11,244.79 and that the amount of tax due and owing thereon was the sum of $2,776.87, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-

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property basis, was the sum of $94,235.84, upon which said net income there was owing to the United States of America an income tax of $61,-341.68.

In violation of Section 145(b), Internal Revenue Code; 26 U. S. C., Section 145(b).

A True Bill.

/s/ JAMES M. GLYNN,
Foreman.

/s/ MILES N. PIKE,
United States Attorney.

[Endorsed]: Filed April 9, 1951.

[Title of District Court and Cause.]

MOTION FOR A BILL OF PARTICULARS

The defendant by his attorneys, John R. Golden and Leslie C. Gillen, moves the Court to require the attorney for the Government to file a Bill of Particulars, on the ground that the indictment contains mere conclusions of law and fails to contain a plain, concise and definite written statement of the essential facts, constituting the offenses charged, in that it does not inform the defendant of the nature, kind and amount of each item claimed by the Government as making up the total gross income for Elmer F. Remmer and Helen L. Remmer, and each of them, for each of the years 1944, 1945 and 1946, and in that it does not inform the defendant of the

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type and amount of each deduction against the claimed total gross income of Elmer F. Remmer and Helen L. Remmer, and each of them, for each of the years 1944, 1945 and 1946, which Bill of Particulars should particularly set forth the following with respect to each count in the indictment:

1. The nature or kind of each item claimed by the Government as making up the total gross income claimed to have been received by the defendent.

2. The source of each income item claimed by the Government to make up the total gross income claimed to have been received by the defendant.

3. The amount of each item claimed by the Government as making up the total gross income claimed to have been received by the defendant.

4. The type and amount of each deduction against the claimed total gross income of the defendant, allowed by the Government in computing the alleged net income of the defendant.

5. The type and amount of each deduction against the claimed total gross income of the defendant, disallowed by the Government in computing the alleged net income of the defendant.

6. Whether or not the amount of each item making up the total gross income claimed by the Government to have been received by the defendant, was made up from figures taken from the books of defendant, or from some other source or sources or a combination of such books and other sources.

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7. If the amount of the total gross income claimed by the Government to have been received by the defendant is partly made up of items from sources other than the books of the defendant, the nature and amounts of each claimed by the Government to have been received by the defendant.

/s/ JOHN R. GOLDEN,

/s/ LESLIE C. GILLEN,
Attorneys for Defendant.

[Endorsed]: Filed April 27, 1951.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF JUNE 15, 1951

June 15, 1951: Hearing on Motion for Bill of Particulars. Ordered Motion is denied.

[Title of District Court and Cause.]

ARRAIGNMENT

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 27th of April, 1951, the plaintiff being represented by Mr. Miles N. Pike, and the defendant being present in court with his counsel, John R. Golden and William K. Woodburn of the firm of Woodburn, For-

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man and Woodburn. The following proceedings were had:

Mr. Pike: This is the time set for arraignment of the defendant in the case of United States of America vs. Elmer F. Remmer, case No. 12,177. I would like to have the record show the presence in court of the defendant.

The Court: The record will show the presence of the defendant, with counsel. The clerk will proceed with the arraignment.

(Clerk hands copy of indictment to defendant and reads):

Q. (By the Clerk): Is that your true name?
A. That's right.

(Clerk continues reading.)

The Court: Is the defendant ready to plead at this time?

Mr. Golden: Before we plead, your Honor, may I point out to you that this is one of the new forms of indictment which gives the rule as to conclusion as to total amount of taxes allegedly fraudulently unpaid and therefore I prepared a motion for bill of particulars, which I would like to file and we are perfectly willing to plead, provided we may do so without prejudice to any further proceedings on this motion and any other motion directed to the same purpose.

Mr. Pike: Your Honor, I see no objection to that.

The Court: So then I take it, Mr. Golden, with

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that understanding, of course, that any plea entered at this time does not prejudice motions filed or that can be filed, you are ready to plead.

Mr. Pike: Well, I understand the motion will actually be filed now, that it will be without prejudice to determination by the Court on the motion.

(Motion filed.)

Mr. Golden: With the understanding then that all rights under this motion and any further proceedings leaning toward further information as to the total contained in the indictment or further particulars are reserved and that plea may be without prejudice thereto, we are prepared to plead.

Mr. Pike: Well, your Honor, I don't know if it would go quite that far. I feel the motion would have to be filed at this time. I feel that the statement of counsel was a little broader than what is admissible by the rule.

Mr. Golden: What I mean, as I understand the practice, and of course it may be different in this district, we make our motion, then the government in answer thereto either comes in with a bill of particulars or a refusal to give a bill of particulars, and if we are not satisfied with what the government produces, then we address the Court, applying for further particulars.

The Court: I think that would be a reasonable understanding. If a bill of particulars was ordered by the Court or given by agreement or consent of counsel, and it didn't seem to include the matter that counsel had in mind, or which might be re-

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quired by the rules or statute, I should think counsel would be entitled to move for clarification or additional bill of particulars.

Of course, I have no knowledge of just what the plea will be, but it has been my practice here that in the arraignment I consider it advisable to inform the defendant as to possible penalties under the count before he enters his plea, so the defendant is informed that for violation of the charge contained in Count 1, the defendant could be fined as much as ten thousand dollars or imprisoned as much as five years, or both said fine and imprisonment, on a plea of guilty or conviction after a trial and that penalty applies to each of the counts. I want the defendant to know that before he contemplates his plea. That, of course, is the maximum fixed by statute. That does not mean, of course, the Court would impose that sentence. The Court may impose anything less than, any fine or imprisonment less than that. I think it is my duty to inform the defendant of the penalty before a plea is contemplated. So now, Mr. Remmer, I understand you are ready to enter your plea.

A. Not guilty.

Q. You are not guilty as to the charge contained in Count 1, and what is your plea to the charge contained in Count 2 of the indictment?

A. Not guilty.

Q. Count 3? A. Not guilty.

Q. What is your plea to the charge contained in Count 4 of the indictment? A. Not guilty.

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Q. And to the charge contained in Count 5?

A. Not guilty.

Q. And to the charge contained in Count 6?

A. Not guilty.

The Court: So plea of not guilty will be entered in each of the counts of the indictment. We will try to find a time for trial. My thought is, and I want counsel to know it and every one else to know it, that whenever a case of this character comes up, a case, I mean, charging violation of the laws of the United States, I will give it preference to civil cases now on the docket. Have you any idea as to preference about the trial, Mr. Golden?

Mr. Golden: It is quite agreeable to us to go along with Mr. Pike.

The Court: So trial of this action will be set for Tuesday, November 7, 1951, in this court room at Carson City, Nevada, with a jury, at 10:00 o'clock, and you are satisfied to have the defendant remain on the present bail?

Mr. Pike: That is correct, your Honor.

The Court: So the defendant is ordered to be in court at Carson City, Nevada, on Tuesday, November 7, 1951.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby cer-

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tify: That I was present and took verbatim shorthand notes of the proceedings had in the foregoing-entitled matter and that the foregoing pages, numbered 1 to 5, including this page, comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, May 24, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed May 24, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR CONTINUANCE

To: United States of America, Plaintiff, and to Miles N. Pike, United States Attorney:

Please Take Notice that the undersigned counsel for the defendant will, on Thursday, the 15th day of November, 1951, at 10:00 o'clock a.m. at Carson City, Nevada, or at such other place as may be convenient to the Court, move the above-entitled Court for a continuance of the trial of the defendant, Elmer F. Remmer, until April 1, 1952. Said Motion will be based upon a supporting Affidavit to be presented on or before the date of the hearing hereof.

Dated: November 9, 1951.

LOHSE & FRY,
Of Counsel for the Defendant.

Service of copy acknowledged.

[Endorsed]: Filed November 13, 1951.

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[Title of District Court and Cause.]

MOTION FOR CONTINUANCE

The defendant, through his counsel, respectfully moves the Court to grant a continuance of his trial until April 1, 1952, for the following reasons:

The defendant has not been given reasonable opportunity to prepare for trial.

(a) In that the Government has in its possession various records of business ventures in which defendant was a partner during the period covered by the indictment, and refuses to permit defendant to examine such records, except upon the condition, among others, that defendant submit the written consent of third parties who are unknown to the defendant and whose names the Government refuses to disclose to the defendant;

(b) In that the defendant has been unable to adequately prepare for trial by reason of the Government's refusal to release from a tax lien filed by the Government any portion of the defendant's assets, notwithstanding that defendant has offered to post a surety bond with a qualified company fully protecting the Government with respect to any funds released; and the Government has refused to release any of the defendant's assets except upon the conditions impossible for defendant to meet, as will be more particularly set forth in the Affidavit to be presented in support hereof.

(c) In that to properly prepare defendant's

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case for trial requires a complete accounting analysis of all records relating to nine separate business ventures in which the defendant had an interest during the period covered by the indictment and the refusal on the part of the Government to release any portion of defendant's assets has greatly restricted his ability to employ and secure accounting assistance requisite for the proper preparation of his defense;

(d) In that the indictment contains no particulars enabling the defendant to determine upon what the indictment is based, despite defendant's Motion for a Bill of Particulars, which was denied.

That this Motion will be based upon an Affidavit of counsel to be presented on or before the date of the hearing hereof.

Dated: November 9, 1951.

LOHSE & FRY,
Of Counsel for Defendant.

[Endorsed]: Filed November 13, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION TO INSPECT AND TAKE COPIES

To: United States of America, Plaintiff, and to Miles N. Pike, United States Attorney:

Please Take Notice that the undersigned counsel

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for the defendant will, on Thursday, the 15th day of November, 1951, at 10:00 o'clock a.m. at Carson City, Nevada, or at such other place as may be convenient to the Court, move the above-entitled Court for its order that the United States Attorney permit the defendant to inspect and copy or photograph the books, papers, documents and other tangible objects described in the motion hereto attached. Said motion will be based upon supporting affidavits to be presented on or before the date of the hearing hereof.

Dated the 12th day of November, 1951.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

ORDER SHORTENING TIME

On motion of defendant's counsel, cause appearing,

It Hereby Is Ordered that the foregoing notice of motion may be served by mail not later than November 13, 1951.

/s/ ROGER T. FOLEY,
Judge of the United States
District Court.

[Endorsed]: Filed November 14, 1951.

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[Title of District Court and Cause.]

MOTION TO INSPECT AND TAKE COPIES

The defendant, through his counsel, respectfully moves the Court for its order that the United States Attorney permit the defendant to inspect and copy or photograph, at such times and places and in such manner and upon such terms and conditions as are just, the books, papers, documents and tangible objects hereinafter described, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon the ground that said items may be material to the preparation of his defense and that the request therefor is reasonable, all as more fully appears in the affidavits to be used at the hearing of this motion.

Said books, papers, documents and tangible objects are as follows:

The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following businesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years: One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21 Club; San Diego Social Club; 311 Club; Menlo Club, Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club; and any other businesses from

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which the Government contends defendant received income as an owner during said years.

This motion will be made under Rule 16 of the Rules of Criminal Procedure based upon affidavits of counsel to be presented on or before the date of the hearing hereof.

Dated this 12th day of November, 1951.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN R. GOLDEN IN SUPPORT OF MOTION FOR CONTINUANCE AND OF MOTION TO INSPECT AND TAKE COPIES

State of California,
City and County of San Francisco—ss.

John R. Golden, being duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Northern District of California and all the Courts of California, and in the above-entitled case before the United States District Court for the District of Nevada; that he has been

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the personal attorney for the defendant herein for approximately three and one-half years and knows of his own knowledge the matters hereinafter averred; that he has been one of the attorneys representing the defendant in income tax matters since February, 1950; that prior thereto the Bureau of Internal Revenue placed liens against the defendant in a total sum in excess of Eight Hundred Thousand ($800,000.00) Dollars; that as a result of said liens the defendant ever since has been without funds or other assets with which to prepare and undertake his defense herein; that affiant has never received any fee or compensation for his representation of the defendant herein; that shortly after the defendant's income tax case came to affiant's attention, affiant attempted to obtain a release of a portion of the assets under lien in order to retain tax counsel and properly prepare and undertake representation of the defendant in his tax matters; in this connection affiant telephoned to the then Collector of Internal Revenue at Reno, Nevada, on June 20, 1950, and at said Collector's suggestion, wrote a letter to said Collector, with a copy to the United States Attorney at Reno, Nevada, on June 21, 1950, requesting permission to post a corporate surety bond to obtain a partial release of the assets under lien for the purposes aforesaid; that on the same day, June 21, 1950, said Collector wrote to affiant denying such permission; that affiant again wrote to said Collector on June 22, 1950, renewing said request, and on July 6, 1950, said Collector wrote to affiant to the effect

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that he would not consider a bond for partial release but would accept corporate surety bond in the then amount of said liens, that is, Eight Hundred Sixty-Seven Thousand, Three Hundred Seventy-Three and 52/100 ($867,373.52) Dollars; that the defendant could not possibly procure a bond in any such amount; that prior to June 20, 1950, affiant engaged the services of a certified public accountant practicing in San Francisco, California, to assist him in his representation of the defendant in income tax matters, in the expectation that a portion of the defendant's assets under lien would be released for the purposes aforesaid and that defendant would accordingly be able to compensate said accountant for his services; that after affiant's failure to obtain a release of a portion of the defendant's assets as aforesaid, said accountant notified affiant in November, 1950, that his services would not be available in connection with the defendant's income tax matter; that both affiant and his associate, Leslie C. Gillen, engage in general civil and criminal practice and neither of them is versed in income tax law and procedure; that after the office of the Regional Counsel, Penal Division, Bureau of Internal Revenue, had recommended indictment herein, affiant, through personal friendship, was able to associate Spurgeon Avakian, attorney at law of Oakland, California, who specializes in income tax law, as one of the defendant's counsel, and arrangements were made for a conference in defendant's case in Washington, D. C. with the

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Department of Justice; that said conference was cancelled by the Department of Justice just prior to the departure of Mr. Avakian to Washington, D. C. to attend said conference; that on March 2, 1951, affiant wrote to Assistant Attorney General Theron Lamar Caudle, in charge of the tax division of the Department of Justice, Washington, D. C., renewing his efforts to obtain a release of a portion of the defendant's assets under lien and requesting that no action be taken on the recommendation for indictment until there had been such release of assets and an opportunity to prepare a showing against such indictment; that Mr. Caudle in reply notified affiant that such matters were the responsibility of the Bureau of Internal Revenue rather than the Department of Justice; that accordingly affiant wrote to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C. on March 9, 1951, again renewing said request; that Mr. Oliphant agreed to discuss this matter when counsel arrived in Washington, D. C. for the forthcoming conference with the Department of Justice; that said conference was cancelled by the Department of Justice on March 14, 1951, and the Chief Counsel for the Bureau of Internal Revenue referred affiant to Walter Campbell, Regional Counsel, Penal Division, in San Francisco, California, in connection with his attempts to obtain a release of a portion of the defendant's assets under lien; that during the next two weeks counsel for the defendant and said Mr. Campbell held several discussions concerning this matter, and in said dis-

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cussions Mr. Campbell informed counsel that on instructions from the Bureau of Internal Revenue, Washington, D. C., he would have to insist that as a condition of the release of any assets that the defendant submit a statement of his present assets and liabilities; notwithstanding the renewed offer to post a corporate surety bond in any reasonable amount to protect the Government in releasing any such assets; that such condition was not feasible because without the funds with which to retain an accountant the defendant could not furnish same and, accordingly, this last request for a release of a portion of the defendant's assets was, in effect, denied; that on April 9, 1951, the indictment herein was filed; that affiant, being still without the services of an accountant, filed a motion for a bill of particulars herein on approximately April 27, 1951; that counsel for the United States refused to supply affiant with any of the particulars so demanded and said motion was placed on the calendar for hearing on June 15, 1951, on which date the above-entitled Court denied said motion; that thereafter said Mr. Avakian conferred with affiant and advised him that, particularly by reason of the complete lack of any particulars as a result of the denial of the motion for a bill of particulars, it would be essential to the proper preparation and presentation of the defense herein that the services of an accountant be engaged and that such accountant have sufficient time and opportunity to analyze the books and other records pertaining to all the defendant's activities; that in September, 1951, although still

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hampered by lack of funds for the defense herein, affiant, again through personal friendship, finally was able to engage the services of Lawrence Semenza, certified public accountant of Reno, Nevada, to assist in the preparation and presentation of the defense herein; that said Mr. Semenza commenced to work immediately in this case but has not completed his analyses nor had made available to him all of the books and other records that pertain to this case all as more fully appears in the affidavit of said Mr. Avakian filed herewith.

/s/ JOHN R. GOLDEN.

Subscribed and sworn to before me this 12th day of November, 1951.

[Seal] /s/ MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 14, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF SPURGEON AVAKIAN IN SUPPORT OF MOTION FOR CONTINUANCE AND OF MOTION TO INSPECT AND TAKE COPIES

State of California,
City and County of San Francisco—ss.

Spurgeon Avakian, being duly sworn, deposes and says:

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I am an attorney at law, practicing in Oakland, California, as a member of the firm of Phillips & Avakian, and specializing in tax law.

In March, 1951, Mr. John R. Golden associated me as counsel for Mr. Elmer Remmer in connection with an investigation then being conducted by the Bureau of Internal Revenue of the tax returns of Mr. Remmer. Subsequently, on April 9, 1951, Mr. Remmer was indicted by the United States Grand Jury in Carson City, Nevada, for allegedly attempting to defeat and evade the income taxes of himself and his wife for the years 1944, 1945 and 1946. Said case is presently set for trial in Carson City on November 28, 1951, and this affidavit is being made for presentation to the Court in support of a motion by defendant for a postponement of said trial to permit defendant's counsel to prepare for trial and of a motion for inspection of records in possession of the Government. The following facts are within my own personal knowledge, except as indicated otherwise.

1. The Government's Refusal to Permit Inspection of Books and Records of Defendant's Businesses. On October 22, 1951, I talked by telephone with Mr. Walter M. Campbell, Jr., who is Regional Counsel of the Penal Division of the Bureau of Internal Revenue, in San Francisco, California, and who, I am informed, has been designated to try the above-entitled case for the Government. I told him that I had just learned that the Government had in its possession various books and records of

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some of the business ventures in which Mr. Remmer had an interest, and that, in preparation for trial, I wanted to arrange for an examination of them. He stated that all such records were then in Reno undergoing examination by representatives of the Bureau, and that arrangements for our examination of them there could be made if we showed that Mr. Remmer had an interest in the businesses to which they pertained. I replied that, if the Government contended that Mr. Remmer had an interest in such businesses, that should be sufficient showing of his interest; but if Mr. Campbell would give me a list of the businesses as to which he had any doubt, I would endeavor to make such additional showing as might be necessary. Mr. Campbell said he would prefer to have me submit a list of the businesses in which Mr. Remmer claimed to have had an interest during the years in question. Since Mr. Campbell was then engaged in a trial which had been in progress for three weeks (and which was not concluded until November 7), he asked me to telephone this list to his secretary. I attempted to get in touch with Mr. Campbell's secretary later that day and also on October 23, but was unable to do so.

Accordingly, on October 23, 1951, I wrote to Mr. Campbell as follows:

"Dear Mr. Campbell:

"As stated in my telephone conversation with you yesterday, I have just learned that the Bureau has in its possession various records of some of the

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ventures in which Mr. Remmer had an interest. We would like to arrange for the examination of such records in the immediate future, in preparation for the trial in the above-entitled case. In view of your statement that the records are now in Reno, I assume that the best procedure would be for Mr. Semenza to see them there as soon as you have given the necessary authority to your men in Reno.

"So far as I know, Mr. Remmer had an interest in the businesses known as One-Ten Eddy, B-R Smoke Shop, 186 Club, Day-Nite Cigar Store, 21 Club, San Diego Social Club, 311 Club, Menlo Club, and Transit Smoke Shop. If this list is incomplete, and the government has possession of the records of other businesses in which he had an interest, we would, of course, be entitled to study those records also and would appreciate being advised accordingly.

"Thanking you for your co-operation, I am,

"Sincerely yours,

"SPURGEON AVAKIAN."

Because Mr. Campbell was then engaged in said trial continuously I was unable to confer with him personally on this matter until November 9, 1951, except for one telephone conversation on or about October 30, 1951, in which he stated that, because of his preoccupation with said trial, he had not yet had a chance to consider my letter of October 23. On November 7 I received from him a letter dated

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November 6, which, insofar as pertinent to this point, reads as follows:

"Dear Mr. Avakian:

"Reference is made to your letter dated October 23, 1951, concerning records of some of Elmer Remmer's ventures, which records you believe are now in the possession of the Bureau of Internal Revenue. You wish to arrange to examine such records in preparation for the trial of the case.

"* * *

"* * * As Mr. Remmer's representative, you are, of course, entitled to see any records of his which we may have, provided proper showing is made as to his interest; and inasmuch as such records were obtained from third parties, the written consent of such parties to inspection by Remmer or his representatives should be furnished this office.

(Emphasis added.)

"Very truly yours,

"WALTER M. CAMPBELL, JR.,
"Regional Counsel."

On November 8, I discussed this letter with one of Mr. Campbell's assistants, who suggested that I talk directly to Mr. Campbell. I was unable to contact Mr. Campbell until November 9, at which time I told him that I saw no basis for requiring the consent of third parties as a condition to our examination of the records of Mr. Remmer's businesses, but, if he would give us the names of such

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third parties, we would attempt to obtain their consent rather than delay further our preparation for trial. He replied that he did not feel free to give us such names.

Thereafter, on November 9, 1951, I wrote again to Mr. Campbell, renewing my request for permission to examine said records, objecting to the condition of furnishing the written consent of third parties, but offering to seek the consent of such parties if he would give me their names and addresses and describe the records as to which the consent of each of them was required.

During the period 1944-6, inclusive, Mr. Remmer reported on his Federal income tax returns income from the businesses known by the following trade names, as an owner of a partial interest therein: One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21 Club; San Diego Social Club; 311 Club; Menlo Club, Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club.

Furthermore, in 1949, after the filing of tax liens against Mr. Remmer as more particularly described in the affidavit of John R. Golden, which is filed herewith, the Bureau of Internal Revenue issued its notice of assessment (commonly known as a 90-day letter), in which it alleged that Mr. Remmer received income from the businesses whose trade names are listed above, during the years 1944-6, inclusive. The interest of Mr. Remmer in the business ventures to which the books and rec-

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ords in question relate is shown, therefore, not only in his tax returns but also in the adjustments proposed by the Bureau of Internal Revenue.

My experience as a tax attorney includes three years of service with the Tax Division of the Department of Justice, in Washington, D. C., and five years of private practice. Based on that experience, it is my opinion and belief that proper preparation of this case for trial requires an accounting analysis of all books and records of the business ventures in which Mr. Remmer had an ownership interest. Because of the Government's refusal to identify the third parties from whom these records were obtained, and because I have been unable to gain this knowledge in any other way, I do not know precisely what records the Government now has in its possession, but I believe that they include the books of account, ledgers, cash books and expense books of some or all of the businesses named above. All such records, together with any others pertaining to said businesses, are material to the preparation of Mr. Remmer's defense, since they constitute evidence tending to show the amount of net income of said businesses.

Based on my experience as a tax attorney, it would, in my opinion, probably require a minimum of one month, and more probably two or three months, to analyze the records of these nine businesses, once such records have been made available to defendant's representatives.

2. The Effect of The Denial of a Bill of Particulars. As shown in the accompanying affidavit

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of Mr. John R. Golden, the defendant's motion for a Bill of Particulars was denied by the Court. The indictment simply alleges a total amount as the net income for each year, without any particulars. No further information has been obtained from the Government, contrary to its usual practice of advising a taxpayer of the items of income alleged to be unreported and of giving him a chance to submit evidence relative thereto, prior to an indictment. The 90-day letters issued by the Bureau of Internal Revenue in 1949 to Mr. Remmer and his wife provide no assistance to defendant in preparing for trial because they are based on amounts of alleged net income substantially different from those alleged in the indictment. The following tabulation shows the amounts of the combined net income of Mr. and Mrs. Remmer, as shown on their returns, as set forth in the 90-day letters issued in connection with the tax liens filed in 1949, and as alleged in the indictment:

Year	Per Returns	Per 90-Day Letters	Per Indictment
1944	$ 19,000.00	$136,718.94	$ 67,469.21
1945	59,318.36	265,661.78	75,865.19
1946	22,494.58	185,150.63	188,471.68
Total....	$100,812.94	$587,531.35	$331,806.08

The fact that so many different businesses are involved in this case, makes it necessary to do a tremendous amount of accounting work to prepare for trial. The denial of any particulars simply

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magnifies this task, because proper preparation requires an analysis of each and every business, even though the Government may secretly intend to challenge the correctness of the tax returns only as to some of them in the trial of the case.

3. Other Factors Bearing on the Inability to Prepare a Defense by November 28, 1951. As set forth above, the analysis of defendant's records which are in possession of the Government will not be possible by November 28, even if the Government makes such records available on November 15. In my conversation with Mr. Campbell on October 22, 1951, the only condition he mentioned for examination of these records was the making of a satisfactory showing as to Mr. Remmer's interest. The further condition, that we furnish the written consent of undesignated third parties, was not mentioned prior to Mr. Campbell's letter of November 6. The raising of this second condition after a delay of more than two weeks from the making of our request, has delayed by that much time the preparation of the defense.

From the time when I was first associated in this case, I have advised Mr. Golden and the defendant that, particularly in view of the numerous business ventures involved, a tremendous amount of accounting work would be required, and that the case was too complex to analyze without such accounting. The efforts to obtain proper accounting assistance, and the effect on these efforts of the Government's refusal to release any of Mr. Remmer's assets from the tax liens mentioned above,

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are related in the accompanying affidavit of John R. Golden. As soon as the services of an accountant were obtained, in September, 1951, said accountant commenced work on this case, under my general direction, and from then until October 19, 1951, he was diligently engaged in such preparation. I first learned, during conferences with said accountant in Reno on October 18 and 19, 1951, that the books and records of the businesses named above were in the possession of the Government. Promptly after my return to my office in Oakland, on October 22, 1951, I requested permission from Mr. Campbell to examine said records, with the results set forth above.

Within the limitations resulting from the Government's refusal to release any of Mr. Remmer's assets from the tax liens, defendant and his counsel have sought with diligence to prepare for trial but have been unable to do so for the reasons set forth above and in the accompanying affidavit of John R. Golden.

/s/ SPURGEON AVAKIAN.

Subscribed and sworn to before me this 12th day of November, 1951.

[Seal] /s/ MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed November 14, 1951.

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[Title of District Court and Cause.]

AFFIDAVIT OF WALTER M. CAMPBELL, JR., IN OPPOSITION TO MOTION FOR CONTINUANCE AND TO MOTION TO INSPECT AND TAKE COPIES

District of Nevada—ss.

Walter M. Campbell, Jr., being duly sworn, deposes, and says:

That he is an attorney at law, presently serving as Regional Counsel, Penal Division, Bureau of Internal Revenue; that he is appearing in the above-entitled case by virtue of an appointment by the Attorney General of the United States as Special Assistant to the United States Attorney for the District of Nevada, which appointment has heretofore been filed with the Clerk of this Court, together with the requisite oath of office; that as a part of his duties as Regional Counsel he reviews reports of investigations made by various agencies of the Bureau of Internal Revenue regarding violations of the Internal Revenue laws for the purpose of determining whether or not the evidence justifies a recommendation by the Commissioner of Internal Revenue to the Attorney General that prosecution be had and, in the event the Attorney General forwards a particular case to the United States Attorney, he then provides such assistance as the United States Attorney may desire in the presentation of evidence to a Grand Jury and to the court if the need therefore arises; that the

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United States Judicial District of Nevada is within the jurisdiction of affiant in the performance of his official duties; that it is the practice of the affiant during the consideration of a case to afford the taxpayer and his representatives conferences at which they may offer evidence or such explanations as they may desire for the purpose of convincing affiant or his representatives that prosecution should not be recommended; that the report and recommendation of the Intelligence Unit of the Bureau of Internal Revenue in the above-entitled case was received by affiant on or about January 11, 1950; that the indictment herein was returned on April 9, 1951, and the defendant was arraigned on April 10, 1951, and thereafter entered his plea of not guilty on April 27, 1951, at which time a date was set for trial on November 7, 1951, which has since been continued to November 28, 1951; that on June 15, 1951, a motion on behalf of the defendant for a bill of particulars was denied by this court;

That during the course of the pendency of this proceeding and from and after January 11, 1950, and continuing up to the present time, conferences and communications have been had with various attorneys and accountants representing the defendant Elmer F. Remmer; that under the rules of procedure of the Treasury Department it is required that before conferences can be held with the representatives of a taxpayer the taxpayer must file with the Treasury Department a power of attorney authorizing his representative to appear in

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his behalf; that the following powers of attorney, the originals of which are in affiant's possession, have been filed by or on behalf of the taxpayer:

(1) Power of attorney executed April 29, 1949, by Elmer F. Remmer to Daniel J. Hanlon, Attorney at Law, Washington, D. C., and Paul Dillon, Attorney at Law, St. Louis, Missouri;

(2) Power of attorney executed June 2, 1949, by Elmer F. Remmer to John P. Thatcher, Attorney at Law, Reno, Nevada, and Lawrence J. Semenza, Certified Public Accountant, Reno, Nevada;

(3) Power of attorney executed March 10, 1950, by Elmer F. Remmer to John P. Thatcher, Attorney at Law, Reno, Nevada, William K. Woodburn, Attorney at Law, Reno, Nevada, Lawrence Semenza, Certified Public Accountant, Reno, Nevada, John R. Golden, Attorney at Law, San Francisco, California, Leslie C. Gillen, Attorney at Law, San Francisco, California, Nathan Jay Friedman, Certified Public Accountant, San Francisco, California, Paul Dillon, Attorney at Law, St. Louis, Missouri, and Daniel J. Hanlon, Attorney at Law, Washington, D. C.;

(4) Power of Attorney executed November 17, 1950, by Elmer F. Remmer revoking previous powers of attorney as to John P. Thatcher, Attorney at Law, Daniel J. Hanlon, Attorney at Law, and Nathan Jay Friedman, Certified Public Accountant, and appointing or reaffirming the appointment of the following: Andrew E. Hurley, Attorney at Law, New York, New York, William J. Forman,

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Attorney at Law, Reno, Nevada, William K. Woodburn, Attorney at Law, Reno, Nevada, Lawrence Semenza, Certified Public Accountant, Reno, Nevada, John R. Golden, Attorney at Law, San Francisco, California, Leslie C. Gillen, Attorney at Law, San Francisco, California, and Paul Dillon, Attorney at Law, St. Louis, Missouri.

In addition to the above-named attorneys and certified public accountants there have also been associated in the case in behalf of the defendant Spurgeon Avakian, Attorney at Law, Oakland, California, since not later than April of 1950, and George Lohse, Attorney at Law, Reno, Nevada, within the past few days;

That, by reason of the foregoing, affiant believes and therefore states that the defendant Elmer F. Remmer has at all times, and particularly since April 29, 1949, been represented by competent legal counsel and by competent accountants; that Lawrence J. Semenza, a certified public accountant, has continually, since at least June 2, 1949, represented the defendant in this matter;

That a conference was held in affiant's office on May 25, 1950, at which were present on behalf of the defendant John R. Golden, Attorney at Law, and Nathan Jay Friedman, Certified Public Accountant; that it was represented to the affiant at that time that Mr. Friedman was at that time actively engaged in making an audit of the defendant's affairs; that affiant informed the taxpayer's representatives that if they prepared a net worth statement on behalf of the taxpayer that the

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Government representatives would be willing to meet further with the taxpayer's representatives and make a comparison of such net worth statement with that which had been prepared on behalf of the Government; that no such net worth statement has ever been presented on behalf of the defendant;

That on October 30, 1950, a conference was held in affiant's office at which were present in behalf of the taxpayer John R. Golden, Attorney at Law, Andrew E. Hurley, Attorney at Law, and Nathan Jay Friedman, Certified Public Accountant; that during the course of this conference it was revealed on behalf of the taxpayer that an audit was being conducted and on that occasion certain records were made available to and turned over to the accountant for the taxpayer;

That at a time prior to the indictment in this case certain records which had come into the possession of the investigating agents from third parties were delivered to Lawrence Semenza, Certified Public Accountant, at his request and upon his receipt and promise to restore them when desired by the representatives of the Government, in order that the said Semenza might use them in connection with his employment by the defendant; that thereafter and in preparing to present this case to the Grand Jury at Carson City, Nevada, Mr. Semenza was called upon to return such records; that thereupon Mr. Semenza stated that he had turned such records over to Nathan Jay Friedman, Certified Public Accountant, who in turn had delivered them

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to John R. Golden, Attorney at Law, and that the said attorney would not release the records to him in order that he might restore them to the Government as he had agreed; that thereafter a subpoena duces tecum was issued to the said Lawrence Semenza to appear before the Grand Jury and produce such records; that the said Lawrence Semenza appeared before the said Grand Jury without said records and repeated under oath substantially the same statement theretofore made to the investigating agents; to wit, that the attorneys for the defendant had refused to restore possession of said records; that on or about October 24, 1951, affiant received the original of the letter set forth upon Pages 2 and 3 of the affidavit of Spurgeon Avakian filed herein; that on November 6, 1951, affiant wrote Mr. Avakian, as follows:

"Dear Mr. Avakian:

"Reference is made to your letter dated October 23, 1951, concerning records of some of Elmer Remmer's ventures, which records you believe are now in the possession of the Bureau of Internal Revenue. You wish to arrange to examine such records in preparation for the trial of the case.

"You are familiar with the circumstances under which Lawrence Semenza received some of the records in this case from Special Agent Ray A. Weaver, gave a receipt to him for them and agreed to return them to Mr. Weaver on notice. At that time Mr. Semenza had on file a power of attorney authorizing him to represent Remmer before the Bureau. At a later time return of the records was

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sought from Semenza, who was unable to carry out his undertaking because he had turned them over to another accountant representing Remmer. It is our belief that counsel for taxpayer (of whom it is realized you are only one) had it in their power to enable Semenza to fulfill his undertaking, but declined or refused to do so.

"In the light of the foregoing, we do not feel justified in permitting any of the records involved in this case to leave our possession. As Mr. Remmer's representative, you are, of course, entitled to see any records of his which we may have, provided proper showing is made as to his interest; and inasmuch as such records were obtained from third parties, the written consent of such parties to inspection by Remmer or his representatives should be furnished this office."

That by reason of the foregoing affiant believes and therefore states the fact to be that the defendant has had ample opportunity to prepare the defense of his case and that the motions for a continuance and for inspection of records should be denied.

/s/ WALTER M. CAMPBELL, JR.

Subscribed and sworn to before me this 15th day of November, 1951.

[Seal] AMOS P. DICKEY,
Clerk of the District Court.

By /s/ O. F. PRATT,
Deputy.

[Endorsed]: Filed November 15, 1951.

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[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF NOVEMBER 15, 1951

Nov. 15, 1951. Hearing on Defendant's Motion for a continuance of trial date; and Motion to Inspect and Take Copies. Ordered that both Motions are denied.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR PRODUCTION AND INSPECTION OF BOOKS, PAPERS, DOCUMENTS AND OBJECTS

To: United States of America, Plaintiff, and to Miles N. Pike, United States Attorney:

Please take notice that the undersigned counsel for the defendant will, on Tuesday, the 27th day of November, 1951, at 10:00 o'clock a.m. at its Courtroom at Carson City, Nevada, or at such other time as may be convenient to the Court, move the above-entitled Court for its order that the United States Attorney and his Special Assistant in the above-entitled case, be directed to produce the books, papers, documents and objects designated in the subpoena hereto attached, copies of which subpoena are being served on the United States Attorney and his Special Assistant herein, before the Court at a time prior to the trial of the above-entitled case

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or prior to the time when the same are to be offered in evidence or at such other time as the Court may direct, and for its further order that upon the production thereof the defendant and his attorneys and accountant be permitted to inspect the same, at such times and places and in such manner and upon such terms and conditions as are just. Said motion will be based upon the affidavits referred to in the motion hereto attached.

Dated the 20th day of November, 1951.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

[Endorsed]: Filed November 23, 1951.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION AND INSPECTION OF BOOKS, PAPERS, DOCUMENTS AND OBJECTS

The defendant, through his counsel, respectfully moves the Court for its order that the United States Attorney and his Special Assistant in the above-entitled case, be directed to produce the books, papers, documents and objects designated in the subpoena hereto attached and hereinafter described, copies of which subpoena are being served on the United States Attorney and his Special Assistant herein, before the Court at a time prior to the trial of the above-entitled case or prior

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to the time when the same are to be offered in evidence or at such other time as the Court may direct, and for its further order that upon the production thereof the defendant and his attorneys and accountant be permitted to inspect the same, at such times and places and in such manner and upon such terms and conditions as are just.

Said books, papers, documents and objects are as follows:

All books, papers, documents and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained from or belonging to the defendant or obtained from others by seizure or by process or obtained by Government counsel in any manner other than by seizure or by process, (a) in the course of the investigation by the Grand Jury which resulted in the return of the indictment herein, and (b) in the course of the Govermnent's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to said Grand Jury, or (b) are to be offered as evidence in the trial of the defendant under said indictment, or (c) are admissible in evidence either for or against the defendant with respect to any of the allegations or charges contained in said indictment, including without limitation the books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following busi-

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nesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years; One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21-Club; San Diego Social Club; 311 Club; Menlo Club; Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club; and any other businesses from which the Government contends defendant received income as an owner during said years.

Said motion will be made under the authority of Rule 17 of the Rules of Criminal Procedure and the decision of the United States Supreme Court on April 30, 1951, in the case of Bowman Dairy Co. vs. United States, 341 U. S. 214-222, 95 L. ed. 879, 95 L. ed. Advance Opinions 545, and will be based upon the affidavits of Spurgeon Avakian and John R. Golden in support of Motion for Continuance and of Motion to Inspect and Take Copies, which affidavits were filed herein on approximately November 13, 1951, and further affidavits to be presented on or before the date of the hearing hereof.

/s/ JOHN R. GOLDEN,
Attorney for Defendant.

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[Title of District Court and Cause.]

SUBPOENA TO PRODUCE DOCUMENT OR OBJECT

To: Miles N Pike, United States Attorney, and to Walter M. Campbell, Jr., Special Assistant.

You are hereby commanded to appear in the United States District Court for the District of Nevada at the Post Office Building in the city of Carson City on the 27th day of November, 1951, at 10:00 o'clock a.m. to testify in the case of United States v. Elmer F. Remmer and bring with you all books, papers, documents and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained from or belonging to the defendant or obtained from others by seizure or by process or obtained by Government counsel in any manner other than by seizure or by process, (a) in the course of the investigation by the Grand Jury which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to said Grand Jury, or (b) are to be offered as evidence in the trial of the defendant under said indictment, or (c) are admissible in evidence either for or against the defendant with respect to any of the allegations or charges con-

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tained in said indictment, including without limitation the books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following businesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years: One Ten Eddy Street; B-R Smoke Shop; One Eighty-Six Club; Day-Nite Cigar Store; 21 Club; San Diego Social Club; 311 Club; Menlo Club, Menlo Bar and Tiny's Waffle Shop; Transit Smoke Shop and Transit Club; and any other businesses from which the government contends defendant received income as an owner during said years.

This subpoena is issued upon application of the defendant.

Dated: November 20, 1951.

[Seal] /s/ AMOS P. DICKEY,
Clerk.

By /s/ MARION G. OSMAN,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 23, 1951.

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[Title of District Court and Cause.]

AFFIDAVIT OF CHRISTOPHER P. MILLER IN SUPPORT OF MOTION FOR PRODUCTION AND INSPECTION OF BOOKS, PAPERS, DOCUMENTS AND OBJECTS

State of California,
City and County of San Francisco—ss.

Christopher P. Miller, being duly sworn, deposes and says:

That I am a Certified Public Accountant registered in the State of California;

That in the spring of 1950 I was taken by Mr. Ray Weaver, a Special Agent of the Intelligence Unit of the Bureau of Internal Revenue, to a room located at 100 McAllister Street, San Francisco, California, and there shown material which was stated to be records obtained by the Bureau relating to Elmer Remmer; that this material consisted of a mass of original documents such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports and daily information relating to a number of businesses in which Elmer Remmer was alleged to have an interest; that this material filled a packing box of approximately fifty cubic feet in volume plus several other smaller cartons;

That the total time that I and others with whom I am associated spent reviewing these records was not more than twelve hours of which my time was not more than eight hours;

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That I estimated that the time necessary for a complete audit of these records would be in my opinion more than one month. Since I was informed that there were no funds available, neither I or my associates did any further work on these records;

That since November 15, 1950, neither I nor anyone else with whom I am associated have done any work on this case.

/s/ CHRISTOPHER P. MILLER.

Subscribed and sworn to before me this 24th day of November, 1951.

[Seal] /s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires June 28, 1955.

[Endorsed]: Filed November 26, 1951.

[Title of District Court and Cause.]

AFFIDAVIT OF LESLIE C. GILLEN IN SUPPORT OF MOTION FOR PRODUCTION AND INSPECTION OF BOOKS, PAPERS, DOCUMENTS AND OBJECTS

State of California,
City and County of San Francisco—ss.

Leslie C. Gillen, being duly sworn, deposes and says:

That he is an attorney at law duly admitted to

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practice before the United States Court of Appeals for the Ninth Circuit, the United States District Court for the Northern District of California and all the Courts of California, and in the above-entitled case before the United States District Court for the District of Nevada; that he has been one of the attorneys representing the defendant in income tax matters since approximately February or March, 1950, and knows of his own knowledge the matters hereinafter averred; that during the latter part of March, 1951, affiant's associate, John R. Golden, was on temporary active duty as a Reserve Officer with the United States Army, and during that time affiant was negotiating with Walter Campbell, Regional Counsel, Penal Division, Bureau of Internal Revenue, San Francisco, California, in an attempt to obtain the release of a portion of the defendant's assets under income tax lien upon the posting of a satisfactory corporate surety bond to protect the Government, and in the course of those negotiations affiant offered to submit for Mr. Campbell's consideration the defendant's affidavit reciting his inability to finance his defense, and confirmed such offer by letter to Mr. Campbell dated March 28, 1951, reading as follows:

"This refers to our conference this afternoon regarding a release of funds to Mr. Remmer for preparation of his defense to contemplated charges of tax evasion.

"We understand that the Chief Counsel of the Bureau has suggested that, as a condition of re-

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leasing any funds from the government's lien, Remmer should submit a statement of assets and liabilities, and of the amounts needed. As we have pointed out to you, however, a financial statement cannot be prepared without extensive accounting work, and we cannot hire an accountant until after funds have been released.

"With regard to your inquiry as to whether Remmer can submit an itemized list of his assets and liabilities, without a valuation of the items which would require accounting analysis, we feel that there are certain basic objections as discussed below, and that a preferable procedure would be to release funds on a surety bond which would fully protect the government. The bond could be conditioned on the payment of the tax liability as ultimately determined and would obligate the surety company to pay the amount of the bond if the tax liability were not paid by Remmer. We believe that such a bond can be obtained from a reputable surety company, on the strength of collateral which would be provided by Remmer's brother.

"With such a bond, the government would, for all practical purposes, be protected as fully as it is now, and a release of funds on that basis would neither prejudice the government nor subject the Bureau to criticism.

"Our fear of having our client submit a list of assets and liabilities lies in the ever-present possibility that some assets might be omitted through faulty memory, especially in the absence of accounting analysis of his financial transactions during the

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past few years. Mr. Remmer's activities have been varied, and have frequently involved loans and investments with personal friends and close business associates, without the record-keeping formalities which are observed in dealings between strangers. Under these circumstances, there would be a real possibility of unintended errors in any statement based solely on his memory.

"If this were an ordinary case, we could assume the risk of satisfying the government, in the event of such errors, that the taxpayer had simply made a mistake. This, however, is a case in which a certain newspaper has created a public atmosphere most unfriendly to the taxpayer. The denial to us of a conference on this matter in the Department of Justice in Washington is, we believe, one of the results of that newspaper campaign against our client. It is quite possible, therefore, that any mistakes made by our client in a list of assets, no matter how honest and unintentional, will subsequently be made the basis of a criminal accusation. The pressure on the government to do this might be particularly strong if Remmer should be indicted and thereafter should be acquitted of tax evasion charges.

"We want to make it clear that our objection to the submission of an itemized financial statement is based on (1) the danger of inadvertent errors, in the absence of accounting investigation, and (2) the fact that the government can be fully protected by a surety bond without the submission of an itemized financial statement. The making of such

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errors is a matter of common human failing against which we, as counsel, have a duty to exercise caution, and it is solely in that spirit that we respectfully request that the funds be released on a surety bond basis.

"Our client would, of course, submit an affidavit reciting his inability to finance his defense and affirming that he has no interest in the collateral posted with the surety company.

"We understand that the cash covered by the tax lien is the sum of approximately $35,000 which is held in an escrow in Reno. It is our opinion that the accounting and legal fees and expenses in this case, if a full investigation is made, will exceed that amount, particularly if a lengthy trial should develop. Accordingly, we request that the full amount of that escrow be released.

"We trust that, in fairness to the taxpayer, the Bureau will permit a release of his funds without imposing conditions which are unnecessary to protect the government."

That Mr. Campbell rejected said offer and advised affiant that release of funds would not be recommended unless the defendant submitted a "satisfactory" detailed statement of his assets and liabilities, together with a statement of "what funds are necessary for his defense by way of attorneys' fees, accounting fees, etc."; that for the reasons outlined in the letter quoted above and because of the liens theretofore placed upon the defendant's assets, as appears from the affidavit of John R. Golden on file herein, and the consequent inability

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to analyze the charges which the Government might be contemplating against the defendant and to make a true estimate of the situation, the defendant was unable to comply with the conditions demanded by Mr. Campbell; that on November 9, 1951, Spurgeon Avakian, one of the defendant's counsel herein, wrote a six page letter to Mr. Campbell in reply to the letter dated November 6, 1951, written by Mr. Campbell to Mr. Avakian and quoted in Mr. Campbell's affidavit in opposition to Motion for Continuance and to Motion to Inspect and Take Copies, filed herein on November 15, 1951; that affiant read to the Court Mr. Avakian's said letter to Mr. Campbell at the hearing of the Motions for Continuance and to Inspect and Take Copies made before the Court on November 15, 1951, at Las Vegas, Nevada, and incorporates said letter herein as though again set out in full; that to the best of affiant's belief Mr. Campbell has not replied to Mr. Avakian's said letter.

/s/ LESLIE C. GILLEN.

Subscribed and sworn to before me this 23rd day of November, 1951.

/s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires June 28, 1955.

[Endorsed]: Filed November 26, 1951.

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[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH SUBPOENA DUCES TECUM

To: Elmer F. Remmer, defendant above named, and to Messrs. John R. Golden, Leslie C. Gillen, Spurgeon Avakian, George Lohse and Leslie M. Fry, his attorneys:

You and each of you will please take notice that the undersigned counsel for plaintiff will on Tuesday, the 27th of November, 1951, at 10:00 a.m., at the Courtroom of the above-entitled Court, in Carson City, Nevada, or as soon thereafter as counsel may be heard, move the above-entitled Court for orders as follows:

(a) For an order quashing the subpoena duces tecum heretofore served upon Walter M. Campbell, Jr., Special Assistant to the United States Attorney for the District of Nevada, at San Francisco, California, on or about November 20, 1951, and

(b) For an order quashing the subpoena duces tecum heretofore served upon Miles N. Pike, United States Attorney for the District of Nevada, at Reno, Nevada, on November 23, 1951; that said motion will be made and based upon the affidavits referred to in that certain "Motion to Quash Sub-

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poenae Duces Tecum" attached to this Notice of Motion.

Dated November 26, 1951.

/s/ MILES N. PIKE,
United States Attorney, One of the Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed November 27, 1951.

[Title of District Court and Cause.]

MOTION TO QUASH SUBPOENAE DUCES TECUM

The plaintiff, through its undersigned counsel, respectfully moves the Court for an order

(1) To quash the subpoenae duces tecum to produce "all books, papers, documents and objects * * *" heretofore caused to be served by counsel for the above-named defendant upon (a) Walter M. Campbell, Jr., Special Assistant to the United States Attorney for the District of Nevada, and (b) upon Miles N. Pike, United States Attorney for the District of Nevada, which said subpoenae were served respectively upon the said Walter M. Campbell, Jr., in San Francisco, California, on or about November 20, 1951, and upon said Miles N. Pike on November 23, 1951. That said motion to quash is made and based upon the following grounds and reasons:

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(1) That compliance with said subpoenae duces tecum would be (a) unreasonable, and (b) oppressive.

(2) That the said records enumerated and designated in each of the two said subpoenae referred to records that have heretofore been made available for the inspection of the defendant or his duly authorized representatives on occasions long prior to the scheduled date of the above-entitled case upon the merits, which scheduled trial date is presently set for trial with a jury at Carson City, Nevada, at 10:00 a.m., Wednesday, November 28, 1951.

(3) That the said books, papers, documents and other records referred to in said subpoenae appear to be the same, or substantially the same, as the books, papers, documents and other records heretofore referred to by counsel for defendant in those certain Motions for Continuance and to Inspect and Take Copies and the evidence introduced and proceedings had with reference to said motions before the Federal Court sitting at Las Vegas, Nevada, on November 15, 1951, at the conclusion of which said hearing on said motions the said Court entered its order denying said motions and each of them.

That this motion is made pursuant to the authority contained in Rule 17c, Federal Rules of Criminal Procedure, and will be based upon the affidavit of Walter M. Campbell, Jr., heretofore filed in opposition to the above-referred-to Mo-

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tions for Continuance and Motion to Inspect and Take Copies, both of which said motions were heard and determined by the above-entitled Court on November 15, 1951, in the above-entitled case, and which said affidavit of said Walter M. Campbell, Jr., was sworn to and filed in said case on or about November 15, 1951, and such further affidavits or testimony as may be filed or given prior to or at the hearing on this motion to quash said subpoena duces tecum and each of them.

Dated at Reno, Nevada, this 26th day of November, 1951.

/s/ MILES N. PIKE,

United States Attorney, One of the Attorneys for Plaintiff.

[Endorsed]: Filed November 27, 1951.

[Title of District Court and Cause.]

COPY OF CRIMINAL ENTRY OF NOVEMBER 27, 1951

Nov. 27, 1951. Hearing on deft's Motion for Production and Inspection of Books, Papers, etc., and plff's Motion to Quash Subpoena Duces Tecum.

Nov. 27, 1951. Ordered deft's Motion for Production and Inspection, etc., is denied.

Nov. 27, 1951. Ordered Plff's Motion to Quash Subpoena Duces Tecum is granted.

Nov. 27, 1951. Ordered telegraphic request of Walter M. Campbell, Jr., for a postponment of trial is denied.

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[Title of District Court and Cause.]

AFFIDAVIT SUPPLYING OMISSIONS IN THE RECORD

State of Nevada,
County of Washoe—ss.

John R. Golden and Spurgeon Avakian, each being duly sworn, each for himself and not one for the other, deposes and says:

That he is one of the attorneys of record for defendant herein and was personally present in Court on December 19, 1951, during all of the proceedings hereinafter described and knows, of his own knowledge, the facts hereinafter averred.

That on said date, in the absence of the jury, affiant, John R. Golden, requested the Court to set a date and time for the hearing of defendant's Motion to Correct Errors in the Record arising from Omissions, which Motion was filed herein on December 17, 1951, and noticed for hearing on December 18, 1951, at 1:00 o'clock p.m., or at such other time as the Court may order.

That the Court informed said affiant that said Motion would be heard at the next calling of the Court's regular Motion calendar.

That said affiant thereupon requested the Court to hear said Motion not later than the last Court day of the year 1951.

That the Court denied said request.

That upon reading the transcript of the proceedings of December 19, 1951, in the absence of the jury, it appears that the Court Reporter did

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not report the foregoing request by said affiant and the Court's foregoing statements, and the Court Reporter has so informed said affiant.

That each of said affiants has been informed that the next regular Motion calendar of the Court ordinarily would be held on January 7, 1952, but does not know whether said Motion will be heard then because the above-entitled case still is on trial, and will be on trial, on said day.

/s/ JOHN R. GOLDEN,

/s/ SPURGEON AVAKIAN.

Subscribed and Sworn to before me this 2nd day of January, 1952.

[Seal] /s/ DOROTHY MOHR,
Notary Public in and for the County of Washoe, State of Nevada.

[Endorsed]: Filed January 2, 1952.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF FEBRUARY 21, 1952

Feb. 21, 1952. Hearing on deft's Motion to correct errors arising from omissions. Ordered that this Motion is denied.

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DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED BY THE COURT

Defendant's Requested Instruction No. 19

It is a maxim of our law that where an act may be attributed to a criminal or to a non-criminal cause, it is the duty of the jury to attribute the act to the non-criminal cause rather than the criminal one. A crime is never presumed where the conditions may be explained upon an innocent hypothesis.

The jury is instructed that it is their duty to reconcile all circumstances shown in evidence with the innocence of the defendant, and to account for all facts, if possible, upon the hypothesis that the defendant is not guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 10

You are instructed that you are not permitted to guess as to the guilt or innocence of the defendant. If the evidence is such that you are required to guess or indulge in surmise or conjecture as to the guilt or innocence of the defendant, then you must return a verdict finding the defendant not guilty. In such instance, the presumption of the defendant's innocence applies and your ver-

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dict must be in accord with the presumption of innocence.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 16

I instruct you that it is a rule of law that a party is bound by the testimony of his own witness. This means that a party eliciting a fact from a witness called by him endorses and vouches for the credibility of and is concluded by the statements of such witness. This is true unless the party calling the witness has succeeded in impeaching him by certain well defined methods. These methods do not include a showing or allegation of bias or hostility.

Therefore, even if you may feel that a witness called by one of the parties is or might be biased or hostile to that party, nevertheless in determining the credibility of that witness you must follow the rule that the party calling him vouches for him and is bound by his testimony.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 17

You are instructed that the defendant in this case is presumed to have good character for the

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traits involved in the accusation, and it is your duty to consider this presumption, together with all the other facts in the case, in arriving at your verdict.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 21

You must bear in mind that the character of evidence which would warrant a verdict in a civil case is different from that which is required by law to justify a conviction in a criminal case. A mere preponderance of evidence would be sufficient to justify a verdict against the defendant in a civil case, but it is wholly insufficient in a criminal case. In a criminal case, such as this, in addition to a preponderance of evidence the law requires that the evidence shall be of such character and be so clear and convincing that the jury, and each of the jurors composing the jury, shall be satisfied to a moral certainty and beyond all reasonable doubt that the defendant has committed the particular crime charged, before the jury can find the defendant guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

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Defendant's Requested Instruction No. 26

I instruct you that you are not entitled to consider or weigh, as against the defendant, the fact of his arrest upon the charge preferred here. Under no circumstances known to the law could you be justified in finding this defendant guilty, because of the fact of his arrest upon this charge; nor would you be justified in concluding that this defendant must be guilty or otherwise he would not have been arrested upon the charge preferred. I instruct you that in passing upon the merits of this case, you must remember that the guilt or innocence of a person accused of crime is not to be determined by the mere fact of his arrest, nor must you be influenced thereby.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 28

It sometimes happens that a case on trial attracts more than passing attention and notice, in the newspapers and among the public generally. However conscientious and careful a juror might be in observing the Court's admonitions and in keeping his or her mind insulated against any outside comment or observation, it might be that inadvertently and without any intention of influencing a juror, and without fault on anybody's part, some casual remark or chance observation, or comment might reach a juror's ear, particularly if a

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case is talked about or commented upon generally in public places where a juror has to go, or is a matter or topic of general conversation.

It also happens sometimes that as testimony is given there are reactions or responses to it among those in attendance in the courtroom, whether the spectators have any direct interest in the outcome of the case or not. You are therefore instructed and admonished that if any incidents of this nature have occurred, or do occur, or if you are conscious of any such things, none of them should be permitted to influence or affect any of you to the slightest extent, bearing in mind always that it was to try this case on its merits that you were empanelled and sworn, and that the only evidence you may legally or properly consider or entertain under your oaths as jurors is such evidence produced by either side, in open Court, while the Court is in session, with both sides present and having the opportunity to cross-examine and otherwise to subject the evidence to the tests sanctioned by law.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 39

You are instructed that the evidence adduced by the prosecution is to be estimated not only by its intrinsic weight, but also according to the evidence which is in the power of the prosecution to pro-

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duce. This rule in criminal cases applies solely to the prosecution and not to the defendant.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 40

You cannot convict the defendant upon your own or any suspicion, no matter how strong. In all criminal cases, the proof inculpating the accused should be of a degree of certainty transcending mere probability, mere surmises, speculations and conjectures, and exceeding strong suspicion.

The evidence in a criminal case may (let it be assumed), create a strong suspicion, or it may create a strong probability that the complicity of the defendant in the alleged crime is established as charged; but, nevertheless, I instruct you that our law, in its wise and humane demand for the protection of the life and liberty of a human being, requires more than strong suspicion or strong probability; it demands that the evidence should lead to a moral certainty of the conclusion of guilt, beyond every other reasonable hypothesis, and to the exclusion of all reasonable doubt. Less than this will not suffice; for if a defendant could be convicted on mere suspicion no citizen would be safe against public disgrace and imprisonment.

You are therefore charged by me that you would not be justified in finding this defendant guilty upon the ground that it is more probable that he

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is guilty, if there be any such ground, than that he is innocent.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 41

You are instructed that suspicious circumstances are not, in themselves, sufficient to convict the defendant, but the prosecution must prove to a moral certainty and beyond a reasonable doubt the guilt of the defendant. If, after considering all the evidence in the case, you find that there are no more than suspicions, even though strong suspicions, as to the guilt of the defendant or that the evidence only creates suspicious circumstances pointing to the defendant, you must return a verdict finding the defendant not guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 42

You are instructed that laws are made and juries called upon to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you are not satisfied beyond a reasonable doubt that the defendant is guilty, you must say so by a verdict of "not

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guilty." By so doing, the object of the law will be attained as fully as if you were to find a verdict of guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 43

The Court instructs the jury that matters of fact, if any, which are left uncertain by the evidence, cannot be made certain to the prejudice of the defendant by inference. In the absence of evidence, no inference can be drawn by the jury against the defendant; but, on the contrary all the inferences and presumptions consistent with the facts proved are to be drawn and indulged in favor of the innocence of the defendant. No fact or circumstances upon which you may base a conclusion of guilt is sufficient, unless such fact or circumstance has been proved beyond a reasonable doubt and to the same extent as if the whole conclusion depended upon that one fact or circumstance.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 47

You are instructed that if the testimony in this case in its weight and effect be such that two conclusions can be reasonably drawn from it, the one

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favoring defendant's innocence because of lack of proof and the other tending to establish his guilt, the law demands that the jury shall adopt the conclusions favoring the defendant's innocence, because of said lack of proof, and therefore find the defendant "not guilty."

In other words, if the evidence in this case, in its weight and effect, be such that two conclusions can be reasonably drawn from it, the one tending to establish his guilt, and the other creating a reasonable doubt as to his guilt, law, justice and humanity alike demand that the jury shall adopt the conclusion of innocence and find the defendant "not guilty."

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 48

If one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore if in such a case you have any reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would be thereby created, and you should give the defendant the benefit of the doubt, and acquit him.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

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Defendant's Requested Instruction No. 49

I instruct you that no defendant can be convicted unless the prosecution proves each and every fact necessary to constitute the crime to a moral certainty and beyond all reasonable doubt. A defendant cannot be convicted upon mere suspicion or upon probability of guilt, however strong. Neither can he be convicted upon a bare preponderance or upon a greater weight of the evidence, but only upon evidence that proves his guilt to a moral certainty and beyond all reasonable doubt. If there is any reasonable doubt of his guilt whatever, it will be your duty to find the defendant Not Guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 50

A defendant in a criminal case is never required or expected to prove his innocence, but the law places the burden on the prosecution to prove the defendant guilty of the crime with which he is charged, and to prove every fact essential to constitute that crime beyond all reasonable doubt and to a moral certainty; and if the jury cannot say, after a careful consideration of all of the evidence in this case, that the guilt of the defendant is thereby established in their minds beyond all reasonable doubt, and to a moral certainty, it is

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their sworn duty to acquit the defendant by returning a verdict of "Not Guilty."

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 54

The Court instructs the jury that no facts or circumstance can be used by you as a basis for any inference of guilt against a defendant, unless such fact or circumstance is proved beyond every reasonable doubt, and every fact or circumstance in the case which is not proved beyond every reasonable doubt, should be wholly dismissed from your consideration, and must not be permitted by you to influence you to any extent against the defendant.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 56

You are instructed that under the law there are only two possible verdicts in a criminal case, namely, guilty and not guilty.

The verdict of guilty may be reached by you only if you and each of you are convinced that the defendant has been proved guilty to a moral certainty and beyond all reasonable doubt; if you are not absolutely so convinced your verdict must be not guilty.

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In other words, you need not be satisfied of the defendant's innocence to reach a verdict of not guilty, but rather your verdict must be not guilty except in the one instance I have described.

The prosecution legitimately may ask for a verdict of guilty only if it has convinced you of the defendant's guilt to a moral certainty and beyond all reasonable doubt, but the defense is entitled to a verdict of not guilty under all circumstances save that of proof of guilt to a moral certainty and beyond all reasonable doubt.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 57

The reasonable doubt to which I refer, such as would entitle the defendant to an acquittal, need not necessarily arise out of or from the evidence itself, but may result or arise from a want or lack of evidence, sufficient to satisfy the mind.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 60

In a criminal trial you, the jury, cannot convict the defendant merely because you believe the evidence is such that a man of prudence would act upon it in his own affairs of grave importance. Men frequently act in their grave and important concerns

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without a firm conviction that the conclusions upon which they proceed to act are correct, but having deliberately weighed all the facts and circumstances, known to them, they form a conclusion or opinion upon which they proceed to act, although they may not be fully convinced of its correctness. But such a degree of certainty is wholly insufficient to authorize a verdict of guilty in a criminal case. In criminal cases the jury should be fully convinced of the correctness of their conclusion, that the accused is guilty, and that conviction should be so clear and so strong as to exclude from their minds all reasonable doubt.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 69

One of the elements of the crime charged in this indictment is the making of a wilful attempt to evade the taxes. A wilful attempt must be shown by evidence of affirmative action on the part of the defendant, done with the motive of defrauding the government of income taxes. Acts of omission, such as the failure to make careful inquiries or to search for additional information which might show the correct tax, do not constitute a wilful attempt within the meaning of the statute of which the indictment is based. Before you may find the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant affirmatively, and by acts

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of commission, did certain things with the bad purpose and the evil motive of deliberately showing an amount of tax on the returns of himself and his wife which he at the time knew to be less than the tax actually due.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 75

You are instructed that when considering Section 145b, I.R.C., the law speaks of "willfull" acts. This means acts of the type which by common knowledge are done to conceal. Where in filing an income tax return or avoiding payment of income taxes, full disclosure of the facts are made, fraud is negatived by such disclosure, even if the taxpayer makes an erroneous or untenable claim based on such facts; revealment is deemed to exonerate such person from a charge of fraud.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 77

You are instructed that if you find from the evidence that the defendant acted without corrupt intent in doing the acts detailed by the evidence introduced upon the trial herein, such lack of cor-

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rupt intent will entitle the defendant to an acquittal at your hands.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 78

You are instructed that if a defendant believed or understood the law to be different, or if he honestly sought and followed erroneous advice, or if he came to a belief that he was entitled to do that which he did do, such a defendant is entitled to be acquitted on any charge growing out of his acts based on such belief.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 79

I charge you that there are certain types of crime which are complete when the person intentionally does the acts denounced by law. There is another class of crime which requires not only the deliberate act but a further element, to wit: The commission of the act with a specific intent. The first intent, that is, general intent, is merely to do the act; the second class is to do the act with a specific intent that this act may bring about a certain result.

The specific intent involved in this indictment is an intent to defraud the United States of taxes.

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This intent is a question of fact which must be proven by the prosecution beyond a reasonable doubt. After considering all the evidence, including the presumption of honest and lawful intent with which every defendant is clothed, should you entertain a reasonable doubt as to the intent of the defendant to defraud the United States of taxes you must acquit.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 80

Before the defendant in this case can be found guilty of the alleged charge set forth in the indictment, it must be established, by the evidence, to a moral certainty and beyond a reasonable doubt that the defendant had the specific intent to commit the acts therein alleged.

If, in your judgment as jurors, the prosecution fails to prove such specific intent to a moral certainty and beyond a reasonable doubt as to the defendant in this case, or, if after considering all the evidence you or any of you entertain a reasonable doubt as to whether the defendant in this case had such specific intent, then you must return a verdict finding the defendant not guilty.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

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Defendant's Requested Instruction No. 81

Before you may convict the defendant you must be satisfied to a moral certainty and beyond every reasonable doubt that there is a tax deficiency due and that defendant wilfully and unlawfully paid less tax than he knew to be legally due.

Unless there is some form of deceit or dishonesty proved to you to a moral certainty and beyond every reasonable doubt, you must find the defendant not guilty.

The mere failure, if you find such failure existed, to pay the tax legally due, or the filing of an incorrect or false tax return, if you find such was done, is not enough to convict the defendant, but in addition you must also find to a moral certainty and beyond every reasonable doubt that any such act or omission was done purposely in bad faith with an intent to evade tax.

In other words, the gist of the offense is an act done with a bad purpose without justifiable excuse, and an honest rather than a dishonest error, due perhaps to honest reliance on the misguided advice of others or the incompetence of bookkeepers and accountants or an honest but mistaken interpretation of the applicable law or regulations, would not support a finding of wilfullness as the word is used in criminal law.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

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Defendant's Requested Instruction No. 82

You are instructed that error as to doubtful legal points, if honestly made, will not sustain a charge of fraud.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 88

In determining the good faith of the defendant you are to take into consideration all of the facts and circumstances disclosed by the evidence, including any information or legal advice you find that the defendant received in good faith and regardless of whether you find that such information or advice was true or proper.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 89

You are instructed that if you find from the evidence that the defendant exercised good faith in doing the acts detailed by the evidence introduced upon the trial herein, then such good faith will entitle such defendant to an acquittal at your hands, for it is the law that good faith is a complete defense to the charge alleged in the indictment herein.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

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Defendant's Requested Instruction No. 90

If you believe that the defendant sought advice with respect to tax liability on certain items and believed in and followed the advice, then even if the advice proved to be wrong, the defendant is entitled to an acquittal because the element of wilfullness would be absent.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 107

Before you may consider any evidence of any assets belonging to the defendant in computing his net worth, you must first find to a moral certainty and beyond all reasonable doubt that such assets were acquired and paid for by the defendant in the applicable year and you must also find to a moral certainty and beyond all reasonable doubt the cost to the defendant of such assets.

Withdrawn by counsel at time of settling instructions, February 15, 1952, to be subject of argument.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 108

In this case the government has attempted to prove that the defendant and his wife owe additional income tax for each of the years in question

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by reference to what is known as the "net worth and expenditures" method. This method involves, for each year, the calculation of the increase in net worth from the beginning to the end of the year, and the addition to that increase of amounts spent by the defendant and his wife in the way of expenditures which are not deductible for income tax purposes. In order for this method to be effective, the net worth of the defendant and his wife at the beginning and the end of the year must be clearly and accurately established by competent evidence. Before you can treat this total amount—that is, the increase in net worth and the non-deductible expenditures—as taxable income for that year, you must be satisfied beyond a reasonable doubt that all of that money represents taxable income received by the defendant and his wife during that particular year. It is not up to the defendant to prove that some of that money was accumulated in prior years or was received by him or his wife in some form other than income, such as loans or gifts or inheritance. Rather, the government must prove beyond a reasonable doubt that its computations are based on income of each of the years 1944, 1945 and 1946. To meet this burden, the government must accurately establish the net worth of defendant and his wife at the beginning and end of each year. It is not sufficient for the government to list simply the assets and liabilities it knows about; it must also satisfy you, by competent proof, that there were no other assets and liabilities in existence. The defendant is not required to show that the gov-

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ernment's net worth statements are incorrect or incomplete. If the government's proof leaves an uncertainty as to whether all the assets and liabilities of defendant are included in the government's computation of net worth, it follows that those computations cannot be relied upon.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 109

In this case the government has attempted to prove that the defendant and his wife owe additional income tax for each of the years in question by reference to what is known as the "net worth and expenditures" method. This method involves, for each year, the calculation of the increase in net worth from the beginning to the end of the year, and the addition to that increase of amounts spent by the defendant and his wife in the way of expenditures which are not deductible for income tax purposes. In order for this method to be effective, the net worth of the defendant and his wife at the beginning and the end of the year must be clearly and accurately established by competent evidence. Before you can treat this total amount—that is, the increase in net worth and the non-deductible expenditures—as taxable income for that year, you must be satisfied beyond a reasonable doubt that all of that money represents taxable income received by the defendant and his wife during that particular

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year. It is not up to the defendant to prove that some of that money was accumulated in prior years or was received by him or his wife in some form other than taxable income, such as loans or gifts or inheritance. Rather, the government must prove beyond a reasonable doubt that its computations are based on taxable income of each of the years 1944, 1945 and 1946.

To meet this burden, the government must accurately establish the net worth of defendant and his wife at the beginning and end of each year. It is not sufficient for the government to list simply the assets and liabilities it knows about; it must also satisfy you, by competent proof, that there were no other assets and liabilities in existence. The defendant is not required to show that the government's net worth statements are incorrect or incomplete. If the government's proof leave any doubt based upon reason as to whether all the assets and liabilities of defendant are included in the government's computation of net worth, it follows that those computations cannot be relied upon, and you must find the defendant not guilty.

For example, if you are satisfied beyond a reasonable doubt that his net worth at the beginning of a particular year was $100,000.00, and that his net worth at the end of that particular year was $120,000.00; and if you are satisfied beyond a reasonable doubt that his non-deductible expenditures during that year were $10,000.00; and if you are satisfied beyond a reasonable doubt that none of the $20,000.00 increase in his net worth or of the $10,000.00

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in non-deductible expenditures came to defendant as a loan, or as a repayment of a prior loan, or as a gift or inheritance, you would then be justified in concluding that his net income for that year was $30,000.00.

If, however, you cannot determine beyond a reasonable doubt the amount of his net worth at the beginning or end of the year, you cannot compute his net income by this method. As an illustration, if the defendant had an asset at the beginning of the year consisting of cash money in an undetermined amount, so that you could not compute his total net worth at the start of the year beyond a reasonable doubt, you could not determine how much his net worth actually increased during the year. On the other hand, if you should be satisfied beyond a reasonable doubt as to the amount of any such cash, you could compute the net income by this method.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 111

There has been evidence in this case that, in a number of businesses, the defendant entered into agreements with other parties providing that such other parties were to have a "working interest" in the business, consisting of a specified percentage of the profits, but were to leave their shares in the business until the defendant had recovered his in-

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vestment, at which time the other partners would become partners in the assets of the business as well as in the profits.

Under the law it is permissible for two or more people to enter into such a partnership arrangement. If such an agreement is made, each partner is taxable on his percentage interest in the profits, regardless of how much money he actually draws out of the business. If one partner has originally contributed more of the investment than the other partners, and he draws more than his share of the profits out of the business, the excess simply reduces his investment in the business and is not taxable income. He is taxable only on his percentage share of the profits each year.

Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates did not intend to operate said businesses as profit-sharing partners, you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 114

The crucial factor in applying the increase in net worth concept to prove income, is satisfactory proof of the taxpayer's assets at the starting point. In criminal cases the courts insist upon inflexible proof

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that all of the taxpayer's assets have been accounted for at the start of the tax period in question.

In attempting to prove income for the years in question by the net increase in worth and expenditure method, it is incumbent upon the prosecution expressly to exclude the hypothesis that some of the large expenditures by the defendant, if you find evidence of any such expenditures, might have been made from sources other than current business income.

Without adequate proof that all of the defendant's assets at the beginning of the period were taken into consideration and his net worth at that time clearly and accurately established by competent evidence, and without excluding the reasonable probability that any increase in net worth or expenditures are traceable to prior accumulations or gifts or loans or other non-taxable items, the defendant must be acquitted.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

Defendant's Requested Instruction No. 124

During the period involved in this indictment, Sec. 29.41-3 of Regulations III issued by the Secretary of the Treasury provided, in part, as follows:

"It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his

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judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so. * * * Among the essentials are the following:

"(1) In all cases in which the production, purchase, or sale of merchandise of any kind is an income-producing factor, inventories of the merchandise on hand (including finished goods, work in process, raw materials, and supplies) should be taken at the beginning and end of the year and used in computing the net income of the year. * * *

"(2) Expenditures made during the year should be properly classified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to a capital account and not to an expense account; and

"(3) In any case in which the cost of capital assets is being recovered through deductions for wear and tear, depletion, or obsolescence, any expenditure (other than ordinary repairs) made to restore the property or prolong its useful life should be added to the property account or charged against the appropriate reserve and not to current expenses. * * *"

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

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Defendant's Requested Instruction No. 129

There has been testimony in this case that the prosecution has in its possession various business records of the enterprises in which the defendant had an interest, and that the prosecution has not produced those records for introduction in evidence.

It would be proper for you to infer, from the prosecution's failure to produce those records, that they contain evidence which would be detrimental to the prosecution's case and beneficial to the defendant.

Furthermore, in determining whether these business enterprises maintained adequate books and records, it is proper for you to consider that, in addition to the books and records in evidence, there are other records maintained by these businesses which the prosecution has kept in its possession and has declined to place in evidence.

Refused: February 21, 1952.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed March 10, 1952.

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[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find the defendant, Elmer F. Remmer, is guilty as charged in the first count of the indictment; is guilty as charged in the second count; is guilty as charged in the third count; is guilty as charged in the fourth count; 7 to 5 (Disagreement) guilty as charged in the fifth count; and 7 to 5 (Disagreement) guilty as charged in the sixth count.

Dated this 22nd day of February, 1952.

/s/ IRVIN J. SMITH,
Foreman.

Counts Nos. 5 and 6:
7 Guilty.
5 Not Guilty.

[Endorsed]: Filed February 22, 1952.

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District Court of the United States for the
District of Nevada Division

No. 12,177

UNITED STATES OF AMERICA,

vs.

ELMER F. REMMER.

JUDGMENT AND COMMITMENT

Violation of Sec. 145(b), Internal Revenue Code;
26 U.S.C. Sec. 145(b), in 6 counts

On this 29th day of February, 1952, came the attorney for the government and the defendant appeared in person and by counsel, namely, John R. Golden, Esq., Leslie C. Gillen, Esq., and George Lohse, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of Not guilty, and a verdict of guilty of the offense. Count 1: That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America, for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of ....., as

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charged in counts 1, 2, 3, and 4 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted in counts 1, 2, 3 and 4.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand ($5,000.00) Dollars. Count 2: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand ($5,000.00) Dollars, the imprisonment portion of the sentence is to run concurrently with the imprisonment portion of the sentence imposed upon Count 1. Count 3: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand ($5,000.00) Dollars, the imprisonment portion of the sentence is to run concurrently with the imprisonment portion of the sentence imposed upon Count 1. Count 4: Five (5) Years and pay to the United States Government a fine in the sum of Five Thousand ($5,000.00) Dollars, the imprisonment portion of the sentence is to run concurrently with the imprisonment portion of the sentence imposed upon Count 1, so that the total sentence is Five (5) Years imprisonment, and the total amount of the fines is the sum of Twenty Thousand ($20,000.00) Dollars. It Is Further Ordered that defend-

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ant be further imprisoned until payment of the fines, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ROGER T. FOLEY,
United States District Judge.

The Court recommends commitment to: A Federal Penitentiary.

AMOS P. DICKEY,
Clerk.

By /s/ CHARLES V. MILLER,
Deputy Clerk.

A True Copy. Certified this 29th day of February, 1952.

[Seal] AMOS P. DICKEY,
Clerk.

By /s/ CHARLES V. MILLER,
Deputy Clerk.

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[Title of District Court and Cause.]

SENTENCE

Be It Remembered, That the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Friday, February 29, 1952, Hon. Roger T. Foley, Judge, presiding, the plaintiff being represented by Messrs. Bruce Thompson and Robert F. McDonald, and the defendant being present in court with his attorneys, Messrs. Leslie Gillen, John R. Golden and George Lohse. The following proceedings were had:

The Court: In the case of the United States of America vs. Elmer F. Remmer, the record will show the presence of the defendant with counsel. The time fixed for consideration of the probation officer's report and time of sentence was originally fixed at three o'clock, but I am informed that counsel desire to have the matter heard at this time.

Mr. Gillen: We understood that you had finished the matter you had today and we wanted your Honor to know that we are here.

The Court: Will counsel stipulate we may proceed at this time?

Mr. Gillen: Yes, your Honor.

Mr. Thompson: Yes, your Honor.

Mr. Gillen: May it please the Court, there was filed this day by the defense a formal motion for a new trial. Your Honor will recall that on the occasion of the return of the verdict in this case, I orally advised your Honor of the intention of a

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motion for a new trial and said it would be supplemented by a formal motion and your Honor permitted the motion to be filed as of this date. There are eighteen grounds specified in our motion, copy of which has been served on the United States attorney, and there is in support of that motion an affidavit made severally in joint form by Mr. Golden and myself. I might state, too, your Honor has possibly ruled on every ground that is set forth here, with the exception of ground 17, and I do not know what is your Honor's pleasure in regard to hearing any argument on the other 17 grounds set forth.

The Court: You have no desire to argue the matter further?

Mr. Gillen: We can.

The Court: If you want to.

Mr. Gillen: Well, if your Honor feels that argument would not in any wise change your Honor's decision regarding our position regarding the other 17 grounds, why, we submit the matter with the supporting affidavit.

The Court: Very well.

Mr. Gillen: And as to the 17th ground set forth, your Honor will note that this is a matter that came to our attention subsequent to the return of the verdict in this case and in that matter we ask for an opportunity to obtain evidence in that connection by hearing.

The Court: You submit the motion for a new trial now, the entire motion?

Mr. Gillen: Yes, we will submbit that, with our request that——

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The Court (Interceding): The motion for new trial will be denied on all the grounds stated therein.

Mr. Gillen: I take it that also includes, your Honor, that the defendant have a right to have a hearing on the 17th ground, take testimony on the 17th ground?

The Court: That will be also denied.

Mr. Gillen: Very well. It will appear that the next order would be the matters that are before you on the calendar for consideration.

The Court: Yes. The defendant may rise. Mr. Remmer, this is the time appointed for consideration of the probation officer's report and the matter of sentence. On the 22nd day of February, 1952, the jury impanelled in the case of United States of America vs. Elmer F. Remmer, No. 12,177, returned to this Court its verdict of guilty on the charge contained in the first count of the indictment, verdict of guilty on the charge contained in the second count of the indictment, and verdict of guilty on the charge contained in the third count of the indictment and verdict of guilty as charged in the fourth count of the indictment. Now, by virtue of the verdict of the jury, the defendant, Elmer F. Remmer, is hereby adjudged guilty of the offense set forth in the first count of the indictment, which charged that he did, on or about the 13th day of April, 1945, in the District of Nevada, wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing at the time to the

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United States of America for the year 1944, by filing and causing to be filed with the Collector of Internal Revenue, a false and fraudulent income tax return, wherein he stated his net income for that year was $9500 and that the amount of tax due and owing thereon was the sum of $2570, whereas he then and there well knew his net income for the calendar year, computed on the community property basis, was the sum of $33,734.61, and upon which a net income tax was due and owing in the sum of $16,259.54. The defendant is adjudged guilty of that offense.

And by virtue of the verdict of the jury, the defendant is adjudged guilty of the charge set forth in Count 2 of the indictment, substantially the same as the charge contained in Count 1 of the indictment, except that it charges that the defendant did attempt to defeat and avoid a large part of the income tax due the government by his wife, Helen L. Remmer, by causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return, showing the same amount of net income as alleged in Count 1 of the indictment and the same amount of taxes due, and alleging also there was due the United States of America the sum of $16,259.54. The defendant is adjudged guilty of that offense.

By virtue of the verdict of the jury, the defendant is adjudged guilty of the offense set forth in Count 3 of the indictment, which alleges that he did, on or about June 14, 1946, in the District of Nevada, wilfully and knowingly attempt to defeat and evade

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a large part of the income tax due and owing the United States of America, by filing and causing to be filed with the Collector of Internal Revenue a false and fraudulent income tax return, wherein he stated his net income for the calendar year was $28,888.68, computed on the community property basis, and that the amount of tax due and owing was the sum of $13,072.02, whereas, as he then and there well knew that his net income for the said calendar year, computed on the community property basis, was the sum of $37,157.10, upon which income he owed to the United States of America the sum of $18,586.83. The defendant is adjudged guilty of the offense set forth in Count 3 of the indictment.

By virtue of the verdict of the jury, the defendant is adjudged guilty of the offense set forth in Count 4 of the indictment, which alleges that on or about the 14th of June, 1946, in the District of Nevada, the defendant, Elmer F. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by his wife, Helen L. Remmer, by filing and causing to be filed with the Collector of Internal Revenue in the District of Nevada, a false income tax return for and on behalf of Helen L. Remmer, in which it was stated her net income for the calendar year, computed on the community property basis, was the sum of $30,429.68 and that the amount of taxes due and owing thereon was the sum of $14,074.29, whereas, as he then and there well knew, her net income for said calendar year, computed on the

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community property basis, was the sum of $38,-708.09, upon which said net income there was due and owing to the United States of America a tax of $19,649.82. The defendant is adjudged guilty of that offense.

Now, Mr. Remmer, have you anything to say why the judgment of the Court should not be pronounced against you on Count 1 of the indictment?

A. No, sir.

The Court: Have you anything to say why the judgment of the Court should not be pronounced against you on Count 2 of the indictment?

A. No, sir.

Mr. Gillen: Your Honor, at this time I think we should properly have advanced our motion for a new trial, but your Honor has passed on it.

The Court: Have you anything to say why the judgment of the Court should not be pronounced against you on Count 3 of the indictment?

A. No, sir.

The Court: Have you anything to say, Mr. Remmer, why the judgment of the Court should not be pronounced against you on Count 4 of the indictment?

Mr. Gillen: Same answer.

The Court: I will be glad to hear from counsel or the defendant or both, but I think it might be well to hear from the probation officer and the United States Attorney. You may be seated. I did not require the probation officer to file a formal written report, for the reason I think the Court

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has had ample opportunity to become acquainted with the facts and circumstances of this case during the trial. I did ascertain from the probation officer that the defendant, Elmer F. Remmer, has not until this time been convicted of a felony. Is there anything the United States Attorney would like to say?

Mr. Thompson: Your Honor please, I believe the ten or eleven weeks of trial also fairly informed all of us regarding Mr. Remmer's past activities and I see no need to make any additional statement.

The Court: Mr. Gillen, or other counsel, or the defendant, have you anything you would like to say further at this time?

Mr. Gillen: I think it would add nothing. Your Honor is acquainted with the fact there is no past criminal record or felony of this man and your Honor is acquainted with the fact of his business activities in the State of Nevada in connection with Cal-Neva and other matters that came before your Honor. I feel we don't have anything further at this time.

The Court: The Court having asked the defendant if he has anything to say why the judgment of the Court should not be pronounced against him on the four counts in the indictment, and no sufficient cause to the contrary been shown or appearing to the Court, it is the order of the judge that the defendant be, and hereby is, committed to the custody of the Attorney General, or his authorized representative, for imprisonment for the period of five years, and pay to the United States Government a fine in the sum of five thousand dollars on the

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charge contained in Count 1 of the indictment. I want to say at this time I do not intend to impose any additional term, that the additional terms here will be concurrent, so the defendant will know now.

It is adjudged the defendant be, and hereby is, committed to the custody of the Attorney General or his authorized representative, for imprisonment for the period of five years and pay to the government of the United States five thousand dollars on the charge contained in Count 2 of the indictment. The term of imprisonment hereby imposed as punishment for the offense charged in Count 2 of the indictment, is to run currently with that imposed as punishment for the offense charged in Count 1 of the indictment.

It is adjudged the defendant be, and hereby is, committed to the custody of the Attorney General or his authorized representative, for imprisonment for the period of five years and pay to the Government of the United States five thousand dollars on the charge contained in Count 3 of the indictment. The term of imprisonment hereby imposed as punishment for the offense charged in Count 3 of the indictment is to run concurrently with that imposed on Count 1 of the indictment.

It is adjudged the defendant be, and hereby is, committed to the custody of the Attorney General, or his authorized representative, for imprisonment for the period of five years and pay to the Government of the United States five thousand dollars on the charge contained in Count 4 of the indictment. The term of imprisonment hereby imposed as pun-

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ishment for the offense charged in Count 4 of the indictment is to run concurrently with that imposed on Count 1 of the indictment.

It is further ordered that said defendant be further imprisoned until the amount of the fine on each of said counts be paid to the United States Government, the total sum being twenty thousand dollars.

The defendant is committed to the custody of the United States Marshal for the execution and carrying out of the aforesaid judgment of the Court.

Mr. Gillen: Now, may it please the Court, at this time it is perfectly plain to me—I am sure I am correct in it—the term of imprisonment on each count is concurrent?

The Court: Yes.

Mr. Gillen: The fines imposed on each count are cumulative, twenty thousand dollars?

The Court: Yes, twenty thousand dollars total fine and total period of imprisonment five years, five years on each count and the second, third and fourth counts concurrent with Count 1.

It is recommended that this period of confinement be had in a federal penitentiary.

Mr. Gillen: I understand. At this time, may it please the Court, I respectfully appeal to the Court, advising the Court that it is the intention of the defendant to formally give notice of an appeal from the conviction in this matter. I appeal to the Court at this time to fix a bail and permit the defendant to be admitted to bail pending his bail under Rule 46(a), subdivision 2, of the Rules of Criminal Procedure. I understand it is only necessary for us to

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make an oral motion, but we have made a written motion, which we present to your Honor and which we have served upon the United States attorney. I need not point out to your Honor that throughout this entire proceeding the defendant in this case has religiously appeared at each and every proceeding of the case and there was never any question about his appearance or about his tardiness in attendance upon court procedure, and I will ask your Honor to fix a bail at this time. We will file at the same time this formal notice of appeal—there are some insertions to be made—and we will file that, too.

The Court: Tht motion for bail is denied and defendant is remanded to the custody of the marshal. The court will be in recess until 10:00 o'clock Monday morning.

Mr. Gillen: May we interrupt, your Honor, upon another matter. There is another matter here that we want to take up with your Honor. Rule 38(a), subdivisions 2 and 3, provide an election that reposes in a convicted person under sentence to elect not to commence the service of his sentence and to also stay the payment of any fines pending a review of his case by an appellate tribunal, and at this time there is before your Honor, presented by the defendant, a formal election upon the part of the defendant, on the basis of the appeal to be taken, not to commence the serving of his sentence and to stay the payment of the money sentence until the entire matter has been reviewed. That, your Honor will find in Rule 38A, sections 2 and 3.

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The Court: Of course, do you contemplate giving some security for the fine?

Mr. Gilllen: I suppose it could be arranged. Of course, your Honor does have in mind that there is a very substantial lien which now has tied up all of the available property of the defendant, all of his assets.

The Court: I have no objection, and I can not see why there should be any objection, to an order staying the sentence of imprisonment pending the appeal, that is as to the effect of staying the operation of the sentence, but I would require ample security for the payment of the fine on that condition.

Mr. Gillen: Not in derogation of your Honor's thought, I wonder how the United States attorney feels about that, because they are familiar with the substantial lien on our defendant's assets, more than enough to protect——

The Court: Has the United States any objection to an order staying sentence pending appeal?

Mr. Thompson: I think the defendant has the right not to elect commencing upon service of his sentence. Mr. Gillen attributes to our office a considerable sum we have a lien. It is true that the federal government has attempted to place a lien upon the defendant's property. Whether that has actually been effected against all or any substantial part of the defendant's property, we have no knowledge. As a matter of fact, I do not know personally just what particular items of property are presently subject to the lien thereon.

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Mr. Gillen: There is one item of 35-thousand dollars in cash, lien at the First National Bank of Nevada, and your Honor will recall there was some evidence here——

The Court (Interceding): I willl make the order that the fines may be stayed upon the defendant giving good and sufficient bond in the sum of twenty thousand dollars.

Mr. Gillen: May we have a certain number of days in which to put up that bond? In other words, the election to stay the beginning of the prison sentence has the effect of not releasing the defendant, but keeping him in custody locally. Now, we wouldn't want to see him whisked away before we could put that bond up.

The Court: He won't be whisked away.

Mr. Golden: Your Honor's order was he be imprisoned until the fine is paid. May that be made that we have five days in which to post that bond and pending that he will remain here and then that condition will be met by posting of the security. Do I make that clear, your Honor?

Mr. Gillen: The arrangements have to be made with some surety company and this is Friday afternoon. We are also facing a two-day holiday in which we can't do anything.

The Court: He has been committed to the custody of the marshal and I can't see where he will suffer any additional inconvenience by requiring the bond to be presented——

Mr. Gillen: What Mr. Golden is thinking of, while he is exercising his election as to the impris-

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onment portion of the sentence, he apparently is under compulsion to pay the money fine of the sentence——

The Court: That will be stayed as soon as the bond is presented. What rule is that?

Mr. Golden: 38(a), 3.

The Court: I have made an order that payment of the fine will be stayed upon condition that a bond in the sum of twenty thousand dollars be filed and I don't understand just what difference it would make——

Mr. Gillen: And he should be imprisoned until payment of that fine. The United States marshal may determine, since your Honor said imprisonment should be in a federal penitentiary, that as to that part——

The Court: He shall be imprisoned on this fine part by the United States marshal until the bond is filed and approved by the United States attorney.

Mr. Gillen: All right. We just were fearful——

The Court: So you understand that. So we will be in recess until Monday morning at 10:00 o'clock.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, in the matter of the sentence

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held in Carson City, Nevada, on February 29, 1952, and that the foregoing pages, numbered 1 to 15, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, March 31, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed April 10, 1952.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF FEBRUARY 22, 1952

Feb. 22, 1952. Mr. Gillen gives oral notice of motion for new trial. Ordered deft's time is extended to Feb. 29, 1952, to file written Motion for New Trial.

Feb. 22, 1952. Mr. Gillen moves for order releasing deft. on bail. Ordered that this motion is denied, and deft. is remanded to the custody of the Marshal.

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[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for each of the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

2. The Court erred in overruling defendant's objections to and denying defendant's motions to strike:

a. The testimony of the witness Scollin and Government Exhibits 17, 18 and 19 and each of them.

b. The testimony of the witness Badobinatz and Government Exhibit 42.

c. Government Exhibits 15 and 60 and each of them.

d. The testimony of the witness Lando as to his lack of acquaintanceship with certain named persons, viz.: Joe Leonard, Bob Burgess, Sacramento Sam and Crying Mack.

e. The testimony of the witness Gillingham and Government Exhibit 58.

f. The testimony of the witness McCaffery and Government Exhibit 59.

g. The testimony of the witness Greenhouse and Government Exhibit 71.

h. The testimony of the witness Strong and Government Exhibits 100 and 100a and each of them.

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i. The testimony of the witness Bray and Government Exhibit 101.

j. The testimony of the witness Hill and Government Exhibit 16.

k. The testimony of the witness Ezralow as to Government's Exhibits for Identification 154, 154a and 154b and each of them.

l. The testimony of the witnesses Kyne, Maundrell, Casselini, Busterna, Lando, Silverman and Ezralow and each of them as to the 186 Club and Government's Exhibits 87, 87a, 88, 88a, 166, 167, 43, 131 and 110f and each of them.

3. The verdict is contrary to the weight of the evidence, especially as to the recognition of the partnerships and of the loans.

4. The verdict is not supported by substantial evidence, especially as to the use of the net worth and expenditures method to compute net income.

5. The Court erred on June 15, 1951, in denying defendant's motion for a bill of particulars.

6. The Court erred on November 15, 1951, in denying defendant's motion to inspect and take copies.

7. The Court erred on November 27, 1951, in denying defendant's motion for production and inspection of books, papers, documents and objects and in quashing the subpoena duces tecum issued in connection therewith.

8. The Court erred in compelling defendant's counsel, during the trial, to produce defendant's

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books and records and in denying defendant's motions to return them and suppress their use in evidence and in admitting them in evidence over defendant's objections.

9. The Court erred in denying defendant's motions, during the trial, for the production and inspection and admission in evidence of defendant's books and records taken and retained by the Government and withheld from evidence.

10. The Court erred in sustaining objections to questions addressed to the witnesses Kyne, Maundrell, Schriber, Weaver, Brady, Morgan and Harkness and each of them for the Government, and the witnesses Semenza, Woodburn, Thatcher, Graham, Edna Jeffress, James Jeffress and Golden and each of them for the defense, and in rejecting defendant's offers of proof in connection with said defense witnesses and said Brady.

11. The Court erred in refusing to allow in evidence Defendant's Exhibits Z, D1, E1 and F1 and each of them.

12. The Court erred in admitting testimony of the witness Weaver, especially as to an alleged conversation with the defendant.

13. The Court erred in charging the jury and in refusing to charge the jury as requested.

14. The Court erred in denying the defendant's motions for a mistrial.

15. The Court erred in permitting the attorney

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for the Government over objection to argue to the jury outside the record.

16. The Court erred in denying defendant's challenge for cause to the prospective juror John W. Humphrey.

17. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the jury, the Court, the prosecuting attorneys and the Agents of the Federal Bureau of Investigation and each of them in the circumstances described in the affidavit filed herewith, which by this reference is incorporated herein. The interests of justice demand and the defendant respectfully moves that there be a trial of this issue, that he be permitted to adduce evidence as such trial, that subpoenas be issued for the attendance at such trial as witnesses of the jurors, the trial Judge, the members of the United States Attorney's office and other prosecuting counsel, the Agents of the Federal Bureau of Investigation, the person who communicated with the juror I. J. Smith and others who participated in the incident described in said affidavit, and that defendant through his counsel be permitted to examine fully into the conversation and what took place between such unidentified person and the juror Smith, the conversation and what took place between the juror Smith and the trial Judge, the conversation and what took place between the juror Smith and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge

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and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the prosecuting attorneys or any of them and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, the conversations and what took place, pertaining to this incident, between the juror Smith and the other jurors or any of them, the conversation and what took place between the unidentified person who spoke to the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, and generally into all matters and things pertaining to the incident described in said affidavit in order to fully investigate the same to determine to what extent it had any effect on the jury and was prejudicial to the defendant.

18. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the trial Judge.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,
By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

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[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of California,
City and County of San Francisco—ss.

Leslie C. Gillen and John R. Golden, being duly sworn, each for himself and not one for the other, deposes and says:

That he is one of the defendant's attorneys in the above-entitled case and participated in the trial thereof.

That the trial of said case commenced on November 28, 1951; that the jury reached its verdicts on February 22, 1952; that subsequently and on February 23, 1952, affiant first learned of the facts hereinafter averred.

That in December, 1951, or January, 1952, a person unknown to affiant had a conversation with one of the jurors in said case, namely, I. J. Smith, who later became the foreman of the jury; that in the course of said conversation said person made a remark to said Smith to the effect that said Smith could profit by bringing in a verdict favorable to the defendant; that said Smith promptly reported the substance of said conversation to the trial Judge in said case, Honorable Roger T. Foley, and the latter conferred with the prosecuting attorneys concerning sam ; that as a result the Federal Bureau of Investigation was requested to and did make an investigation of said incident and made a report

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thereon; that neither Judge Foley nor the prosecuting attorneys related said incident to any of defendant's counsel and the latter were kept in complete ignorance thereof until the verdicts had been reached, and thereafter learned thereof only through the press; that copies of articles appearing, respectively, in the San Francisco Chronicle and the Oakland Tribune, on Sunday, February 24, 1952, are attached hereto and by this reference incorporated herein.

That, had defendant's counsel been apprized of the situation, they would have moved for a mistrial and further would have requested that Judge Foley remove said Smith as a juror and substitute an alternate juror, or which there were two, for him, for the reason that said Smith, having had such conversation, quite naturally would be apprehensive of being suspected and criticized were he to vote and attempt to have the other jurors vote for a verdict in favor of the defendant, and thus would be and was prejudiced against the defendant by reason of such conversation; that the omission of the trial Judge to bring the facts of the aforesaid out-of-Court incident to the attention of defense counsel at the time of its occurrence prevented defense counsel from making timely efforts to avoid prejudice to the defendant as aforesaid and his acts and conduct deprived defendant of a fair trial.

That the interests of justice demand and affiant respectfully moves that there be a trial of this issue, that he be permitted to adduce evidence at such trial, that subpoenas be issued for the attend-

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ance at such trial as witnesses of the jurors, the trial Judge, the members of the United States Attorney's office and other prosecuting counsel, the Agents of the Federal Bureau of Investigation, the person who communicated with the juror I. J. Smith and others who participated in the incident described hereinabove, and that defendant through his counsel be permitted to examine fully into the conversation and what took place between such unidentified person and the juror Smith, the conversation and what took place between the juror Smith and the trial Judge, the conversation and what took place between the juror Smith and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the prosecuting attorneys or any of them and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, the conversations and what took place, pertaining to this incident, between the juror Smith and the other jurors or any of them, the conversation and what took place between the unidentified person who spoke to the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, and generally into all matters and things pertaining to the incident

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described hereinabove in order to fully investigate the same to determine to what extent it had any effect on the jury and was prejudicial to the defendant.

/s/ LESLIE C. GILLEN,

/s/ JOHN R. GOLDEN.

Subscribed and sworn to before me this 28th day of February, 1952.

[Seal] /s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires June 28, 1955.

Remmer Jury
Cleared in
Hint of 'Fix'

Judge Reveals FBI Made
Probe After Report of
Remark to One of Panel

By Victor Stier
Tribune Staff Writer

Carson City, Nev., Feb. 23.—Federal Judge Roger T. Foley revealed today that the FBI investigated the possibility of jury tampering midway in the income tax evasion trial of Elmer F. (Bones) Remmer.

The FBI found no evidence of tampering in its inquiry, Judge Foley said.

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Remmer, Bay area and Nevada gambler, was found guilty by a jury last night of four of the six counts of tax evasion on which he was indicted in 1948. He is now in the Washoe County Jail at Reno awaiting sentencing, which has been set for 3 p.m. next Friday.

From his jail cell today, Remmer declared: "We're going to fight this thing through. We've just started. If I had it to do all over, I'd do it the same way with the same lawyers."

Remark by Juror

Judge Foley said the tampering investigation stemmed from a remark made to one of the jurors, I. J. Smith, a Reno insurance and realty man, who subsequently became jury foreman.

Sometime in December, the judge related, Smith came to him and told this story:

A former client of his (Smith's) had come to his home on business. During the course of their conversation, he made a remark to the effect that Smith could get a lot of money out of the trial through the defense.

Smith told the judge he thought the man, a dealer in a Reno gambling casino, had simply made a waggish remark and that he was kidding. However, in view of Judge Foley's admonitions not to discuss the case, Smith said he decided to report the incident.

Asks FBI Check

Judge Foley said today that he informed the prosecution, but not the defense, and had the Reno office of the FBI check the story.

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"It was the conviction of the FBI, and my own that the man made a remark in bad taste."

Asked why he didn't tell the defense, Judge Foley explained: "If there was anything to the report, it probably would have been a defense move. If it had been a police officer or an internal revenue man who had made the remark, I would have notified the defense and not the prosecution, so as to eliminate any possibility of their stopping the investigation."

Attorneys Aroused

Defense attorneys were irate when informed of Judge Foley's story.

"Any conference with the judge should have had both sides present," they declared in a statement.

"If we had been informed, as we had a right to be, we would have strongly urged Judge Foley to excuse the juror and replace him with one of two alternates since it would have been only natural for that juror to lean over backwards to avoid any possible criticism or suspicion.

"If the judge gave the report enough weight to refer it to the FBI, it is all the more reason why we should not have been kept in ignorance."

Denies Tampering

Smith denied the report, but admitted: "I did talk to Judge Foley about another thing. Nobody tried to influence me. The man might have been out of line, but he did not try to tamper with me."

Asst. U. S. Attorney Bruce Thompson said: "I can't talk about it."

Remmer was dressed in a light tan, monogrammed

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sport shirt and tan checked slacks when he talked with newsmen in the Reno jail today.

His declaration to "fight this thing through" backed up statements made last night by his attorneys, who said they will file formal motions of appeal and for a new trial early this week.

Reno Gambler Talked With Juror

Jury Tampering Charge
Enters the Remmer Case

By Pierre Salinger
Chronicle Staff Writer

Carson City, Nevada, Feb. 23.—Elmer F. (Bones) Remmer's attorneys are going to bring up the matter of a "secret investigation" of alleged tampering, when the San Francisco gambler's conviction for tax evasion goes to the Federal Circuit Court in San Francisco on appeal.

The announcement was made today after Federal Judge Roger T. Foley confirmed that he had summoned the FBI to check into a visit a gambling house dealer paid to one of the jurors hearing the case.

The Judge said he had informed the prosecution about the incident, but had not mentioned anything about it to the defense.

As Attorneys Leslie C. Gillen and John R. Golden began preparing the way for an appeal, their client spent his first day in the Washoe County Jail. He was sent to jail Friday after the jury convicted him on four counts of criminally evading his income

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taxes in the years 1944 and 1945. The jury could not agree on two other counts involving Remmer's taxes in 1946.

Gambler's Visit

The gambling house dealer's conversation with a juror took place in December, when the trial was less than a month old. He called on I. J. Smith, a Reno real estate dealer and insurance man, a member of the jury and later its foreman, to consult with him about some automobile insurance.

Picture on Page 3

In the course of the conversation the dealer said: "You could get a pile if you would go along with Bones."

Smith, who confirmed the incident, said he considered the remark only a jest, but he reported it the following day to Judge Foley.

The Judge, who said he also did not take the remark seriously, called in the FBI because, he said, "a Judge should take every precaution." The FBI's report confirmed his belief that the remark was not meant seriously, the Judge added.

Defense Objections

Asked why he had notified the Government's attorneys about the "innocent incident," but not the defense, Judge Foley explained:

"This incident turned out to be harmless. But if there had been anything to it, and if we had told the defense, it would have stifled our investigation."

Gillen and Golden objected to this comment.

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"Any conference with the Judge should have had both sides present," they said, in a joint statement. "By definition, all parties are present at a conference.

"If we had been informed, as we had the right to be, we would have strongly urged Judge Foley to excuse the juror and replace him with one of the two alternates. Under the circumstances, it would have been the natural thing for that juror to lean over backward to avoid any possible criticism or suspicion.

"Judge Foley gave the incident enough credence to refer it to the FBI. That is all the more reason why he should not have kept us in ignorance."

First Night in Jail

The attorneys reported today that, in spite of the secrecy, they had finally learned of the incident.

Remmer, meanwhile, reported he was well rested after spending the night in jail for the first time in his life.

When he arrived at the jail in Reno after his conviction last night, he made up for the lack of a pillow in his cell by curling up his clothes and resting his head on them. Then he dropped off to sleep almost instantly.

He chatted briefly with his lawyers and newspapermen.

"If we had it all to do over again, I'd do it with the same lawyers and the same way," Remmer said.

And, to the newsmen who interviewed him

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through the bars of his little cell, the portly gambler commented:

"I still don't know what I'm here for. I don't know of a single thing I've done to be in here."

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF FEBRUARY 29, 1952

Feb. 29, 1952. Ordered that the motion for new trial is denied.

Feb. 29, 1952. Judgment order. Entg. Judgment. Judgment: Ordered deft. be committed to the custody of the Attorney General for 5 years on each of counts 1, 2, 3 and 4, the sentences on counts 2, 3 and 4 to run concurrently with the sentence imposed upon count 1; and fined $5,000.00 on each of counts 1, 2, 3 and 4, so that the total sentence is 5 years and fined $20,000.00. The Court recommends commitment to a Fed. Pen. Remanded.

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[Title of District Court and Cause.]

ELECTION NOT TO COMMENCE SERVICE OF SENTENCE AND MOTION TO STAY PAYMENT

An appeal having been taken, the defendant elects not to commence service of any sentence of imprisonment and also moves the Court for a stay of any sentence for the payment of money.

This election and motion is made pursuant to Rules 38(a) (2) and (3) of the Rules of Criminal Procedure.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,

By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF FEBRUARY 29, 1952

Feb. 29, 1952. Ordered that the payment of the fines is stayed upon the filing of a bond in the sum of $20,000.00 as security therefor.

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[Title of District Court and Cause.]

MOTION FOR BAIL UPON REVIEW

The defendant moves the Court to allow him to remain at liberty on bail in a reasonable amount pending his appeal, which defendant intends taking forthwith.

This motion is made pursuant to Rule 46(a) (2) of the Rules of Criminal Procedure upon the ground that it appears that this case involves several substantial questions which should be determined by the Appellate Courts, as more fully appears from the transcript of the proceedings and all of the papers on file herein, which by this reference are incorporated in this motion.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,
By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

COPY OF CRIMINAL DOCKET ENTRY OF FEBRUARY 29, 1952

Feb. 29, 1952. Ordered that the motion for bail upon review is denied.

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[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Elmer F. Remmer, Golden Hotel, Reno, Nevada.

Names and addresses of appellant's attorneys: Leslie C. Gillen and John R. Golden, 33 Post Street, San Francisco, California; Spurgeon Avakian, Financial Center Building, Oakland, California; and Lohse and Fry, 139 North Virginia Street, Reno, Nevada.

Offense: Violations of Section 145(b), Internal Revenue Code, 26 U.S.C. Section 145(b). (Four counts.)

Concise statement of judgment or order, giving date, and any sentence: On February 22, 1952, the jury brought in verdicts of guilty of Counts One through Four of the indictment. On February 29th, 1952, the Court entered its judgment and commitment and sentenced the defendant to Imprisonment for a period of five (5) years and to pay a fine of Five Thousand ($5,000.00) Dollars on each of the four counts of which he was convicted and ordered the sentences of imprisonment on counts two, three and four to run concurrently with the sentence of imprisonment on count one, or, a total of five (5) years imprisonment and Twenty Thousand ($20,000.00) Dollars fine.

Name of institution where now confined, if not on bail: Washoe County Jail, Reno, Nevada.

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I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated February 29, 1952.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,
By /s/ JOHN R. GOLDEN,
Attorneys for Defendant.

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Defendant and appellant Elmer F. Remmer hereby designates as the record on appeal in the above-entitled matter, the complete record and all of the proceedings and evidence therein.

Dated this 3rd day of March, 1952.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,
By /s/ JOHN R. GOLDEN,
Attorneys for Appellant.

Affidavit of Service by Mail attached.
[Endorsed]: Filed March 5, 1952.

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[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Instruction No. 1

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct those mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just as little inclined to interfere with the province of the jury passing upon the facts of the case, as it is sensitive about having the jury to undertake to determine what is the law of the case. With this understanding of our respective duties, the Court states to you the following general principles.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 2

The indictment itself is a mere charge or accusation against the defendant, and is not of itself any evidence of his guilt, and no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of or on account of the indictment.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 3

The indictment in this case charges violations of Section 145(b) of Title 26, United States Code, which so far as it applies here reads: "* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter * * * shall * * * be guilty" of an offense.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 4

The indictment charges the defendant with six offenses or counts as follows:

Count One: That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year

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1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $9,500.00 and that the amount of tax due and owing thereon was the sum of $2,570.00, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $33,734.61, upon which said net income he owed to the United States of America an income tax of $16,259.54. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Two: That on or about the thirteenth day of April, 1945, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1944 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1944, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $9,500.00 and that the amount of tax due

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and owing thereon was the sum of $2,570.00, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of $33,734.60, upon which said net income there was owing to the United States of America an income tax of $16,259.54. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Three: That on or about the fourteenth day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $28,888.68, and that the amount of tax due and owing thereon was the sum of $13,072.02, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $37,157.10, upon which said net income he owed to the United States of America an income tax of $18,586.83. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Four: That on or about the fourteenth

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day of June, 1946, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1945 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1945, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $30,429.68 and that the amount of tax due and owing thereon was the sum of $14,074.29, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of $38,708.09, upon which said net income there was owing to the United States of America an income tax of $19,649.82. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Five: That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the

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Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $11,244.79 and that the amount of tax due and owing thereon was the sum of $2,776.87, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $94,235.84, upon which said net income he owed to the United States of America an income tax of $61,341.68. In violation of Section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Count Six: That on or about the fifteenth day of March, 1948, in the District of Nevada, Elmer F. Remmer, late of Reno, Nevada, who during the calendar year 1946 was married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for said calendar year, computed on the community-property basis, was the sum of $11,244.79 and that the amount of tax due and owing thereon was the sum of

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$2,776.87, whereas, as he then and there well knew her net income for the said calendar year, computed on the community-property basis, was the sum of $94,235.84, upon which said net income there was owing to the United States of America an income tax of $61,341.68. In violation of section 145(b), Internal Revenue Code; 26 United States Code, Section 145(b).

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 5

The defendant is presumed to be innocent at all stages of the proceeding until and unless the evidence shows him to be guilty beyond a reasonable doubt. This rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 6

A reasonable doubt is one based on reason. It is not mere possible doubt, but is such doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the

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truth of the charges as contained in a court of the indictment, there is not a reasonable doubt as to such count. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation.

Given:

/s/ ROGER FOLEY,
United States District Judge.

Instruction No. 7

You are instructed that the rule of law which throws around the defendant the presumption of innocence and requires the Government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 8

You are to consider only the evidence introduced in this case. A conviction is justified only when such evidence excludes all reasonable doubt as the same has been defined to you, without it being restated or repeated. You are to understand that the

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requirements that a defendant's guilt be shown beyond a reasonable doubt should be considered in connection with and as accompanying all the instructions that are given to you.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 9

Every person required to pay income taxes is under a personal duty to file or cause to be filed for him a proper income tax return. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of good faith as to the correctness of the statement which he signs, whether prepared by him or somebody else.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 10

It is not necessary for the Government to prove that the defendant received income in the exact amount stated in the indictment or that the taxes due on his income were exactly as stated in the indictment. It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial amount of income in excess of that which he reported on his income tax returns and

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that he wilfully attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 11

To establish its case the government must prove both of the following elements: (1) That substantial income tax was due and owing from the defendant in addition to that declared in his original income tax returns; and (2) that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment is wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income tax law. The word "attempt," as used in this law, involves two elements: (1) An intent to evade or defeat the tax; and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar years 1944, 1945 and 1946 he had an income which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during such calendar years and which he knew it was his duty to state in his returns for such years.

There are various schemes, subterfuges, and de-

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vices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.

If you find from the evidence beyond a reasonable doubt that the defendant did consciously, knowingly and intentionally fail to report or cause to be reported his true income and thereby the Government was cheated or defrauded of taxes, you may find that he intended to evade the tax. However, you must not convict the defendant unless the evidence has convinced you beyond a reasonable doubt that he knew he was doing wrong.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 12

The possession of money alone is not sufficient to establish net taxable income. But evidence of the possession of money and the expenditure of money

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may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 13

If you find that there were any gains, profits or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both were taxable.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 14

The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

The Government is authorized by law, if the

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books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

If, at the end of a year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of his taxable income.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 15

The Government has placed before you evidence relating to the defendant's net worth at the end of each of the years 1943, 1944, 1945 and 1946. A defendant's net worth at a given time is the difference between all of his assets and all of his liabilities. Loans receivable are to be considered as assets and loans payable are to be considered as liabilities in computing the net worth. Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the defendant's taxable net income by this method you should add the defendant's living and other non-deductible expenses for

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that year as shown by the evidence and the income taxes which he paid during that year to the increase in net worth. These expenditures should be added because they are not represented in the assets which the defendant has accumulated and are not deductible expenses.

Expenditures which are deductible under the income tax laws are immaterial and of no significance in computing net income on the so-called "net worth and expenditures" method. The law provides that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business. The term "ordinary and necessary business expense" does not have any specific definition, but it refers generally to expenditures which have a reasonable relationship to the carrying on of a business.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 16

If you find that the defendant had substantial taxable income for the years 1944, or 1945, or 1946 which he did not report on his income tax returns, then you may find that there was a substantial amount of tax due to the United States Government for such year by the defendant.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 17

As I have heretofore charged you, the defendant has been indicted under a statute which applies to "any person who wilfully attempts in any manner to evade or defeat any tax imposed," etc. With respect to the meaning of the phrase "in any manner," I charge you that Congress did not define or limit the methods by which a wilful attempt to evade and defeat might be accomplished. The indictment in this case charges attempts to evade taxes by filing false income tax returns. In event you determine that the income tax returns, or any of them, understated the incomes of the defendant, or his wife, you must then determine if such understatement was wilful.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 18

The Court instructs the jury that in every crime or public offense there must exist a union or joint operation of act and intention.

Intention is manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 19

The word "wilful" when used in a criminal statute generally means an act done with a bad purpose, but the word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by disregard whether one has the right so to act.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 20

Since a state of mind is difficult to prove precisely, evidence of surrounding circumstances may be admitted to prove intent or knowledge. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 21

You may find that there is evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress in-

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formation for other reasons. Thus, even if you should find that the defendant desired to conceal his ownership of property from anyone, you may also find in addition to such motive the existence of an intent to defraud the United States of moneys due as income taxes and to attempt to defeat or evade such taxes.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 22

There is a distinction between civil tax cases and criminal tax cases. This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled a civil claim for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 23

The law requires that income tax returns (other than returns of corporations) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 24

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Partnerships as such are not subject to income tax, but are required to make returns of income.

A partner in a partnership shall include in his individual net income his share of the net income or loss of the partnership. If he draws either more or less than his share, his income tax is nevertheless based on the share to which he is entitled under the partnership agreement.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 25

Every person subject to income tax shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in any return under the internal-revenue laws.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 26

You are instructed that the defendant in this case is being tried upon the charges named in the indictment and no other charges. If you sus-

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pect or believe from the evidence that some offense or misconduct or crime not mentioned in the indictment was committed by the defendant, but so believing, you nevertheless entertain a reasonable doubt as to whether such defendant committed the particular offenses charged against him in the indictment herein, you will resolve that doubt in favor of the defendant and return a verdict of "not guilty."

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 27

Money received as a gift or inheritance is not taxable income. The prosecution has the burden of proving to your satisfaction beyond a reasonable doubt that none of the money which it claims as taxable income came to the defendant or his wife as a gift or inheritance.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 28

Certain businesses were described in the income tax returns in evidence as partnerships. The law does not prescribe any specific form of agreement as a requisite for partnership status. A partnership is an organization of two or more parties who have intended in good faith, and acting with a business purpose, to join together in the present conduct

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of an enterprise. The arrangement between them may be either written or oral, and can be either an express or an implied agreement. It is not necessary that they contribute equal amounts of capital, or devote equal amounts of time to the business of the partnership, or have an equal share in the drawings, or have an equal right to draw money out of the business. The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 29

You are instructed that the law of California in effect during the years included in this case provided for membership or non-stock corporations and that such corporations did not issue stock.

This instruction pertains to the One Eighty-Six Club.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 30

Under the income tax laws, the net income of a corporation is not taxable to any of the shareholders unless it is actually distributed to them.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 31

Liquor floor stock taxes assessed in 1944 could either be added to the cost of the liquor or could be treated as a deductible expense at the option of the taxpayer provided that such liquor was held in the course of a trade or business or for the eventual production of income.

This instruction pertains to the Gallagher and Burton whiskey transactions mentioned in the evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 32

As previously stated to you, the income tax law provides that the net income of the taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping books of the taxpayer. In this case two methods of recording transactions in books of account have been referred to, one referred to as the cash method and the other as the accrual method. Under the cash method income is recorded as of the time it is actually received and expenses are included only when actually paid. Under the accrual method of recording transactions income is set up when the right to receive the money arises and expenses are set up at the time the liability is incurred.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 33

Evidence is of two kinds, direct and circumstantial. Direct evidence is that evidence which is given when a witness testifies directly of his own knowledge to the main fact or facts to be proven. Circumstantial evidence is proof of certain facts and circumstances from which the jury may infer other and connecting facts, which usually and reasonably follow. Crimes may be proven by circumstantial evidence as well as by direct testimony of eye witnesses; but the facts and circumstances in evidence taken as a whole must be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of the defendant's innocence.

In a case of either direct or circumstantial evidence it is not necessary that the proof shall be conclusive. It is sufficient if the jury believe from all the facts and circumstances of the case that the accused is guilty, and that they have no reasonable doubt in their minds as to his guilt. If the jury believe the facts as shown by the evidence in this case as to any count are all consistent with the supposition that the defendant is guilty, and cannot reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty of that count; but if the jury do not so believe, they should find the defendant not guilty of that count. All that can be required is not absolute and positive proof, but such proof as convinces

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the jury that the crime has been made out against the accused beyond a reasonable doubt.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 34

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your minds, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 35

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of

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expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 36

You are the sole judges of the credibility and the weight which is to be given to the testimony of the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of a witness' testimony, as may be dictated by your judgment as reasonable men and women. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has

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testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If the jury believe that any witness has wilfully sworn falsely as to any material fact in the case, they may disregard the whole of the evidence of any such witness, except insofar as it is corroborated by other credible evidence.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 37

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence, or as to the credibility of a witness. In admitting evidence, to which an objection is made, the Court does not determine what weight should be given such evidence. As to any offer of evidence that was rejected by the Court, you, of course, must not consider the same. As to any ques-

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tion to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 38

You are instructed that if the Judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either party you will not allow yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are, or are not worthy of credence; what facts are, or are not, established; or what inference should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The verdict to be rendered must represent the considered judgment of each juror.

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In order to render a verdict it is necessary that each juror agrees thereto. Your verdict must be unanimous.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 39

The fact that an attorney may have during the course of the trial persistently or vehemently pressed argument in the interest of his client is not to be considered by you to the prejudice of his client.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 40

The matter of sympathy is not to enter into your deliberations. Every man who commits a crime is in one sense unfortunate. He is to be pitied, and those who are to share his suffering, and who are innocent, are also to be pitied; but that is one of the almost universal attendants and consequences of crime. Few persons can commit a crime unless some innocent person suffers in consequence. Your sole duty and my sole duty, under our oaths, is to ascertain and determine what the truth is. You are to determine whether a crime has been committed, and whether the evidence offered upon this witness

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stand satisfies you of the guilt of the defendant beyond a reasonable doubt.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 41

A person charged with an offense against the laws of the United States shall, at his own request but not otherwise, be a competent witness. His failure to make such request and to testify as a witness shall not create any presumption against him; and no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of, or on account of, his failure to testify as a witness in the case.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 42

It is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of

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the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the guilt or innocence of the defendant for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 43

While you have a right to use your knowledge and experience as men and women in arriving at a decision as to the weight of the testimony and credibility of witnesses, yet your finding and decision must rest upon the evidence admitted in this trial. You cannot act upon the opinions and statements of counsel as to the truth of any evidence given, or as to the guilt or innocence of the defendant.

You must consider all the evidence in connection with the law as given by the Court, and therefrom reach a verdict; in doing so you must, without favor or affection, bias, prejudice or sympathy compare, weigh and consider all the facts and circumstances shown by the evidence, with the sole, fixed and steadfast purpose of doing equal and exact justice between the United States of America and the defendant at the bar.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

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Instruction No. 44

The Court instructs the jury that you should weigh all the evidence before you and ponder upon the instructions of the Court, that you may not, perhaps, by careless disregard of your responsibilities, fail in conserving the rights of society, on the one hand, or, on the other, condemn to punishment one who may have done no wrong. Court are only respected when there is an earnest desire and true endeavor on the part of all their officers to do right. Any departure from this justly arraigns the law tribunals for inefficiency, and excites public disregard and contempt for their decrees. Neither passion nor sympathy should swerve or sway, but you should keep as certainly to the course pointed out by impersonal justice as the needle is faithful to the pole. Thus only shall you escape an accusing conscience and redeem the oathbound obligations assumed by each of you at the time you were chosen to hear attentively, to consider wisely, and determine justly.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

Instruction No. 45

The duty of counsel and of the Court has now been performed. Counsel have brought to your consideration facts and evidence which, in their judgment, will assist you in determining the truth. They have assisted you in marshalling and explaining the

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testimony. The Court has endeavored to advise and correctly instruct you as to the law, and it now remains for you to perform the last and the most important duty in this trial, to determine the issue of guilt or innocence; and it is with the utmost confidence that I submit this case to you, believing that you will not permit your judgment to be unduly influenced by sympathy or sentiment on the one hand, or by prejudice on the other; that you will consider the law simply as it is given to you by the Court, and the evidence which has been introduced before you during the progress of this trial.

The liberty of the defendant is sacred; it cannot lightly be taken away. You cannot bring in a verdict of guilty until the guilt of the accused is proven by the evidence in the case beyond a reasonable doubt. The interests of the Government are also important; its laws are made to be obeyed, and if broken, they should be vindicated. If, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should bring in your verdict accordingly. You must be just to the defendant; you must also be just to the Government. Duty demands it, the law demands it, and your oath demands it. As upright men and women, as honest jurors, you are now charged with one of the most solemn and responsible duties of an American citizen, and I trust that you will perform it with an eye single to your duty, to your oath, to the law as given you by the Court, and to the evidence in the case.

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It takes twelve to find a verdict. The Clerk, as a matter of convenience, has prepared forms of verdict which will be handed to you.

If you find the defendant guilty of any of said offenses charged in the indictment, you will insert the word "is" in the blank space before the word "guilty"; if you find the defendant not guilty of any of said charges, you will insert the word "not" in the blank space before the word "guilty."

In arriving at your verdicts, you may find the defendant not guilty on all counts or guilty on all counts, not guilty on some counts and guilty on other counts, or you may reach a verdict on some counts and fail to reach a verdict on other counts.

You will now retire to your jury room, and when you have agreed upon a verdict, you will have your foreman sign it, and notify the Marshal, and you will be returned into court.

Given:

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 21, 1952.

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In the United States District Court, for the District of Nevada

No. 12,177

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMER F. REMMER,

Defendant.

Before: Hon. Roger T. Foley, Judge.

HEARING ON MOTION FOR CONTINUANCE

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Las Vegas, Nevada, on Thursday, the 15th of November, 1951.

Appearances:

WALTER M. CAMPBELL, JR., ESQ.
MILES N. PIKE, ESQ.
Attorneys for Plaintiff.

LESLIE C. GILLEN, ESQ.,
GEORGE LOHSE,
Attorneys for Defendant.

The following proceedings were had:

The Court: In the case of United States of America vs. Elmer F. Remmer, No. 12,177, there have been several motions and I suppose it would

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be logical to take up the motion for continuance first, would it not?

Mr. Lohse: Yes, your Honor.

Mr. Pike: The Court is familiar with the circumstance that Mr. Walter Campbell, with headquarters at San Francisco, who is attorney with the Penal Division of the Internal Revenue, is present in court and Mr. Campbell has the status of Special Assistant to the Attorney General for the purposes of this case and for the purposes of this case has the status likewise of Special Assistant to the United States Attorney for this district. Mr. Campbell is familiar with this case. He has worked on it and he is present in court for hearing of this motion.

Mr. Gillen admitted for purpose of this case.

Mr. Gillen: Does your Honor desire I proceed?

The Court: Yes.

Mr. Gillen: May it please the Court, there are two motions your Honor mentioned and I thought the logical way to approach the problem was on the motion for continuance. I believe this, your Honor, I believe that both motions pretty well dovetail one into the other and I think can be followed by your Honor very readily because the second motion, which your Honor so kindly shortened the time, is whether, in respect under Rule 16, would ultimately, for its ultimate time, require some further time before proceeding to trial, so I think both matters could be addressed to your Honor at once.

May it please the Court, Mr. Lohse, the Nevada counsel, filed, on behalf of the defendant in this

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case, the initial motion for a continuance upon the several grounds that are set forth in his motion and mentioned in his motion that the motion would be supported by affidavits which would subsequently be presented. Those affidavits are now in court and were served on opposing parties and address themselves, I believe, in support of both motions. I might state to your Honor also that counsel, Mr. Lohse, in his motion mentioned the date of April 1st as the requested continued date, and I might say to your Honor that that is an arbitrary date. We have in mind discussing it with Mr. Lohse; that our problem here is an efficient accounting analysis and we have in mind that accountants are busy in the early part of the year up until the middle of March, for reasons that we are all acquainted with, so in the event your Honor did entertain our motion, the date of April 1st is not the necessary date, as far as we are concerned.

The Court: Before we proceed, would it be well to have Mr. Lohse entered as attorney of record?

Mr. Lohse: Your Honor, I filed the motion for continuance and signed as one of counsel for the defendant in the action and filed that with the clerk in Carson City and presumed, after talking the matter over with Mr. Pike, that would be sufficient filing of notice of my association in the case.

Mr. Pike: Yes, I see no objection to the Court entering order recognizing George Lohse as one of counsel.

The Court: Is it you personally?

Mr. Lohse: The firm, your Honor.

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The Court: Proceed.

Mr. Gillen: May it please the Court, on the initial motion for continuance filed by Mr. Lohse on behalf of this defendant very sketchily the grounds set forth are that primarily the defendant was not given a reasonable opportunity to prepare his defense in this matter and that is based upon the fact that, as we contend, the government has, and is, withholding certain documentary evidence which it is necessary for our accountant to see and for the attorneys to see, in order to adequately present a defense in the matter.

Secondly, that the government has, by an arbitrary assessment, tied up all the available assets of the defendant in this case and that has seriously hampered the defendant in being able to have means to provide himself with adequate services of accountants, as well as counsel, and in that regard, may it please the Court, it will be noted later in the affidavits, if your Honor has not had opportunity to read those affidavits, in that regard there was a request made that there be released for the defendant for his defense certain of his liquid assets, and in that regard it was offered, and we were prepared to file, a surety bond to protect the government in the amount that the government saw fit to release to us.

Another condition was imposed by the government that we felt, as lawyers, we could not conscientiously recommend that our client comply with, and that will be set forth in the affidavits, and also that one of the complications in this matter, which

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makes it so difficult for us, is that there are approximately, to our knowledge, nine business enterprises involved and requires a very comprehensive study by the accountants in order to be able to furnish the attorneys with sufficient evidence to enable them to present a proper defense; and finally, may it please the Court, supporting our motion for a continuance, it is set forth that the indictment itself, being pleaded under the simplified form, there is absolutely nothing, excepting that the contention of the government is that for certain years certain amounts of taxes were due and were not paid, and although the bill of particulars was requested and refused by the government, and also the matter was taken up and upon showing in a a former matter before your Honor, we were denied bill of particulars, which leaves us in very bad position in not having sufficient accounting study, not having means to provide such a thing, not having documents to work with and not having any particulars from the government regarding its contention.

Then finally, with regard to the second motion, may it please the Court, that is based upon our contention, under Rule 16, that we have not had an adequate opportunity to inspect and obtain information from documentary evidence which the government is withholding from us and which it is the government's contention is evidence of business interests or partnerships, some of which we know about and some of which we are doubtful whether we know about and we contend, of course, that we are entitled, under the rule, to examine those docu-

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ments and determine the merit of the government's contentions and to possibly explain to the government and to the Court that there is no merit in many or most of the contentions.

Now if the Court would permit me, I would like to read the supporting affidavits. There are two, one of which is made by my associate, Mr. Golden, who was before your Honor on the matter of bill of particulars, and the other made by Mr. Spurgeon Avakian, whom as your Honor is undoubtedly acquainted, is a specialist in tax law and has been appointed by Mr. Golden and myself as the technical expert in the matter, because we are just ordinary run of the mill lawyers and do not propose to know too much about tax law. With your Honor's permission, I would like to read these two affidavits and I believe they will assist your Honor to follow our motions. Shall I proceed?

The Court: Yes.

Mr. Gillen: The first is in the United States District Court for the District of Nevada, United States of America against Elmer F. Remmer, No. 12,177, "Affidavit of John R. Golden in Support of Motion for Continuance and of Motion to Inspect and Take Copies." (Reads to line 24, page 3: "* * * for the forthcoming conference with the Department of Justice: * * *" I might say to your Honor that I was in Washington, D. C. on this matter in February of 1950 and at that time it was discussed that there would be another hearing on the matter, and I might state to your Honor that through correspondence there was another hearing

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arranged for Mr. Avakian, who had come into the case in the interim, and I might say Mr. Avakian and I were to make that trip together, referred to in the affidavit, and in fact had our airplane reservations and reservations at the Mayflower Hotel. We were to leave the day following the day of the receipt of the letter that the contemplated conference had been arbitrarily cancelled and the matter had been referred to Mr. Pike, United States attorney in Nevada.

Now if I may proceed with the reading of this: (Continues reading to end of affidavit. Containing also the federal jurat.)

Now if I have the permission of the Court, I would like to read the further enlightening affidavit of Mr. Avakian. (Reads to line 20, page 3.) I might state I was also engaged in the same trial Mr. Campbell was engaged in at that time. (Continues reading to bottom page 3.) And this is letter from Mr. Campbell. I might state to your Honor there is a portion left out. I have a copy of the letter. We feel the portion omitted has nothing to do with this.

The Court: Unless counsel think it necessary to read the portion not in the affidavit——

Mr. Pike: That will be handled subsequently. We suggest the affidavit be read as it is.

Mr. Gillen: All right; we will read the affidavit: (Reads) L. 26, page 3—"' * * * You wish to arrange to examine such records in preparation for the trial of the case.' " Then this *delated* from the

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paragraph which Mr. Avakian did not consider pertinent to the matter, and I have it, it appears next to the last paragraph of the letter. (Continues reading from affidavit to bottom of page 3,) And the emphasis is added by ourselves. That is the end of the letter. Resuming the affidavit: (Completes reading of the affidavit.) And bears the federal jurat.

Now I think perhaps, your Honor, it would be well for me to bring to your Honor's attention in further detail than appears in these affidavits the portion of the letter from Mr. Campbell to Mr. Avakian of November 6, 1951, which was omitted as not being pertinent, but it is pertinent because of a letter that followed from Mr. Avakian to Mr. Campbell. Probably to pick up the *threat* of our thoughts, we had better read the first paragraph of Mr. Campbell's letter and then the next paragraph will be the paragraph that was omitted from the letter as stated in the affidavit. This is the Walter Campbell letter to Spurgeon Avakian on November 6, 1951:

"Dear Mr. Avakian:

"Reference is made to your letter dated October 23, 1951, concerning records of some of Elmer Remmer's ventures, which records you believe are now in the possession of the Bureau of Internal Revenue. You wish to arrange to examine such records in preparation for the trial of the case."

This is the next paragraph that was omitted, your Honor:

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"We are familiar with the circumstances under which Lawrence Semenze * * *"

That is the accountant in Reno:

"* * * under which Lawrence Semenza received some of the records in the case from Special Agent Ray A. Weaver, giving him a receipt for them, and agreed to return them to Mr. Weaver * * *. At that time Mr. Semenza had on file power of attorney, authorizing him to represent Remmer before the grand jury. At a later time return of the records was sought from Semenza, who was unable to carry out his undertaking because he had turned them over to another accountant representing Remmer. It is our belief that counsel for the taxpayer had it in their power to enable Semenza to fulfill his undertaking, but declined or refused to do so."

Mr. Campbell: Read the first sentence of the succeeding paragraph.

Mr. Gillen (Reads): "In the light of the foregoing, we do not feel justified in permitting any of the records involved in this case to leave possession."

Mr. Campbell: To leave our possession.

Mr. Gillen: Evidently an error, was omitted in the copy of the letter I have here. I suppose it should be "to leave our possession." Now, may it please the Court, Mr. Campbell then winds up his letter:

"As Mr. Remmer's representative, you are, of course, entitled to see any records of his which we may have, providing proper showing is made as to his interest * * *"

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Now you see what is happening there, may it please the Court, is that first of all we are informed that the government does have records, our accountant, Mr. Semenza, tells us he walks into a stone wall at this point. It is first admitted that the government has admitted they have records, then a condition is laid down. We have to know what the interest of the defendant was, says Mr. Campbell. Mr. Avakian counters by saying if the government contends that Mr. Remmer has an interest, isn't that sufficient, then it is up to us to find out what you *content* and attempt to explain it. Then Mr. Campbell puts a further condition. He says: "We have those records—if we do have the records—from third persons and you are going to have to get permission of those third persons before we can show you those records," and Mr. Avakian says, "Well, if you will tell us who those third persons are and what those records are, although we do not think we have to, we will try to get their consent and try to furnish you with the information of how many business enterprises there were"; then in his letter of November 6th Mr. Campbell goes further: "You remember something happened on the matter when the records were turned over by Mr. Weaver to Mr. Semenza and Mr. Semenza did not give them back because he did not have them, and we think one of the counsel kept that from being done," and it has been, if I may say so respectfully, it has been a matter of bringing up new conditions and playing cat and mouse. First of all, "we have certain records and if you want

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them, you have to tell us what the records are and you have to get permission of the people from who, we got them; maybe we have the records and maybe we don't. You tell us what the interest of Mr. Remmer was, what was the contention of Mr. Remmer as to his interest in these and you tell us who the third parties are," and we are unable to do those things and all the time admitting, under Rule 16, we are entitled to see these records.

Now there is something further interposed in this November 6th letter and that is, then Mr. Campbell says in effect "We do not trust you any more because once you got some records from us and we didn't get them back, and for that reason we do not want records to go out of our possession." We are not asking for records to go out of the government's possession. We are simply asking for rights, under Rule 16, to go and look at the records, inspect them, get the information out of them that will enable our accountant to make an intelligent analysis and will enable him fully then to prepare us for the defense in this case.

Now may it please the Court, I think in view of that little condition that is brought up here, I think it would be well if I may impose upon the Court's time to read Mr. Campbell's letter of November 6, 1951. I should like to read copy of the letter then sent by Mr. Avakian to Mr. Campbell in which, in my opinion, the Semenza incident that is bothering Mr. Campbell seems to be very fairly explained, and also the exact position of the defense. May I have your Honor's permission to read that letter.

This is on the stationery of Phillips and Avakian,

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Financial Center Building, 14th at Franklin, Oakland, 12, California, and some other references to the members of the firm. It is dated November 9, 1951, addressed to Mr. Walter M. Campbell, Jr., Regional Counsel, Penal Division, Bureau of Internal Revenue, 100 McAllister Street Building, San Francisco, California:

"Dear Mr. Campbell:

"Thank you for your letter of November 6, 1951, in response to mine of October 23, 1951, in which I requested the opportunity to examine * * *"

Mind you, your Honor, "to examine," not "to take possession":

"* * * any records in the possession of the Bureau of business ventures in which Mr. Remmer had an interest.

"Your letter does not state that you do have such records in your possession, although that conclusion could be implied from your letter as a whole. You state that we are entitled to see any of Mr. Remmer's records which you may have in your possession provided the proper showing is made as to his interest and provided further that we furnish you with the written consent to such inspection of the third parties from whom the Bureau obtained the records. You also state that you can not permit us to take possession of these records because of the incident described in your letter in which Mr. Semenza was unable to return records which were released to his possession by Special Agent Weaver.

"Your letter leaves me confused and uncertain

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as to a number of matters, and, in addition, I believe that some clarification is needed of your understanding of the Semenza incident. To facilitate the examination by us in preparation for trial of any records which we are lawfully entitled to examine. I wish to set forth our position and request clarification of yours in the following respects:

"1. Does the Bureau now have in its possession records of businesses in which Mr. Remmer had an interest? If so, may we have the immediate opportunity to examine them for such periods of time as may be reasonable, considering the volume and contents of the records?

"2. I do not know just what you have in mind when you state that a condition of our examination of any such records is the making of a 'proper showing' as to Mr. Remmer's interest. If the government contends that Mr. Remmer has a proprietary interest in the profits of a particular business and that he is accordingly taxable on some or all of the income therefrom, does not that of itself require the government to recognize the principle that a man is entitled to examine his own records in preparation for trial? Should you not, in good faith, permit us to examine the records of all businesses which you will contend at the trial were owned either wholly or partially by Mr. Remmer? Can you tell us what type of showing you want?

"3. I can neither understand nor justify your statement that the inspection will be conditioned upon the submission of the written consent of third

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parties from whom such records were obtained. In the first place, we do not know what records you have nor the businesses to which they relate nor the names of the third parties from whom they were obtained. Furthermore, I know of no legal authority which requires the consent of third parties before a taxpayer can examine his own records. So far as I know, the owner of records is not only entitled to examine them, but is also entitled to possession of them. The right of the Bureau of Internal Revenue in this respect is specifically limited by Section 3614 of the Internal Revenue Code to the right 'to examine,' and even that right of examination is limited by the Fourth Amendment to the Constitution, which gives a person under criminal investigation the legal right to withhold his records from examination by the government if he desires. The limited time between now and the commencement of the trial on November 28 makes it impractical for us to obtain a ruling from the court on this matter. Whatever our feelings may be as to the illegality and unfairness of the Bureau's position, we are forced as a practical matter to meet whatever conditions you may impose upon our examination of these records, if that will enable us to prepare for the trial. Accordingly, if the government insists upon our furnishing the written consent of such third parties, will you please advise us immediately of the names and addresses of such third parties and of the particular records which they turned over to the government, so that we can seek to locate these people and re-

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quest their written consent. It is to be understood, however, that our compliance with this condition would be under protest and would not be construed as a relinquishment in any manner of any of the rights of our client.

"The denial of our Motion for Bill of Particulars leaves us in a difficult position for preparation of trial. The indictment alleges only a total sum as the net income for each year. Although Mr. Remmer reported income from a number of different enterprises during this period, the indictment does not state what his correct income from each enterprise is alleged to be. We do not know whether you are challenging the correctness of the reported income from all of these enterprises or only some of them. Neither do we know, as to any particular enterprise whether you are questioning the total income of the enterprise or only the percentage allocable to Mr. Remmer. The task of analyzing these complex factors has been aggravated by the fact that, since 1948, Mr. Remmer's assets have been frozen by tax liens based on arbitrary assessments now aggregating over $800,000. This has made it impossible for him to retain the necessary accounting and legal advisors to litigate the validity of that assessment or to make timely preparation for the criminal case. In 1950, Mr. Golden offered to post a surety company bond fully protecting the government, if the government would release a few thousand dollars. The Treasury Department refused to release any portion of the funds except on bond covering the entire assessment. That, of

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course, was an impossible as well as unnecessary condition. In March of 1951, immediately after I entered the case, the request of Mr. Golden was renewed, and the Bureau's Washington office communicated to us, through you, its willingness to release a portion of Mr. Remmer's assets, in order that he might finance his preparation for trial, but only on condition that he first submit a detailed financial statement showing his assets and liabilities at that time. That condition was also impossible, since the financial statement could be prepared only after the accounting work was done, and in addition it would require the expense of a current audit, as well as one covering the years 1944-46. Furthermore, that condition seemed unnecessary, because we were willing to protect the government with a surety bond covering the amount of assets released." In other words, it just became a vicious circle. If you tell us everything you have in mind as to your assets, we will release you some money, so that you can make an analysis of your assets. We say, "Well, we will put up a surety bond, but we can't tell you what our assets are without having an accountant, whom we need money to pay to make the analysis, so we will be able to tell you what our assets were." We are just going around in a circle.

Resuming the letter, may it please the Court:

"The result of all these factors has been to place grave obstacles in the way of our effective representation of our client. Whether intentionally or not, the government has effectively curtailed Mr. Remmer's ability to have his case prepared adequately.

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You already know my views in that regard, and I believe you know my feeling that if you personally had held full responsibility in this matter, we would have been treated with fairness more becoming to a democratic government. I repeat these facts to emphasize the importance to us of having access to the records in question at the earliest possible date, and not as any criticism of you. We realize that government policy is dictated by many people.

"You subsequently informed me that your Washington office was willing to accept a detailed list of assets and liabilities, without valuation. That was somewhat less burdensome than the earlier condition but still would require considerable accounting, and it was equally unnecessary since the bond would fully protect the government.

"4. Your reference to the Semenza incident is written in such a way as to indicate criticism of Mr. Remmer's counsel for not furnishing the records in that case. You state that at some time in the past, Special Agent Weaver had turned certain of Mr. Remmer's records over to his accountant, Lawrence Semenza, on the understanding that the latter would return them to him on notice. You state that 'at a later time return of the records was sought from Semenza, who was unable to carry out his undertaking because he had turned them over to another accountant representing Remmer. It is our belief that counsel for the taxpayer * * * had it in their power to enable Semenza to fulfill his undertaking, but declined or refused to do so.' You will recall that the request of Mr. Semenza to re-

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turn the records in question was in the form of a subpoena from the grand jury served upon him very shortly before the session of the grand jury at which he was directed to appear, in April, 1951. Mr. Semenza learned from inquiry of the other accountant that the records were in the office of John R. Golden, who had been counsel for Mr. Remmer in connection with this matter for some time, and still is. Because Mr. Golden, a reserve officer, was at that time engaged in two weeks of active military service in the Army, Mr. Semenza contacted me, and you will recall that I then telephoned you and advised you in substance as follows:

"a. Since I had just been associated into the case I did not know the contents or significance of the records in question.

"b: Because Mr. Remmer's assets had been frozen for over two years by a tax lien and because the government had declined to release any portion of these funds, even though we had offered to post a bond fully protecting the government with respect to the portion released, it had been impossible to finance an accounting analysis of the records or of the case generally.

"c. I did not know the names of the third parties from whom Mr. Weaver had initially obtained the records or whether he had obtained them in the manner provided by law. Furthermore, I did not feel that his return of them to Mr. Remmer's representatives was a matter of charity on his part, since Mr. Remmer, as the owner of the records, was entitled to them at all times anyway, and the gov-

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ernment at most had the right of inspection, not of possession. Accordingly, any condition exacted by Mr. Weaver from Mr. Remmer's accountant without the knowledge and consent of Mr. Remmer or his lawyers was of no legal effect.

"d. Mr. Remmer was out of town and Mr. Golden, although stationed at the San Francisco Presidio, would not be available for extended consultation until a few days later.

"e. If you would advise me in at least a general way as to the contents or significance of the records in question, I would then be in a position to make an intelligent appraisal of the matter and possibly feel free to make the records available on my own responsibility. You stated that you did not feel free to disclose such matters. I told you that a relinquishment of such papers to the grand jury by Mr. Remmer's attorney might be construed as a waiver of his constitutional rights, and that I felt I would be violating my professional responsibilities as a lawyer if I took such action without first consulting my client, particularly since I was in ignorance of the facts and you were not in a position to enlighten me. I further pointed out to you that the primary reason for my unfamiliarity with the accounting features of the case was the government's refusal to release assets (even on a bond) to permit us to finance the extensive accounting analysis this case requires, and the government's further refusal to give us any indication of the issues of the case (contrary to the general practice in such cases.) As you knew at the time, the gov-

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ernment even cancelled a conference in Washington which had been scheduled for a date several weeks in advance of the indictment.

"f. I further stated to you that, under all these circumstances, I did not feel that we should be asked to decide, in a period of a day or two, and without consultation with our client, an important matter affecting his constitutional rights, particularly since the government, up to that point, had denied to us the benefit of administrative conferences customary in cases of this kind. Realizing the possible embarrassment to Mr. Semenza, I suggested for your consideration the possibility of subpoenaing Mr. Golden before the grand jury, since he was the person in actual possession of the records. In that way, the grand jury could have had the records without any waiver of Mr. Remmer's legal rights.

"I regret that you feel that we acted improperly in that regard. Even if we were wrong, however, I do not see that the government has been prejudiced. In the seven months which have elapsed since the grand jury session, the government has not directly or indirectly requested an opportunity to examine these records, which would indicate their relative unimportance to the government. In any event, it has been my consistent experience that Special Agents do not voluntarily reliquish taxpayers' records without first carefully copying or summarizing all pertinent information, and I doubt that Mr. Weaver was negligent in that regard.

"I trust that you will promptly arrange for examination of these records by us, in view of the

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imminent trial date. Since you have been engaged in a trial continuously during the past six weeks, it has been impossible to discuss this matter with you directly except for several very brief telephone conversations. I appreciate that the requirements of that trial on your time have prevented you from giving extended consideration of this problem; and I can understand that, as a lawyer bound to protect the government's interest, you did not want to decide this matter without careful thought, any more than I wanted to make a hurried and haphazard decision last April in the Semenza incident mentioned above.

"Now that your trial has been concluded, I hope that you can give immediate attention to this matter.

"Sincerely yours,

"SPURGEON AVAKIAN."

May it please the Court—you have indulged me very kindly in reading all these matters—I thought they would be helpful to your Honor—may it please the Court, our suggestion is simply this: Of course from the very outset—and I say this, we try to be brave as possible and not cry babies—but from the very outset in this case we have received from the hands of the government special treatment within my knowledge, because I attended a conference in Washington in February, as I told your Honor, that initially we were specifically told that the year 1944 was not being considered in this investigation at all and then at a very late date in December,

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either November or December, I am sure it was December, of 1949 we were suddenly told that 1944 now was being considered by the government and we had better hurry and do something because the statute was running and thereafter, of course, we were given special treatment by having a promised conference cancelled arbitrarily and the matter being directed to the attention of Mr. Pike here and the machinery set in motion for indicting the defendant in this case, and also the fact that the defendant was practically put in a straight jacket, from a financial standpoint, to properly prepare himself so he could explain his position, but is called upon to walk the plank, so-called, bindfolded, not knowing what the government has had or contends, because of the simplified form of pleading and because of the various other things that were done to place obstacles in his path. I want to say, not facetiously, in this particular country, which is noted for its outdoor sportsmen, a mallard duck at the hands of the hunter would be given fairer treatment and given a chance at least to get out of the way than Mr. Remmer has been given thus far by the government. I do not say that facetiously. It is probably a trite comparison, but that is the fact of the matter and whoever is responsible for it, I don't know, but there have been things done here so that we run around in a circle and we find doors closed on us at every turn and we are in a position now that we are compelled to go to trial without proper preparation, or without opportunity to examine these documents. Whether they

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have merit or not, we do not know; how they were obtained, whether obtained in an unlawful seizure, concerning which the United States government is very strict in our courts, we do not. All those things we would like to go into and have the right to go into those things and if we are forced to go to trial November 28th, we are going into trial in such an important case, with so many complexities, wholly unprepared to give our client proper representation.

May it please the Court, it may be pointed out to your Honor by opposing counsel here that it is a long list of attorneys that have from time to time stepped in and out of the scene in connection with Mr. Remmer's affairs and there have also been several accountants who have appeared briefly and have left the scene and now disappeared, and that is entirely true, and the explanation for the whole thing why the man had so many attorneys that came and went is the fact that the man has never had the adequate means to retain those attorneys and those accountants and it is only people who were willing—if I may use the term—to gamble with him and help him out, because we feel he is being placed at a very great disadvantage and an injustice is being worked upon him, that he has the services of the attorneys he has now and the services of Mr. Semenza.

I submit the matter to your Honor.

Mr. Pike: Your Honor please, in order that there may be no lack of clarity as to the government's position, government's counsel are obliged to

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resist, and do oppose, a granting of both motion for continuance of trial date, which is presently November 28, 1951, and the motion for an inspection and to make copies of the records.

As Mr. Walter Campbell's name appears in the affidavits, reference has been made to him in the correspondence likewise read to the Court this morning, he will present factually to the court matters as to the reasonableness and the timeliness of these motions. It is noted by the Court at the outset, of course, that many of these matters referred to in the affidavits are antecedent and many of them are not antecedent. As stated in Mr. Spurgeon Avakian's letter of November 9, 1951, to Mr. Walter Campbell, some seven months have elapsed since the return of the indictment in this case, and whoever may have been counsel for the defendant prior to that time, it appears that at least for the last seven months past all of the present counsel for Mr. Remmer have continued in that capacity. This case was initially set for trial on the 7th of November of this year and then, due to circumstances in connection with a case that lasted longer than contemplated——

The Court: It was first set for trial November 7th.

Mr. Pike: Correct.

The Court: And then because the Court was engaged in an action that required a week or ten days longer than expected, we had to move the present case back from November 7th to November 28th.

Mr. Pike: Correct. We have subpoenaed wit-

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nesses, we are prepared to go to trial, and the government opposes the granting of either of these motions.

Now as to the motion to inspect the records, it is recognized that under Rule 16 there are rights given to inspect and it is not an arbitrary attitude to deprive the taxpayer or the defendant in this case of any of his substantial rights, but as will be developed factually before the Court, those rights have been exercised, at least in very large part, as will be demonstrated to the Court by Mr. Campbell, so I reiterate that we are obliged to resist on behalf of the government both of these motions.

Mr. Campbell: If the Court please, if I may be heard very briefly. I filed with the clerk of the court this morning a rather hastily prepared affidavit, which has also been served upon opposing counsel, the moving paper having been served on me and Mr. Pike on Tuesday of this week. I will read this affidavit, except for portions which will be portions as set forth by affidavits read by Mr. Gillen: (Reads to Line 18, page 2 of affidavit—"* * * appear in his behalf; * * *"

Parenthetically I say that applies not only to attorneys appearing in his behalf but also to accountants appearing in his behalf.

(Continues reading to Line 6, Page 3.)

Might I state parenthetically that the last power referred to in this affidavit is the present power of attorney which is pending before the Department and so far as my knowledge at this time is con-

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cerned, there have been no revocations by the defendant in this case or withdrawal by any of the attorneys or the accountant mentioned, so that it would appear of his present representation that of Paul Dillon, attorney-at-law, has continued since April 29, 1949, Lawrence Semenza, certified Accountant, since June 2, 1949, at the very least that of other attorneys that now appear in this case, William K. Woodburn, John P. Thatcher, Leslie Gillen and Paul Dillon, as attorneys-at-law, since March 10, 1950. Reading from the affidavit again: (Reads commencing Line 6, Page 3, to Line 18.) And I, in the affidavit, state the letter to Mr. Avakian, which sets out in full reply of November 6, 1951, which has heretofore been read. And the affidavit concludes:

"That by reason of the foregoing affiant believes and therefore states the fact to be that the defendant has had ample opportunity to prepare the defense of his case and that the motions for a continuance and for inspection of records should be denied."

Now, if the Court please, in connection with this case there did come into possession of the government records of certain businesses. None of these records were placed in the government's possession by the defendant in this case, nor were any of his personal records as such given to the government by the defendant or by any of his representatives. The government is still in possession of certain fragmentary records which were delivered to the government by third parties and which relate to

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such enterprises as One Ten Eddy Street; referred to 186 Club, Menlo Club, and certain miscellaneous cancelled checks and bank statements of various purported businesses. In addition to those records the government also previously had in its possession, and obtained from third parties—I might say none of the records referred to which I am referring, or any of the records in connection with this case, were obtained by the government either by process or by seizure; all records were given voluntarily to the government by third parties.

As stated in the affidavit, in connection with work which Mr. Semenza was doing, which was prior to the indictment in this case, Mr. Semenza called upon Special Agents for permission to examine those records in connection with certain work he was doing for Mr. Remmer. It was found more convenient for Mr. Semenza to take those to his office. Mr. Semenza, of course, is a highly reputable certified accountant in this State. Inasmuch as the records have been obtained from third parties, to whom the Special Agent, of course, owed a responsibility to return them if called for, whatever their original sources are, the receipt from Mr. Semenza was obtained to agree, if they became necessary for purposes of the government, to restore them to the Special Agent. Prior to the indictment, and in preparing the present case to the grand jury, Mr. Semenza was called upon for the return of those records. To his embarrassment he found that they had been placed, without his approval, by reason of the fact that Mr. Friedman, another accountant—

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his appearance in the case is shown by powers of attorney—he turned these records to Mr. Friedman, who in turn in November, when he terminated his employment, turned them over to Mr. Golden. It was the government's position, and is now, that both Mr. Semenza and Mr. Golden, so far as the Treasury Department were concerned, were attorneys of record and both had power of attorney, giving them the right to appear for and on behalf of the defendant Remmer. We therefore, as appears from the correspondence, feel it was a situation of one attorney, joined co-counsel, you might say, refusing to honor the obligations or undertaking which had been entered into in good faith by Mr. Semenza. Be that as it may, however, Mr. Semenza was given a subpoena duces tecum, but he repeated substantially the same story before the grand jury that he was unable to produce them. I do not believe there was no responsibility of Mr. Avakian to continue to make further requests of defendant's counsel when they had so clearly indicated that they would not return these records. Possibly it is true that because of that experience, the government has insisted, and does insist, upon the letter of its rights, so far as these records are concerned.

Now I might state to the Court that these records, to which counsel previously referred, the records which are still in possession of the government, have been examined, and I believe in detail, by the representatives of the defendant Remmer. That examination was conducted as a result of conference had with counsel and representatives of the tax-

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payer. I might state parenthetically there have been so many accountants and certified public accountants all at the same time representing this man, I do not presume probably any one of them knows the entire story of the transactions, but nevertheless, by reason of arrangements, made by Mr. Golden in behalf of Mr. Friedman, who also had power of attorney and is a certified public accountant of San Francisco, access was given to him of these records during the time of his employment. I am advised Mr. Friedman, together with some associated accountant in his office, spent approximately a week going over these records. Whether or not the information contained is available to their defense counsel, I do not know. I presume it is. However, that is a basis of our resisting this motion at this late date, because the defense has had in its possession, or the possession of representatives of the defendant, the information which they now seek.

Now I wish to add this. There has been considerable made about the letter which I sent to Mr. Avakian under date of November 6th. As I stated here, and as I stated to Mr. Avakian and stated as early as May 25, 1950, to Mr. Golden, and Mr. Golden represented the taxpayer, we had obtained these records from third parties and therefore we had to protect the custody of those records. All that we have asked here with their motion under Rule 16, is that they make some showing that these records are the records of Mr. Remmer. The rule is very clear and concise. It states:

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"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable * * *" etc.

And certain of those alternatives should be eliminated. We have no records which were obtained from the defendant. We have no records which were obtained by seizure or by process. It leaves the alternative set forth in the section of "records belonging to the defendant but obtained from others," and giving them inspection of those. We have sought in our condition that the defendant make some showing, some representation that they are his records, before we permit that inspection. That is simply what the matter amounts to.

Now so far as release of funds which were taken under jeopardy, as your Honor is aware, the government has the right and it is an unusual power and rarely exercised, where the Commissioner feels, has reason to believe—must be based on reasonable cause—that the interest of the government require, for fear of dissipation or destruction or disappearance of assets of the taxpayer against whom a claim is pending that that might occur, the Commissioner has the right to levy a jeopardy assessment and file

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liens clouding the title of property belonging to the taxpayer. In this instance, without going into the reasons, because they are not material here, the Commissioner exercised that legal right and there is at the present time some $35,000 in cash which is tied up in escrow in Reno. The defendant, through counsel, has sought that the Commisisoner exercise a discretion in levying his lien to the extent that this fund of $35,000 can be released for the use of Mr. Remmer in his defense. The Commissioner requires that a proper showing be made that it is necessary that these funds be released and for that purpose the Commissioner has required, and does in all cases require, that where such a levy is proposed that the taxpayer himself show that he does not have other funds with which he can meet those matters, so as to justify the Commissioner in releasing that money which the government has, and it is for that reason that the Commissioner requested of the defendant here, through me, that a present statement of assets, which would have no effect that I could see upon the issues of the case to be tried, because we are asking what he has today, not what he had back in 1944, '45 and '46—we are asking for his statement of assets and liabilities, in order that the Commissioner may determine that there exists a need and that he is without funds otherwise to protect himself. As I say, however, that is an administrative matter in which the Commissioner is clothed with a discretionary power and it seems to me it is not an abusive discretion on the

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part of the Commissioner, and, of course, the matter of whether or not it is an abuse is not before this Court in any proceeding pending here, but it clearly would not be an abuse of discretion for the Commissioner to require, over the signature and oath of the defendant, that he does require these funds, that he does not have assets available which are not tied up, with which he can defend himself.

I wish to point out to the Court there are several matters in these affidavits, of course, in this last letter of Mr. Avakian, which was read to the Court, which I just received Tuesday afternoon, there are various matters which we do seriously controvert. However, I do not think that is material to the matter here, other than to point out, so far as accounting preparation of this defendant is concerned, there has been ample opportunity afforded the defendant on that prior to his indictment and that about seven months has elapsed since his indictment, with which to prepare these matters; that statement in the affidavit that Mr. Semenza finally agreed in September of this year to undertake the representation, by reason of the fact that Mr. Semenza's power of attorney to represent this man has been on file continuously since 1949, and as I said, to our knowledge, Mr. Semenza did secure certain of the records, which are still in possession of defendant's counsel, for the purpose of representing Mr. Remmer.

So under all these circumstances, if the Court please, I wish to join with Mr. Pike opposing the granting of either of these motions.

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Mr. Gillen: I would like to reply briefly, may it please the Court, to some of the observations made by counsel. May this remark be received with the spirit in which it is given to the Court.

I might say this, your Honor, I am not totally ignorant of the problems that beset the gentlemen who sit on the opposite side of the table. I have never held as prominent position as either, but for as long as 13 years I was senior control deputy for the district attorney in San Francisco, and we did adhere, not only to our consciences or sense of morals, but to the admonitions many times given by the Court to members in our profession and the District Court of the United States, as well as the Supreme Court and many of our States, that prosecutors of a person should be as concerned that the person has an opportunity to fairly defend and he should not be put at an undue disdvantage, as they are concerned with bringing to justice a person that should be brought to justice. Now I should feel, if I were back in my old position as a prosecutor for the State of California and my native city San Francisco, that placing so many un-American obstacles in one's way, I should feel I would be starting the case at a decided mental disadvantage and that I should be starting the case at a decided disadvantage before any fair-minded persons who are going to be the triers of the fact.

May I say this to your Honor, Mr. Pike mentioned that one of his concerns in this case was that witnesses had been subpoenaed. Of course I know—I have a very high regard for Mr. Pike—which con-

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cerns him most, whether witnesses be discommoded or injustice be done to a man, Mr. Pike unhesitatingly would say his greater concern would be that a man have a fair trial than that a witness come over or the government maybe take the trouble to telephone and say, "Instead of answering that subpoena for such and such a date, you will have to answer it for such and such a date."

Mr. Campbell mentioned the affidavit set forth the number of attorneys and two accountants for whom powers of attorney had been given. I might state this to your Honor. Within my knowledge there were in all three attorneys until Mr. Blakey and Mr. Lohse appeared, who have ever taken any part since this investigation was set in motion. That was Mr. Hurley of New York, Mr. Golden and myself, and I can say to your Honor that the reason for giving powers of attorney at these various points, such as attorneys in Nevada, Washington, and so on, was because of the facts of the case, because of the lack of funds on the defendant's part to be able to ship attorneys all over the country because the case was in Nevada and there was the necessity of going to Washington, D. C., and there were arrangements made for attorneys to appear, but they never took an active part. There were only three attorneys until Mr. Blakey coming into the picture and now Mr. Lohse, under the file requiring a local counsel, who took an active part, and I might state to your Honor on the occasion of my trip to Washington in February, that I was then actually in Washington, D. C., on another income

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tax matter and I, so to speak, gave Mr. Remmer the benefit of my feeble efforts, which proved to be very feeble, in the conference which was held in Washington, D. C.

Now there is another observation I would like to make in connection with something that was said by Mr. Campbell, and that is this—Mr. Campbell advises your Honor of something with which your Honor was undoubtedly familiar before, advises your Honor that it is the concern of the Commissioner that when he has good reason to believe that a taxpayer still owes money to the government and when there are available and in sight belonging to that taxpayer, and when there is the fear that arises in his mind that the taxpayer might dissipate those funds that rightfully should go to pay his taxes, that then in that event, as an administrative matter, under the law, he may direct that arbitrary assessment, government lien, be placed upon that property. For why? For the reason that he wants to preserve that property to make it available for taxes should it ultimately develop more taxes are due the government, and that is fair enough. Then Mr. Campbell said in this instance, when Mr. Remmer wanted to withdraw some of his funds, even though he was willing and in a position to put up by surety bond, corporate surety bond to insure the government against losing a dime of whatever part of the liquid assets they released, cash they released, he said the Commissioner wanted to know, did Mr. Remmer really need the money, the defendant? Might he have some other assets? Did he

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really need the money? Of course, it must be obvious to your Honor that the only concern at that point of the Commissioner was, "I have in my possession, or at least under lien, subject to any taxes that may develop, these assets to make that assessment. Now if in substitution thereof I have a corporate surety bond which assures the government, which is the same as money only in another name, that should be my concern, and not my concern whether Mr. Remmer is being prudent about how he spends his money for counsel fees or accountancy fees.

I want to say one other thing, your Honor. I discussed this with my associate and I did not know a point was going to be made this morning and therefore I am not prepared with affidavit on the point. Mr. Campbell mentioned the fact that considerable time ago there was made available, not the records that we are concerned with, but some of the records, to a Mr. Friedman, who was for a brief period of time an accountant. Well, if your Honor will receive it, I can only tell you this, that Mr. Friedman did engage in certain conferences and did set about to make an analysis and did require some money for his services, which we were unable to pay, and did move out of the case and pass into the limbo of those others who were named in powers of attorney but failed to take any active part. Now it is my information, may it please the Court, from my associate—and I say this is not a matter under the oath and dignity of an affidavit, because I did not know a point was going to be made of it—

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it is my information from my associate—if your Honor wishes an affidavit, I am sure I can obtain one as quickly as I can get one from San Francisco —that Mr. Golden and Mr. Friedman did hold conferences with government officials at any early stage in this case and that it developed that the government had quite an abundance of records and that the accountant and attorneys were told that those records would be made available to them for their inspection. This is my information from my association, that Mr. Friedman and one of his men went down to the government office and it is my information that they did not spend any time at all, not a week or several days, but according to my associate, in very short order—as a matter of fact, after perhaps half a day, as I get the information— Mr. Friedman returned to Mr. Golden and told Mr. Golden that there was such a mass of stuff dissembled, in such bad form, that it would take several of Mr. Friedman's men and himself a considerable period of time to sort out the stuff and get it in shape to be able to examine it and know what it might mean, and that that would take considerable time and amount to considerable expense and Mr. Friedman did not feel he would be able to undertake even examining into those documents without a substantial payment, and he pointed out to Mr. Golden, where he was willing to be more or less generous with his own personal time, although he wanted to be paid for his services, still in regard to junior accountants he employed, he had to meet pay rolls for them and he couldn't undertake such

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a monumental job without having a substantial retainer to go over those things, and that is the information in my hands from my associate regarding that incident that Mr. Campbell referred to.

Now may it please the Court, you have been very indulgent with us and I submit the matter.

The Court: I have a recollection of the hearing June 15th in Carson City on motion for bill of particulars. I think at the conclusion of that hearing the Court suggested that counsel confer with Mr. Golden and Mr. Pike and the suggestion was made that certain information be furnished Mr. Golden at that time and I also recollect that the Court at the time, in the event Mr. Golden did not receive the cooperation from Mr. Pike that the Court indicated that should be given, he could apply to the Court later. Now no application of that kind has been made in relation to those proceedings June 15th. Now am I to understand from what we have heard here today all of the records, which are the subject matter of the present motion to inspect, were at some time given to Mr. Friedman or made available to him for inspection?

Mr. Campbell: That is my understanding.

Mr. Gillen: I do not know about all of the records. I will put it this way—there is no question that there was a substantial amount of records in Mr. Campbell's office, or some adjacent office, shown to Mr. Friedman, but Mr. Friedman, as I told your Honor, reported that it would be so expensive to do he could not do it and at that time there was request made for the release of $35,000, to be pro-

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tected by bonds, so we might spend that money for that very purpose.

Mr. Campbell: I might state my understanding is among those records shown Mr. Friedman on that occasion were those which were since subsequently delivered to Mr. Semenza.

Mr. Gillen: Some of them were. May I ask your Honor to keep this in mind, as indicated in Mr. Avakian's affidavit and letter, that it was not until October of 1951 that Mr. Avakian came up here on the 18th and 19th with Mr. Golden and had consultation with Mr. Semenza, that Mr. Avakian and Mr. Golden were made acquainted with the fact that Mr. Semenza was not in position, or had not had an opportunity to see certain records and that he could not make a complete analysis without those and that was the time that Mr. Avakian immediately, upon his return to his office on the 20th of October, appealed to Mr. Campbell to afford us an opportunity to make an examination of those records.

The Court: Now am I also to understand that the matter of releasing assets and accepting surety bond for the funds released, am I to understand that this is an administrative matter, to be determined by the Commissioner of Internal Revenue?

Mr. Campbell: That is correct, your Honor.

The Court: So the ruling concerned with that question, there is not an application to this Court for order requiring the Commissioner to release assets. The only reference to that failure to have

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assets released is to show cause why delay has been had in this matter.

Mr. Gillen: To show our diligence, your Honor, and to show the reason for our present predicament.

The Court: Now, of course, I feel the Court would have no power to make such order. That is a matter of discretion and perhaps could not be subject to review under administrative act.

Mr. Gillen: I think it would be subject to review in appellate proceeding.

The Court: It may be, but here suppose a motion of this kind, Notice of Motion to Inspect and Take Copies, if that motion had been made prior to the time Mr. Friedman entered into the picture, these subsequent funds would amount to a full compliance with an order of the Court granting that motion. The defendant has had all the benefits that the Court could give, the benefit by an order under Rule 16.

Mr. Gillen: No, I do not think so, your Honor, because of this, your Honor—although we know that there was a bundle of records, we do not know that those records contain these particular records which Mr. Semenza needs.

The Court: An examination of that bundle of records were made available to his auditor or counsel. Of course, what took place between the auditor or the accountant and defendant and counsel, can not seem to be chargeable to the government or go to show that the government had not been considerate of the defendant's rights.

Mr. Gillen: Well, as to these new records, as

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your Honor is informed by the affidavits, Mr. Semenza advised Mr. Avakian and Mr. Golden that those records had not been made available to him, concerning some number of business enterprises in which Mr. Remmer is supposed to have a partnership. We do not know what those are.

The Court: If there had been refusal on the part of the government to allow inspection under Rule 16, I would be inclined to feel——

Mr. Gillen: May I respectfully say there has been a refusal.

The Court: I can not see it that way. I think when the accountant Friedman was given access to these records under Rule 16, that takes care of that situation.

Mr. Gillen: I do not think so, your Honor, for this reason, if I may respectfully say so—we do not know, and we suspect, that these are not records that were contained among the records that were made available to Mr. Friedman.

The Court: All right, take it from this view then. I think it is admitted—the Court at least had heard enough here, to authorize the Court to consider that Mr. Friedman had access to these records. Now something happened. He found them in an involved state of confusion, going to require some money, some time, to analyze those records. That was a long time ago.

Mr. Gillen: That is right, your Honor.

The Court: Then why wasn't the motion that was filed on the 14th of November filed at that time?

Mr. Gillen: I will tell you why, your Honor.

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Because, as indicated by Mr. Avakian's letter and Mr. Avakian's affidavit, he said, "it was just brought to my attention that the Government has certain records which we have never seen and which our accountant has never seen and therefore, Mr. Campbell, we are asking you to make those records available for inspection."

The Court: We have no showing of the poverty of this defendant except by relaying. All we have is what he told counsel.

Mr. Gillen: You have the oath of Mr. Golden in his affidavit.

The Court: Mr. Golden tells us what Mr. Remmer told him.

Mr. Gillen: Mr. Golden tells you he received no money.

The Court: That does not show us that Mr. Remmer may not have assets to take care of funds. There is no substantial showing here from which the Court would be authorized to say Mr. Remmer is destitute.

Mr. Gillen: Well, the question is now——

The Court (Interceding): This situation could go on forever. It may be some present counsel acting for Mr. Remmer would be tired of serving.

Mr. Gillen: I have never walked out on a client in 24 years of practice.

The Court: The motion for continuance is denied and motion for inspection is denied and the case will be held on the 28th of November, 1951, at Carson City as set.

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State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes in the case entitled, United States of America vs. Elmer F. Remmer, No. 12,177, at the Hearing on Motion for Continuance and Motion to Inspect Records, held in Las Vegas, Nevada, on Thursday, the 15th of November, 1951, and that the foregoing pages, numbered 1 to 42, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, November 19, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed November 26, 1951.

[Title of District Court and Cause.]

DEFENDANT'S CHALLENGE FOR CAUSE TO JUROR JOHN W. HUMPHREY

November 28, 1951—Carson City, Nevada

John W. Humphrey, Reno, Nevada, employed by Sierra Pacific Power Company, having been drawn as a prospective juror, was questioned by the Court generally and specifically, as follows:

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The Court: Now, ladies and gentlemen, you have heard a statement of the nature of this case. Have any of you heard anything other than the statement of this case; in other words, do you know anything about this case? Have you heard any one discuss this case with you? I want to be sure you understand this question. Have any of you heard about this case before you came into court today?

Mr. Humphrey: I have read it in the paper.

Q. (By the Court): Did what you read amount to any more than what you have heard in this statement? A. No, just about the same.

Q. Anything you read, did it leave with you an impression as to whether or not the charge was true, or any opinion as to whether the charge was true?

A. I am afraid I did form an opinion.

Q. You formed an opinion in the case from just what you read in the papers? A. Yes.

Q. That is all you know about the case?

A. Yes, sir.

Q. Have you discussed the case with any one who knew anything of the facts? A. No, sir.

Q. Have you any idea what the evidence in this case will be? A. No, I do not.

Q. All you know is that the defendant is charged with this offense? A. Yes, sir.

The Court: Any one else here who has read about the case? I suppose several of you have, but the mere reading about this case, has that left with you an opinion as to the guilt or innocence of the defendant?

Juror Coletti: I have heard gamblers at my bar.

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The Court: Did they claim to know anything about the evidence?

A. (Mr. Coletti): They thought they did. I don't know whether they did or not.

Q. And the conversation that you had with gamblers has left an impression on you, or an opinion one way or another?

Mr. Coletti: Yes, sir.

The Court: It would be difficult then for you to sit in this case and listen to this evidence and free your mind from the opinion or impression you gained in your conversations with other people?

Mr. Coletti: I don't know.

The Court: From what you have heard, if you were asked to give a decision, could you give a decision one way or another at this time?

Mr. Coletti: Well, from what I have heard, I think I could.

The Court: Any objection to excusing this juror?

Mr. Thompson: We have no objection, your Honor.

The Court: Any challenges for cause?

Mr. Lohse: Your Honor, the defense has no objection to the excusing of either Mr. Hillygus or Mr. Humphrey.

After further questioning of other jurors:

Mr. Lohse: At this time I thought your Honor was going to pursue the questioning of the prospective juror, J. W. Humphrey.

The Court: Just let me proceed here.

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Mr. Lohse: Your Honor please, on behalf of the defendant, may I challenge one of the jurors?

The Court: Wait a minute. I want to know if you have any further questions to suggest.

* * *

The Court: Any challenge for cause?

Mr. Lohse: Your Honor please, at this time we will challenge the juror Humphrey for cause. If the Court please, Mr. Humphrey expressed the opinion that he was prejudiced against gamblers particularly.

The Court: I did not hear him say so.

Mr. Lohse: I believe he did.

The Court: You did not make any such statement?

Mr. Humphrey: Not at all.

Mr. Lohse: I understood so. Perhaps it was erroneous.

The Court: Well, he did not.

Mr. Lohse: I thought he expressed an opinion he would not be able to fairly judge the defendant because——

Mr. Humphrey: I said I might, because of the occupation——

The Court (Interceding): You have heard what we tried to explain about duties of jurors. You would not find a man guilty unless you believed him guilty beyond a reasonable doubt?

Mr. Humphrey: I would not.

The Court: And you wouldn't find him guilty

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of the offense charged because he worked some place you didn't think a good place to work?

Mr. Humphrey: No.

The Court: The challenge is denied.

Mr. Lohse: We note an exception, your Honor.

The Court: Yes.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had at the drawing of the jury in case No. 12,177, entitled, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, in Carson City, Nevada, November 28, 1951, and that the foregoing pages, numbered 1 to 5, inclusive, comprise a full, true and correct transcript of that portion of my notes relating to the prospective juror, John W. Humphrey, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, April 3, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed April 18, 1952.

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[Title of District Court and Cause.]

December 11, 1951, 10:00 A.M.

HEARING OF CONTEMPT OF COURT OF DAVID N. KESSEL AND WALTER M. PECHART

(In the Absence of the Jury.)

Present: Walter M. Campbell, Jr., Esq., Miles N. Pike, Esq., Bruce R. Thompson, Esq., Attorneys for Plaintiff.
Charles J. Wiseman, Esq., Joseph P. Haller, Esq., Attorneys for David N. Kessel and Walter M. Pechart.
David N. Kessel and Walter M. Pechart.

The Court: We have two matters to consider this morning before we proceed with the trial. Mr. Kessel was called as a witness yesterday and I want to be sure that we understand the state of the record. The question propounded to Mr. Kessel was "Do you know Mr. Remmer's occupation?"

Mr. Campbell: That is correct, your Honor.

The Court: And the witness refused to answer the question and was ordered by the Court to answer the question, for the reason that it appeared to the Court that a response to the question would not present a reasonable danger of incrimination of the witness.

In regard to the witness Pechart, the question was asked, as I recollect it—I want to be sure that

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I have the right understanding—the record here shows the situation as I think we have stated in regard to the witness Kessel—Monday morning, May 10, 1951, the question:

> "Do you know Mr. Remmer's occcupation?
> "A. I refuse to answer the question.
> "Q. Upon what ground?
> "A. Tend to incriminate me.
> "Mr. Campbell: I press the question.
> "The Court: Well, you will be detained until tomorrow morning at 10:00 o'clock. You are committed to the custody of the marshal and you have counsel and in the meantime you may consult counsel. You will have a hearing tomorrow morning at 10:00 o'clock on your refusal to answer. You are now committed to the custody of the marshal."

So I think probably it would be well to take these cases individually.

Mr. Wiseman: Yes, your Honor.

The Court: The legal argument, I presume, would perhaps be the same.

Mr. Wiseman: It would apply to both, your Honor.

The Court: The present impression I have is, and I would like to be informed on the question fully, of course, that the privileges invoked here is to protect against possible prosecution or incrimination of an offense defined by the State law, not federal law. The question which Mr. Kessel refused to answer: "Do you know Mr. Remmer's

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occupation? A. I refuse to answer the question," do you contend that that has to do with the federal law?

Mr. Wiseman: Yes, your Honor.

The Court: What federal law?

Mr. Wiseman: If I may be permitted to explain.

The Court: Yes, I would like to know what your position is because if we could agree on some of the principles it would save some time.

Mr. Wiseman: I very respectfully might say to your Honor that in the opinion of counsel there was no contempt of any order your Honor made yesterday. I think the record will sustain there was no order in the record given to the witness Kessel to answer the question and respectfully I submit to your Honor he was not in contempt yesterday or at this time of any direction of the Court.

It is not, as your Honor suggested, that a question that may, upon the face of it disclose a possible offense against a State law is the grounds upon which this witness invoked his constitutional right against self-incrimination. Now preliminarly, your Honor, a witness—and I think it should be conceded—is entitled to invoke his constitutional right against self-incrimination at any time or upon any occasion and upon any court. Now in order for the Court—and I think the authorities sustain the statement—in order for the Court to pass upon the question as to whether or not the privileges may be exercised, the Court may inquire, and should inquire, into the grounds, so that you, in determina-

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tion of whether or not he should or should not answer the question, can thereupon pass upon it.

Now in this connection, your Honor, if you recall, the witness Kessel, when called upon as a witness in this action, asked your Honor the opportunity to make a statement. Your Honor at that time directed him to answer the question and then he exercised his privilege against answering the question upon the ground that it would self-incriminate him. Now, your Honor, and we expect and represent to you, the witness would have advised this Court that at the present time he is under indictment in the United States Federal court for the Northern District of California. I would expect, your Honor, that he would have told you at that time that that indictment, upon which he is standing trial on the 7th day of January, 1952, in the United States Federal court for the Northern District of California in San Francisco, is based upon a violation of two United States Code, Section 192, the same being a contempt of the United States Senate. I would expect, your Honor, that he would have handed you at that time, so that you could have passed upon the proposition as to whether or not he was invoking his constitutional privilege, not because of a violation of a State law, but for a fear, or a tendency toward a fear, that any answer he might give to you here would incriminate him and privilege his rights under this indictment.

Now, your Honor, this indictment would show that the witness Kessel was called before the subcommittee in what is commonly known as the Ke-

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fauver hearing and upon that hearing, your Honor, exercised his constitutional privilege against self-incrimination, refused to answer certain questions of the committee, thereafter an indictment was returned, and insofar as the witness Kessel is concerned, there are some 28 counts in this indictment which relate for failure to answer certain questions propounded by that committee.

Now, then, your Honor, in order to determine in respect to the witness Kessel as to the relevancy of any question or the materiality of any question asked him upon this trial, you would have to have, it seems to me, before you the indictment, you would have to have before you, with respect to the indictment, the various questions asked the witness Kessel by the sub-committee and upon which he is under indictment and upon which he stands trial on January 7th. Now in connection with that matter, your Honor, a question which is propounded to this witness upon this trial, which appears upon the surface to be an innocuous question, if we may use that expression, might become a very material question, insofar as his constitutional rights are concerned with respect to the questions upon which he now stands upon indictment.

Now then, your Honor, the proposition is still not as simple as that. In connection with this indictment, your Honor, and the number of counts—and the counts, I say, are concise, they simply consist of questions and refusal of the witness to answer—you must, it seems to me, your Honor, to further

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pass upon the materiality of these questions, have the transcript of that testimony which contains other questions which relate to the question propounded to the witness Kessel. Now, your Honor, the indictment, as I say, contains some 28 counts, can be simplified briefly—and I think I make a fair statement to the Court because I am going to hand these to your Honor—the Kessel indictment, the questions related to his business, your Honor, to his business associates, to his knowledge of certain persons and parties, but above and beyond that, your Honor, the questions propounded by that committee with respect to the witness Kessel related to his income tax problems and questions related to whether or not, I believe in counts 20 to 25 or so, related to this question. He was entirely examined with respect to his income tax returns, whether he had ever filed them, whether he had ever been checked by the Internal Revenue Department, whether any penalties had ever been assessed against him, not simply, your Honor, inquiring whether he did or did not know a certain man, but for the purpose of bringing into the answer to those questions any material relating to his income tax problems.

Now, your Honor, I would further expect the witness Kessel, had he been so permitted at the inception of this trial, to have told you further he was under investigation by the Internal Revenue Department for some past year, further that he would have told you that he has been consulted, that accountants have been in communication with ac-

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countants for the Internal and Treasury Departments, that his attorneys have been in conference with them with respect to his income tax returns. Those matters I mention so you may determine whether or not a question, which you would be entitled to consider as being non-incriminating, is in fact incriminating, because the defendant Kessel is now in this position, Judge, he is about to stand trial in federal court on January 7th for failure to answer questions which relate to his business, to his business associates, to his income tax problems, all for the purpose, your Honor, of preserving his constitutional rights against self-incrimination. In other words, he is indicted, he is under indictment because he invoked his constitutional rights, he is now in that analogous position—he comes before this Court, a question is addressed to him, in the absence of your Honor having any knowledge of these things, which I assume you have not up to the present moment, and a question which is innocent on its face, is presented to him, he exercises, in his judgment, his constitutional rights of self-incrimination, and your Honor, having nothing before you except the naked question, not knowing the grounds on which he fears any answer he might give may incriminate, even in respect to the indictment, but above and beyond that in respect to any investigation by the Treasury Department, your Honor can see, in the absence of this information or the grounds upon which he exercises his privilege to an innocent question, would conclude that it is not self-incriminating.

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Now, your Honor, it has been suggested to you —not suggested, but the statement has been made— that this relates to State law. Judge, if you took the indictment, if you are satisfied this man is standing trial within three or four weeks upon the very matters, upon the very questions that are being pressed by counsel at this time, I think your Honor would understand just in a consistent position he would have to exercise his constitutional privilege before you at this time. Let me suggest this to your Honor—he in good faith, and let us say upon advice of counsel, before the sub-committee hearing exercised his constitutional privilege against self-incrimination. Whether he was right or wrong will be determined upon the trial of that case. Now we come before you upon this hearing as a witness for the government in this matter, and a question is asked. Let us assume one of two things now, that he either voluntarily answers the question, he is then in the position of having taken a position before the committee on a refusal to answer and before you here of having voluntarily waived that privilege, so that it will then be said that he should not have exercised and had no right to exercise or grounds to exercise his privilege before that committee. Now take the other part of the matter, your Honor. Assume then, for the purpose of this argument, that a question is addressed to him, assume then that a question, innocent upon its face, is put to him here and your Honor, in the absence of this other information—which I know you have not had up to the present moment—directs

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that witness to answer. Well, it just occurs to me and seems to me, your Honor, that there is then a determination by this district court of the very issue which will be presented to the court before a jury on the 7th of January in San Francisco. In other words, there is a determination by your Honor, unless you have all these material facts before you, that a question asked the witness in San Francisco, upon which he stood his constitutional grounds against self-incrimination, is presented again to the witness here and he is directed and ordered to answer, it is a determination—at least I fear it is a determination—by this court that the question that was asked him in San Francisco, upon which he stood his grounds by that exercise that he should have answered the question and consequently is in contempt of court.

Now, your Honor, in connection with the situation, I feel satisfied, your Honor, it is an unusual situation, in which a witness is under indictment for failure to answer specific questions. Now it seems to me, your Honor, in addition to that and explanatory of that hearing, I would expect, as I told you before, that this witness would have told you, and will tell you, that he is under investigation by the Treasury Department; there have been these conferences between his lawyers and attorneys, all of which furnish a ground upon which he fears that any answer that he might give you here will be self-incriminating. Now the only way that matter can be presented to the Court, and your Honor is justified in inquiring into, is grounds to ascertain if the

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fear he tells you is well-founded. In other words, unless your Honor knows that, simply because an innocent question is presented to the witness and simply because he refuses to answer that question, your Honor would be justified, in the absence of any knowledge of those fears that a man has, to direct and order him to answer that question.

Now, your Honor, with respect to the factual background, I think I have given it to you. I have these indictments here, your Honor. They are easy to read, they can be read in five minutes, your Honor can see the questions. Every question in fact, irrespective of whether or not it is in itself a direct question as to whether or not the man is guilty of a crime, such as "Did you commit the murder," it is not that question, but it is an innocent question, your Honor, which ties in and relates to other questions of importance in this indictment, with respect to this man's personal income tax problem, augmented, your Honor, and expanded by other questions which appear in the transcript of the hearing before the committee, which I have here, which explain in a large measure, or amplify, a question upon which this witness refused to answer.

Now, your Honor, with respect to the legal proposition, I do not think any of us are in dispute. I think, your Honor, with respect to a witness' position under these circumstances, he is entitled, in the absence of a stipulation, and he has, to exercise his privilege with respect to every question asked, particularly under these circumstances. I can well

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appreciate that if a question is asked the witness and each time the witness has to repeat a lengthy statement or state his grounds and every time your Honor has to consider the question and either make an order or direction to answer the question and thereupon the question is answered, I can well understand, your Honor, that that interferes with the orderly progress of this trial, but there is no way, your Honor, that this witness can protect his rights unless to every question asked him he exercises his privilege and the Court considers the materiality of the question and either permits him to decline to answer or orders him to answer. Now that, your Honor, it seems to me is the simple procedure and a stipulation certainly would eliminate it if we deem to every question asked him that he makes that answer.

Now, your Honor, with respect to authorities, I know the Court is thoroughly familiar with the law in this matter.

The Court: You do not need to assume that.

Mr. Wiseman: Let me say this, your Honor, I think we are in accord with this, that a witness, presumably any witness, is entitled to exercise his constitutional right in court. Now that constitutional right, your Honor, should be preserved, and will be preserved, if the facts are known to the Court upon which the Court would base its ruling. Now in respect to Kessel, I think I have indicated to you that he has more than reasonable fears against self-incrimination with respect to any ques-

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tion, based upon, your Honor, the indictment, based upon the transcript of the testimony before the committee, and further based upon the investigation of his activities with respect to his income tax problems over the past years.

Now your Honor recently—and these matters are coming before the courts more often in the last year—recently the Supreme Court of the United States, in Hoffman vs. United States, Supreme Court 814, decided May 29, 1951, in respect to this very point, your Honor, and I just want to read your Honor four or five lines in respect to his right:

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it can not be answered might be dangerous because injurious disclosure would result."

Now the injurious disclosure would result, your Honor, in practically having this court determine that questions asked this witness before the committee in San Francisco were proper questions and that consequently, your Honor, he is in contempt of the Senate Committee. In other words, there would be a determination, a practical determination at least, that the question that was asked him in San Francisco was not a question upon which he could invoke his constitutional privilege, because it had been determined by this Court in Nevada that the

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question was not such that he could invoke the right of self-incrimination.

Now, your Honor, conceding now that the witness in question should feel that a disclosure would be injurious, and certainly upon this record has indicated it would be, I would call your Honor's attention to Estes v. Potter, Fifth Circuit, 183 Fed. (2), page 865, which, in my judgment, expresses the rule as clearly and concisely as any case I have been able to run across, and that case, your Honor, dealt with the very problem that now confronts you. In other words, your Honor, what we have here is a series of apparently innocent questions. The questions presumably relate only to such facts, consequently the privilege could not be invoked with respect to such facts, and I think that is departure, that is contrarywise to what the actual facts of this case were. Now in the Estes case, they considered the question, they did not consider the question as I suggested: "Did you rob a bank," but they were considering questions which formed a link and which all put together produced a charge of some nature against the defendant. Now the Court, dealing with that very problem of the question and answer, said:

> "A witness need only show that his answers are likely to be dangerous to him. If in the circumstances it is reasonable to infer the possibility of incrimination from the answers that the witness may give, the privilege may be claimed."

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Now just at that point may I stop, your Honor, and ask, in fairness of counsel for the prosecution, that after we have shown to you the indictment, which contains the very question that this witness was asked, isn't it, in fairness to state, Judge, that the very questions being asked this witness relate to that indictment. Answers to those, your Honor, would be a determination as to whether or not he was or was not guilty of contempt before that committee.

I am reading, your Honor, from page 868 of the report. Now this is the problem your Honor now has:

> "It is for the court to determine, in the first instance * * *"

and that is primarily your question:

> "It is for the court to determine, in the first instance, whether incrimination is reasonably possible from any answer the witness may give; but if such possibility exists, then the witness has the absolute right to assert his privilege, which extends to more than the admission of a crime or any element thereof. The privilege bars compulsory disclosure of any fact that tends to incriminate the witness."

and citing authorities, Counselman v. Hitchcock, the leading case in contempt in the United States and has been, your Honor, for 75 years.

Now I want to call your Honor's attention likewise to Rogers v. United States, decided in the

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Tenth Circuit, 179 Federal (2), page 559, reading from page 562, when the court said, keeping in mind the Estes case and absolute right of the witness there given; and this, your Honor, I think is an answer to the innocent question upon its face:

> "Furthermore, a witness may not be required to give an answer which furnishes a link in a chain which would enable the Government to obtain the facts showing his guilt of a crime. It is also clear, from all the cases, that a witness may not refuse to answer because his answer might tend to incriminate others."

Now, your Honor, with respect to the link in the chain, that is the very problem this Court has to decide with respect to each and every particular question asked this witness.

Now, your Honor, there is one other case, and I am not going to read any further on the law, because I think the law is clear on the thing: Kasinowitz v. United States. This is the Ninth Circuit, your Honor, 181 Fed. (2), 632, and I believe this was Justice Holmes' decision, I am not positive about it. This, your Honor, is at page 637 from the Ninth Circuit. I am addressing myself to the question I am designating as an innocent appearing question. At page 637 the Court said:

> "The question which the witness may refuse to answer need not of itself require his admission of the commission of a crime, otherwise, as stated in United States v. Weisman, 111 F.

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2d at page 262, the witness 'will be forced to disclose those very facts which the privilege protects.' "

Now, your Honor, I am just going to cite two other cases, Alexander v. United States, 181 Fed. (2), 480 and another, Doran v. United States, 181 Fed (2), 489.

Now I think, your Honor, there is no dispute about the legal proposition; in other words, the witness' absolute right to exercise his privilege. There is no question in the first instance it is the duty of the Court to make determination from the facts brought to the Court's attention and knowledge. There is no question, your Honor, that a simple, innocent appearing question may still give the witness the right to exercise his privilege if it follows a link in a chain which might or might not tend to establish a crime.

Now in conclusion, your Honor, let me state this, there is no dispute, your Honor, and I think counsel will concede, that both of these witnesses are under indictment in San Francisco in federal court for failure to answer questions which are set forth in these indictments. I think further, your Honor, that we concede that they go to trial on the 7th of January; that the questions that are asked this witness in respect to his business—because I briefly summarize both of these indictments, they relate to his business—business activities and his income tax problems, the very purpose of business questions was to bring into the income tax questions the source

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of his business, the witness is going to trial on the very questions, your Honor, relating to his business, his associates, his knowledge of persons and associates, going to trial, your Honor, further with respect to failure to answer questions in respect to income tax problems. These questions are being addressed to him and, your Honor, if he voluntarily answers the questions, he is put in the position of having admitted before this Court that the privilege exercised by him in San Francisco was without ground and without merit, and if your Honor orders him to answer the question, then I say to your Honor that you are determining the question asked the witness in San Francisco was a proper question, that the witness had no right to exercise his privilege, that he was in contempt of the committee at the time and is a determination of the fact which this witness is, under the law, permitted to have submitted to a jury for determination because automatically, your Honor, in this matter he is entitled to have a trial by jury for failure to answer the question. Further than that, as I say, this witness would expect, and I would say, that he would tell you of the investigation made, all of which creates a fear in his mind, your Honor, that any question asked him will be self-incriminating and tend to establish some sort of charge of which he is not informed, although he reasonably fears it will relate to a violation of our Internal Revenue income tax law.

Now, your Honor, I am going to submit to your Honor the indictment and I mention that the tran-

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script of the California hearings which further explain this, I can say to your Honor relates only to the particular 10 or 15 pages of this which I have marked, and if from these matters, your Honor, it appears he has a fear, facing this indictment that he is about to go to trial on, relating to business or income tax returns, I say it is reasonable and a material one, in which he is entitled to invoke his constitutional privilege.

In respect to Mr. Pechart, I submit that Mr. Pechart's position is the same substantially as Mr. Kessel's, that he was not in defiance or contempt of any order of your Honor yesterday, that he stands before you today in the same position as he was originally here before the court, as a witness, and that he did not violate any order yesterday, because the record is free from that.

The Court: Now I would like to ask you a question. Do you agree, Mr. Wiseman, that the provision of the Fifth Amendment, "shall not be compelled in any criminal case to be a witness against himself" applies only to a federal crime and not a State crime?

Mr. Wiseman: I would concede that, your Honor.

The Court: Now I do not recall of ever hearing of a situation just like the one we have here. This is just a matter of conflicting proceedings for contempt. The purpose of the indictment in San Francisco, which you have mentioned is a charge that the witness was in contempt of the Senate Committee. Now if we would be justified in postponing

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the trial of this case until the conclusion of the trial in San Francisco—what I have in mind is this —are we required—put it that way—to postpone the trial of this case until the litigation in San Francisco is completed? We have no idea what the result of that trial will be, but suppose that trial, in effect, amounted to a question that such a question as this would have to be answered: "Do you know Mr. Remmer's occupation?," are we required to stand by and postpone this trial until that court in California decides that this question could be answered? Well, let us look at it from another point of view. It could happen, where people are closely related in business, that a number of trials of this same nature, perhaps on facts somewhat similar, could be in progress at the same time in different jurisdictions or before different tribunals or district courts in the same district, and then when a witness, who would be a material witness in each of those cases, was called and this situation arose, would the Court then, having his presence before it on the witness stand, be required to stand by and await the determination of other proceedings for contempt? You have not cited any case—I have not heard of any case—that embodies such a situation as we have here, none at all. Isn't that true?

Mr. Wiseman: As far as I know, Judge, it is a novel question.

The Court: The case in California is merely a contempt proceeding, that is all it is. The indictment is required by the statute to bring the matter

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before the Court to determine whether or not the witness was guilty of contempt or committed contempt of the Senate Committee. You have the same situation, the same witness, to determine here now whether he must answer this question. That is what I understand we are trying to determine this morning, whether he must answer this question. If the Court determines that he must, then he will be given an opportunity to answer it before the jury. Now I just want to give you some of the thoughts I have running through my mind and I hope what I have said does not disturb any line of argument that counsel has planned here.

I would like to hear further from you.

Mr. Wiseman: Judge, in regard to that may I say this, as an officer of the court. There is upon the part of these witnesses certainly no intention, on advice of their counsel, to be contemptuous of this court in respect to any order that you might make. I think frankly, Judge, there was a misunderstanding yesterday in respect to the manner in which the privilege was exercised by these witnesses. In other words, Judge, they are put before you in this position, where they have to exercise their privilege with respect to every question. They are not questions that have no relation at all, as "What suit did you wear last Sunday?," I don't mean questions of that kind, but with respect to any question with relation to any fear, or assumed fear —and your Honor keep in mind it is not only limited to this indictment, but it is as I told you, that these witnesses, I would expect to tell you, are un-

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der investigation and I think that fact would be conceded by the prosecution, that there has been an investigation and is at present an investigation, that that itself, independently of the indictment, would furnish some grounds upon which you could determine, as you can, the question whether or not a question is or is not material and should or should not be answered. But I say there should be some orderly procedure so the examination of the witness should not become such as to make the jury and your Honor impatient, but your Honor, I think it should be conceded they have a right to exercise their privilege to every question. It is not done for the purpose of harassing or interfering with the progress of this trial because their problems are as important to them as to the defendant or the prosecution in this case. In other words, if they have constitutional privilege as citizens, they have the same right to exercise it as the defendant or any member of the prosecution. So I say, Judge, anticipating the further progress of this trial, that neither the witnesses nor their counsel want to be put in the position before your Honor of even indicating that they desire to be in contempt of any order you may make. In other words, I feel any order you make would be in the exercise of your best judgment and not presuming that these witnesses would be in contempt of any order you make, but I say they are entitled to exercise their privilege. Now there is a method of doing it, which may or may not impress you, but ultimately, your Honor, the privi-

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lege simply relates to their fear of self-incrimination.

The Court: I think we understand we have to meet these things as they arise. No matter if it interferes with the progress of the trial, we must go along and rule on each question. Now the question before us here is simply this, on the part of Mr. Kessel, "Do you know Mr. Remmer's occupation?" That is all we have to consider here.

Mr. Wiseman: I know, regardless of how it arose, your Honor will consider as to the facts before you and make your determination as to the materiality of that question. Thank you, your Honor.

The Court: The only point I am considering or deemed we had here now is this question of this being a matter involving a crime by virtue of this indictment. Maybe that is a crude way of putting it—you understand what I mean.

Mr. Wiseman: Of course, anything that might be fear might be seized upon as charge for violating against income tax.

Mr. Campbell: I take it our present argument, of course, is addressed to the last question. However——

The Court (Interceding): Well, I tell you about that last question. He is going to be ordered to answer this question, but I thought while we had the jury absent we might discuss some questions of law which would be helpful as we go along with the trial. The pleading of privilege under the Fifth Amendment seems fallacious to me under a question

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of this kind—"Do you know Mr. Remmer's occupation?"

Mr. Wiseman: Yes, your Honor, it is a link in a chain of questions.

Mr. Campbell: I understood the argument was to be used as a guide post throughout the examination of these witnesses.

The Court: Yes.

Mr. Campbell: Now, as I understand counsel's argument, he makes two principal points—first, that the witnesses Pechart and Kessel are presently under indictment in the United States District Court at San Francisco for failing to answer certain questions before the committee to investigate organized crime, Interstate Commerce Commission, known as the Kefauver Committee, and, secondly, the contention is that they are presently under investigation with regard to their individual tax matters——

The Court: I am going to interrupt you a moment. I am going to call the jury in and excuse them until 1:30.

(Jury and alternate jurors returned into court at 10:55, admonished and excused until 2:00 o'clock.)

Mr. Campbell (Continuing): As I stated to your Honor, counsel made two principal points; first, as to the indictment presently pending in San Francisco, and, secondly, as to an investigation of the income tax affairs of the two witnesses, which he states is presently under way.

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It would seem a strange situation if, by having refused to answer certain questions before a Senate Committee and then subsequently being either under indictment or under fear of indictment of having committed contempt against the Senate, that the witnesses could, through a claim of immunity upon those points, make their testimony, which would be material and pertinent in collateral cases, to which they were not even parties, a matter beyond the reach of the contending parties in such proceeding, which is in effect what Mr. Wiseman's contention is here.

Referring very briefly to the indictment pending in San Francisco, to the indictment against Mr. Kessel, which is in a number of counts, but as counsel says, very brief in each count, some 32 counts, charging contempt with failure to answer certain questions before the Kefauver Committee. These questions are as follows:

(Reads from indictment.)

Now, if the Court please, we are here in this proceeding and under the indictment inquiring into the affairs of Elmer F. Remmer. We are not inquiring into the affairs of David Kessel or of Walter Pechart. It has been shown by the evidence that has so far been introduced that testimony which could be given by Kessel and by Pechart is material to the issues here, because it has been demonstrated by the return, for example, that they had certain business enterprises in common. It is not material to this inquiry as to the amount of

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profit or loss sustained by Pechart or Kessel from those enterprises. It is material to this inquiry as to the amount of profit which was obtained by the defendant Remmer, which is the only material inquiry which this court is making in this proceeding.

I wish to refer in that connection to the case of United States vs. Greenberg, reported in 187 Fed. (2) at page 35, which is a Third Circuit case, the decision having been written by Judge Maris. If I may read a little at length, because I believe it goes directly to the situation which we have here. I am reading from page 38, and this is an appeal from a conviction for contempt from a judgment of the district court for the Eastern District of Pennsylvania, finding the defendant guilty of contempt of court for refusal to answer certain questions:

> "If, however, a direct answer to the question can not under the particular circumstances of the case upon any reasonable theory disclose a fact which is, in the words of Chief Justice Marshall, 'a necessary and essential part of a crime' the question must be answered. To support the claim of privilege the danger must be real, not remote or fanciful. It must appear that the answer to the question may disclose a fact which will supply a link in the chain of evidence which is necessary to establish the commission of a crime by the witness."

Citing Mason v. United States, 1917, 244 U. S. 362.

> "It is not enough that answers to anticipated later questions might do so."

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Citing Camarota v. United States, 3 Cir., 1940, 111 F. 2d 243, certiorari denied 311 U. S. 651.

"Applying this rule the district court considered the questions here involved and decided that direct answers to them could not incriminate the appellant of any federal crime. We are satisfied that the court was right in so holding with respect to each of the two groups of questions in controversy on this appeal.

"We take up first the group of questions relating to the use of the telephone at 1133 West Diamond Street, Philadelphia. The appellant had stated in reply to previous questions that he had regularly used that telephone but that he had not used it for his lawful business. He declined, however, to answer questions as to whether he used it for any other business and, if so, for what business, claiming that to answer would incriminate him.

"It must be conceded that some possible answers to a question as to a witness' business may be incriminating under the federal law. The witness may be by occupation an illicit dealer in narcotics, an illicit distiller or a counterfeiter. However, as this court pointed out in the United States v. Hoffman, supra, 'the question * * * is so frequently asked of witnesses as a mere identifying question that without more a court may well regard it as normally too innocent to fall within the Marshall principle.' Accordingly the witness 'must show the

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court enough beyond his bare statement of crimination at least to indicate that his claim was not clearly groundless, a contumacious assertion made in bad faith.' "

Citing 185 Fed. 2d 621:

"It is not necessary, of course, for the witness to prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it. Accordingly he need not prove that the government has in its possession or that the grand jury has secured from him or from other witnesses evidence which when the answer to the question under attack is added, will be sufficient to complete the chain of evidence needed to convict him of federal crime. Here, as we shall see, the court was justified in concluding that a direct answer could not reasonably form a link in that chain. Accordingly the court did not err in refusing appeliant access to the grand jury minutes and to the files of the government. Where, as here, the question was innocent on its face all the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them.

"In the United States v. Hoffman * * *"

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Well, I will strike the reference to Hoffman, as the Supreme Court case has been cited to your Honor. Reading further on page 39:

> "The theory which the appellant advanced in support of his claim was that if he should state the business in which he used the telephone the next questions asked him would be whether he had derived income from that business, whether he had employees in that business, and whether he kept records of that business. His answers to these questions, he asserts, might tend to incriminate him of criminal violations of the internal revenue laws relating to the income tax and the withholding of income and social security taxes from employees' wages. We do not have to decide, however, whether the defendant may claim his privilege with respect to these questions for they have not been asked. What we have to decide is merely whether a witness may decline to state his business, although itself not unlawful under the federal law, upon the theory that he may have violated some federal law in the course of the conduct of that business and that subsequent questions with respect to the conduct of his business may develop these delinquencies. We think that to pose this question is to answer it. For to approve the appellant's contention would mean that every business man would be entitled to decline to state his business merely because it might be possible that in

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carrying it on he had infringed the internal revenue laws or some other federal statute. This court ruled against this contention in Camarota v. United States, supra, when we held that Camarota was required to answer questions as to whether he had engaged in a certain business, not unlawful under the federal law, even though he contended that answers to anticipated subsequent questions as to his receipts from such business might tend to incriminate him of a violation of the income tax laws. See also United States v. Weinberg, 2 Cir., 1933, 65 Fed. 2d 394, 395 certiorari denied 290 U. S. 675, 54 S. Ct. 93, 78 L. Ed. 583. We accordingly conclude that the court did not err in denying the appellant's claim of privilege with respect to these questions."

Now as I have stated, with respect to the pending indictments in San Francisco, which are not based upon questions which would be material here or which it would be expected your Honor would be called to rule upon, nevertheless, if such questions were material here, I do not believe that the fact of an impending indictment in San Francisco should deter this court from exercising its judicial discretion in ruling upon the question as to whether or not the witness should be compelled to answer.

Counsel states that to compel a witness to answer certain of these questions would, in effect, be prejudging the case which is to be tried in San Francisco. If that were true, the court to uphold the

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privilege against self-incrimination might also be considered pre-judging the matter. However, I do not believe that either situation is presented here. That is a proposition based upon a—well, I suppose you would refer to it as a quasi-judicial proceeding or a Senate investigation—where the witness when asked certain questions chooses to exercise his constitutional rights. Whether he was right or wrong is not for the determination, of course, of this court. We are now faced with an entirely collateral proceeding, in which they are called as witnesses, not as parties, where the inquiry is not made into their personal affairs in a manner which could incriminate them, so far as would appear from this record, but simply as to their knowledge of the affairs of the income of the defendant, Elmer Remmer. As to the method to be used, this Circuit has laid down the principles in Graham vs. United States, reported in 99 Fed. (2), 746, in a decision by Judge Wilbur. Reading from page 750:

> "There is an inherent difficulty in protecting a witness against self incrimination. His mere assertion, however, advanced, that in his opinion the answer to a given question would tend to incriminate him is not sufficient to justify the witness in refusal to answer unless and until a sufficient showing is made to the court that the claim of the witness is a substantial one. That is, the court must be convinced that the answer of the witness would be calculated to incriminate him if he was guilty of an offense

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foreshadowed by the question. When a witness is examined in open court his objection to answering a specific question is passed upon immediately by the court before the witness is compelled to answer."

Now for the convenience of the Court, if the Court desires to examine the record of the proceeding before the Kefauver Committee, I have here in shorter form, being in form of the proceedings themselves before the Senate against Mr. Kessel and Mr. Pechart for contempt, wherein is set forth a complete reporter's transcript of the testimony. This refers specifically to the particular matters involved.

Now insofar as investigation of these witnesses by the Bureau of Internal Revenue is concerned, I have no doubt that investigation is under way. I accept Mr. Wiseman's statement in that regard. I have nothing to do with the investigation myself, but if that is true, nevertheless the statistics show thousands of citizens are investigated daily, there are thousands of revenue agents in the Senate for that purpose and for the purpose of auditing and investigating returns, and unless the danger became apparent and real and as pointed out in the Greenberg case which I cited to your Honor, any business man could refuse to testify as to any aspect of his business. Further, as I have previously stated, the questions directed, and intended to be directed to these witnesses, do not relate to their own net incomes, to the profits which they them-

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selves received, but to those of the defendant, Elmer Remmer. So far as criminal violations of the Internal Revenue Code are concerned, the year 1944 is now beyond the reach of the statute of limitations, assuming that a timely income tax return is filed. The statute of limitations is within six years of the time the offense has been committed. The civil statute for assertion of tax liability is ordinarily three years, with the exception of those cases where the understatement of income is in excess of 20 per cent, in which event the statute is five years, unless waived by the taxpayer. Under all the cirstances of this case, if the Court please, it is the position of the government that we are entitled to pursue with these two witnesses the matters which are material and within the issues of this case.

For the record I would like to state briefly the questions set forth in the indictment of Walter Pechart and which he refused to answer on the ground of his constitutional privilege and which were the basis of the indictment against him in the Northern District of California, which are as follows:

(Reads from indictment.)

I might state further, your Honor, that it is the position of the government that should any of the questions which are the subject of that indictment become material to the inquiry here, then we shall ask such questions and ask the ruling of the Court to compel the witness to answer such questions on the basis of their materiality to the instant proceed-

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ings because otherwise the mere return of an indictment—or in an instance where no indictment had yet been returned, but there was fear of an indictment because there had been a citation or statement by a committee chairman of the Senate that the witness was in contempt—would successfully impugn and might entirely block the progress of the duly constituted courts of the United States in their function in handling of their business and in determination of lawsuits and criminal actions pending before it.

We will submit it, your Honor.

Mr. Wiseman: If the Court please, I hope I do not misunderstand Mr. Campbell. He refers to the fact that this being a collateral matter, that it might not be available to a witness in a collateral matter, the right to exercise his constitutional privilege. I hope I did not misunderstand him—he is a very able lawyer, but if there is any indication to this court that because the defendants are not directly involved in this case, or say some subsequent case, that for that reason the right to invoke their constitutional privileges is not reserved to them, I think——

The Court (Interceding): I do not so understand Mr. Campbell and I have not that idea myself.

Mr. Wiseman: He mentioned a collateral matter, your Honor——

Mr. Campbell: No, I do not so contend.

Mr. Wiseman: The other case he cited, Graham vs. United States, 99 Federal (2) 746, was fa-

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miliar to us and that is the very point I make before this Court. In other words, Judge, as I said at the inception of the argument, a showing has to be made to you, so that you can determine whether or not any particular question was or was not material, whether a witness could or could not exercise his privilege. The very point, Judge, I argued at the inception of the argument, an opportunity to present to you and make a showing so that you could rule, that you have the facts before you to determine the case. Unless you have those facts, unless you have the showing, as suggested by Graham vs. U. S., it places yourself completely in the dark as to the ground upon which, or the basis upon which, a witness comes before you and exercises his constitutional privilege. We are in direct accord with that and that is the very thing, your Honor, I have been attempting to present to you, the showing from which you could determine whether or not the question, innocent of itself, might or might not incriminate this witness. There is no question about the rule of law and it is expressed, as we concede, in Graham vs. United States for the reason of presenting, of making a showing, as we have attempted this morning.

Now, your Honor, with respect to Greenberg vs. United States, if your Honor reads that case you will find out the court considered the only business question as related in the facts of that case and the court properly, in that case, because the questions had not been answered, did not anticipate what they might have been and consequently made no

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ruling upon them, which confirms the very thing I am suggesting here to your Honor, that unless you have, as you do have in the indictment, questions relating to their income, their business associations, you are not in a position to rule on it and in the Greenberg case, as read to you by counsel, the very acts of these defendants are set forth and it is the very purpose that we had coming before you at this time, Judge, is to impress upon you the fact—as your Honor says, you can not anticipate them at this time certainly—and it is for that very reason, Judge, that we made suggestions with respect to the method of procedure.

Now on the question of Pechart, I hand you my transcript and I tell you the questions contained in the indictment have to be read in connection with other questions referred to in the transcript generally. Now with respect to Pechart, in the transcript I had, which has been supplemented now by loose sheets presented by Mr. Campbell, questions were asked by that committee on page 515 of the transcript:

(Reads.)

The only purpose of those questions is not to establish that they might be guilty of some offense against State law, the very questions asked, in the light of surrounding circumstances, indicate that the inquiry was made to ascertain if there was any offense in respect to his income tax problems and whether it appears in that, it certainly appears in

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the transcript, the committee announced publicly and through the press that any information of an interesting nature would be turned over to the Bureau of Internal Revenue.

Now further with respect to Pechart, your Honor, and on the subject matter of the indictment, questions arose and were asked him with respect to ownership of property, how much his home cost, whether it was mortgaged, whether he owns business property and other questions, your Honor, relating to the question upon which the committee sought the indictment.

Now, your Honor, I have nothing further in that connection. I will submit the matter to the Court, and before I do it, may I call both witnesses. They are in court, have been in court since 10 o'clock, and I respectfully ask that their bail be exonerated.

The Court: No, the bail will continue and both witnesses ordered to appear here at two o'clock this afternoon and I will just give you my thoughts at the present time. If the matter should occur to me before two o'clock I, of course, would change my view, but when they come into court at two o'clock I am going to ask counsel for the government to again propound to Mr. Kessel the question which I think is the question, the refusal to answer of which precipitated these proceedings, so far as he is concerned: "Do you know Mr. Remmer's occupation?" and if he refuses to answer the question, or if he raises his privilege on the grounds an answer to the question might incr nate him, I will

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then order him to answer the question and then if he refused, I will commit him for contempt of this court.

In regard to the witness Pechart, he is ordered to appear here at two o'clock and at that time I will request the government counsel to again propound to him the question which I understand to be the question which precipitated these proceedings this morning: "Q. With regard to a portion of the premises which you rented from Mr. Remmer known as the San Diego Social Club, did you operate any business on those premises?" If he claims his privilege under the Fifth Amendment, the Court will then order the witness to answer the question; upon his refusal to do so, he will be committed for contempt of this court.

So we will be in recess in this case until two o'clock and the witnesses Pechart and Kessel are ordered to appear here in court at two o'clock.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the Hearing on Contempt of Court of David N. Kessel and Walter M. Pechart, held at Carson City, Nevada, on December 11, 1951, and that the foregoing pages, num-

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bered 1 to 40, inclusive, comprise a full, true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, December 24, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed December 27, 1951.

[Title of District Court and Cause.]

HEARING ON PLAINTIFF'S MOTION TO QUASH SUBPOENA DUCES TECUM AND DEFENDANT'S MOTION TO INSPECT

Be It Remembered, That the above-entitled matter came on regularly before the Court at Carson City, Nevada, on Tuesday, the 27th of November, 1951, the plaintiff being represented by Miles N. Pike, Esq., and Bruce R. Thompson, Esq., and the defendant not being present in court but represented by John R. Golden, Esq., Leslie C. Gillen, Esq., and the firm of Lohse & Fry, by George Lohse, Esq. The following proceedings were had:

Mr. Pike: Your Honor, with reference to the case of United States of America vs. Elmer F. Remmer, as stated, previously this morning there has been a motion filed by defense counsel, supported by certain affidavits, in connection with which additional affidavit was received by me in

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yesterday afternoon's mail—as a matter of fact, two additional affidavits, those of Mr. Gillen and Mr. Christopher P. Miller, and likewise I wish to state to the Court that heretofore, on November 23, 1951, I was served with subpoena duces tecum to appear before this Court at this time as a witness, and I, of course, have so appeared in response to the subpoena.

Now it is my understanding—and in this I have only indirect information—that Mr. Walter M. Campbell, Jr., who is of counsel for the plaintiff in this case, for the purposes of this case, and Special Assistant United States Attorney, was, I am informed, served with a similar subpoena duces tecum at San Francisco, California, on or about November 20, 1951. In looking over the courtroom this morning, I did not see Mr. Campbell present and so before proceeding, as the Court may designate, with reference to either the motion filed by defense counsel or the motion to quash the subpoena, I feel it incumbent upon me to tender such explanation as I am in position to make with reference to the non-attendance of Mr. Campbell at this time. Of my own personal knowledge I can simply say that the last conversation I had with Mr. Campbell was on Wednesday afternoon before Thanksgiving last week, which places it November 21st, and at that time he expressed his plans as arriving in Reno, as I understood, on last Friday. Now since then I have had no direct communication with him. I have talked to Mr. A. V. Brady, who is connected with the Bureau of Internal Rev-

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enue and who is present in court this morning, and Mr. Brady has handed me two telegrams, each addressed to him in care of the United States District Court here at Carson City and dated respectively November 25th and November 26th of this year, both signed Walter M. Campbell, and the first one stating in substance that Mr. Campbell would arrive tomorrow morning—that should have been yesterday morning, considering that the wire was sent November 25th, your Honor—and suggesting that Mr. Brady meet Mr. Campbell if possible, and the more recent wire was directed to Mr. Brady, stating that Mr. Campbell had been delayed by illness, that he would arrive tomorrow morning —which would be this morning, November 27th— and suggesting that Mr. Brady meet him. Now other than that, I have no personal information, except that I have been advised indirectly that Mr. Campbell is en route to Reno and Carson City, and the purpose of my explanation, as is apparent to the Court, is in reference to the subpoena which, if it was served, requires an explanation.

Now with that exception, I might state that in the absence of Mr. Campbell, the United States attorney's office is prepared to proceed at this time on the hearing of either of the defendant's motion to produce, which has been set for hearing at this time, or upon the government's motion to quash, which was filed with the clerk of the court just this morning and copies of the Notice of Motion and Motion to Quash Subpoena Duces Tecum served upon Mr. Campbell and myself were handed to

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defense counsel in Reno yesterday afternoon. I do not wish to presume to indicate the order of the hearing on the respective motions and of course I realize that defense counsel would wish to be heard on that, but while addressing the Court I would respectfully suggest that the Court consider hearing the motion to quash the subpoenas because, although I have appeared in response to the subpoena, I have filed this motion to quash the subpoenas duces tecum for the reasons stated and under the authority of Federal Rules of Criminal Procedure No. 17(c), and as the Court will observe, there is a provision about the middle of that paragraph sub-division of the rule that the Court may, when the motion is promptly made, quash such a subpoena.

Mr. Golden: If the Court please, without waiving any rights we may have, we do not make any point of the fact that Mr. Campbell is apparently unavoidably detained and are perfectly willing that the matter be treated as though he were here in response to the subpoena. We are likewise perfectly agreeable, if the Court so wishes, that Mr. Pike proceed further with his motion to quash.

The Court: Very well, thank you. So you desire to proceed with the motion to quash?

Mr. Pike: Yes, your Honor. I do not know as the Court has before it a copy of the subpoena duces tecum itself, and I make particular reference to it because, as the Court will observe, there is affixed to the document a typewritten sheet which designates the books, papers, documents and ob-

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jects sought to be produced here in Court in response to this subpoena and as the motion for the production of certain records filed by defense counsel refers to the decision of the United States Supreme Court in the case of Bowman Dairy Company vs. United States of America, dated April 30, 1951, 341 U. S. P. 214, 95 Advance Sheets, 95 Law Edition 879. I have the Supreme Court advance sheet here, your Honor. I refer to that particularly because on the second page, as appears in the advance sheet of the Bowman decision, there is a quoted portion of a subpoena duces tecum involved in that case, which is not identical with this, but I may say very very similar to it, as a close comparison will disclose. I may say, your Honor, I refer to the Bowman case—this may seem presenting my argument a little in reverse—because the Bowman decision is the decision referred to in the moving paper on defendant's motion to produce, but the subpoena is the language, of the books and other records sought to be produced, I would say substantially identical with the subpoena quoted in the Bowman decision. There are some differences.

So I refer now to Rule 17(c), which, of course, is the authority relied upon for defendant's motion and which is likewise the authority relied on for the motion to quash now before the Court, and reading the entitlement of that sub-section, "For Production of Documentary Evidence and of Objects." Then reading on: "The subpoena may also command the person to whom it is directed to produce papers, documents or other objects designated

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therein * * *," and the government is in reliance upon this next section: "The court, upon motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive." Reading on:

> "The court may direct that books, papers, documents or objects designated in the subpoena, be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects, or portions thereof, to be inspected by the parties and their attorneys."

And so at this time, pursuant to the Notice of Motion heretofore served and filed, I make the motion to quash the two subpoenas served upon Walter M. Campbell, Jr., and myself.

As the moving authority, I refer particularly to the affidavit made by Mr. Campbell and filed and read before this Court at the recent session held at Las Vegas, Nevada, on November 8th, as I recall, 1951, and as those affidavits are rather fresh in the mind of the Court, unless the Court indicates otherwise, I will not read the affidavit again at this time.

I have set out in this motion to quash the subpoena that compliance with the subpoena duces tecum would be unreasonable and oppressive, without designating the facts or the asserted basis for that statement. However, as further grounds I have set up, on line 29 there on the first page of

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the Motion that the "records enumerated and designated in each of the two said subpoenas refer to records that have heretofore been made available for inspection of the defendant or his duly authorized representatives on occasions long prior to the scheduled date of the above-entitled action upon the merits, which scheduled trial date is presently set for trial with a jury at Carson City, Nevada, at 10:00 a.m. Wednesday, November 28, 1951," which is tomorrow. And in particular connection with that, the Court will recall the defendant's motion for a continuance of the trial date and of the motion to produce under Rule 16 of the Federal Rules of Criminal Procedure, which were presented and argued before the Court at Las Vegas and denied by the Court, the Court will recall in that connection the affidavit of Mr. Campbell, and will likewise recall the contentions made by Mr. Campbell before the Court sitting at Las Vegas that on two occasions; namely, the occasion when Mr. Friedman, an accountant from San Francisco, and one of those persons named as authorized to act under the power of attorney designation filed by the defendant with the Bureau of Internal Revenue, was given free access to these records at San Francisco, and I believe that a proper statement to make, from what was presented to the Court at that time, both through the affidavits and through the discussion that took place between defense counsel and Mr. Campbell and his assertions to the Court, that Mr. Friedman spent substantially a week with those records.

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Reference is made in these moving papers to the circumstance of there being no money available to pay accountants' fee and for that reason an examination was not made.

The second circumstance referred to in this paragraph 2 of the government's motion to quash will likewise be brought to the recollection of the Court through the Las Vegas hearing the affidavit statements of Mr. Campbell, to the effect that Mr. Lawrence Semenza, a certified public accountant at Reno, Nevada, being another of the persons designated to act under power of attorney through the document filed with the Bureau of Internal Revenue, examined the records in San Francisco and not only examined them, but took a considerable number of those records with him. The Court will then recall the matters reflected, as to the efforts made by representatives of the Bureau of Internal Revenue to have the records returned to that Bureau and their inability to obtain them for the stated reason as appears in these documents, that Mr. Semenza had given the records to Mr. Friedman and that Mr. Friedman had purportedly given the papers to Mr. Golden, presently of defense counsel, and that those records are not available to the government for production by reason of those particular circumstances.

And the third paragraph of the motion to quash——

The Court: The records that were turned over to the auditor were never returned to the government?

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Mr. Pike: Were never returned. The facts, according to the government's contention, were substantially those already stated but the Court will understand, of course, that I am predicating my statements on what was presented to the Court at Las Vegas. I am undertaking to adhere to that. Many of these matters are not in any way within my personal knowledge, but they are set forth in these various affidavits and documents and were related to the Court there. So that those would be the two occasions referred to in this present motion to quash when certified public accountants, authorized to act on behalf of the defendant, had an opportunity to examine them. Defendant complains that there was not money available to pay those accountants and for that reason they should be given opportunity to examine at this time.

I do not think it is incumbent upon me, as government attorney, in this or any other case, to assume a harsh position and when I have stated here in the language of Rule 17(c) that this is unreasonable or oppressive on the government I, of course, had in mind the meaning of those terms and I had in mind that factually that was true. Here we are the day before the trial. I have not said in so many words in this motion to quash that this is not the time to begin, and I do not think that is necessary, but it is not the time. We have had these proceedings extending over a period of years. Negotiations between representatives of the Bureau of Internal Revenue, the office of the Attorney General, and since April of this year there

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has been an indictment pending against the defendant, and it does not appear to me that there is any proper justification or explanation for seeking to inspect and take copies at this time, the day before trial.

This next paragraph says in substance that the books, papers, documents and other records referred to in this subpoena are substantially those referred to in the motions had before the federal court—I said in here on November 8th earlier this morning and I was mistaken, it was November 15th, at Las Vegas. Now I am not going to indulge in long argument on the same, but I respectfully submit to the Court that examination of papers show that they are the same and the argument would be the same. If the Court will look at the bottom of this small paper attached and forming part of the subpoena duces tecum, it refers to these particular clubs or businesses in which there were certain records turned over, so without discussing the Bowman case at this time, I want to refer to the case of United States vs. Maryland & Virginia Milk Producers Association, which is decision of the United States District Court, District of Columbia, of December 2, 1949, and it appears in 9 Federal Rules Decisions, page 509, and the decision is written by District Judge Holtzoff. Now by way of comment, your Honor, Judge Holtzoff is one of the co-authors with a Mr. Barry of the text on Federal Rules of Criminal Procedure, and if the Court and counsel will recall, in the preliminary drafts of these rules and the discussions that were

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had at the time the rules were being formulated for presentation to the Supreme Court of the United States for consideration and enactment, Judge Holtzoff took a very leading part in those discussions. I do not have it in court, but I have one of the official publications containing the draft of the rules as finally enacted before the recent amendments and that volume has in it the discussions and shows the participation by, who is now Judge Holtzoff, as the basis for each of the particular rules. So I am going to read this short one-column decision of Judge Holtzoff on page 510, as follows:

> "In this prosecution for alleged violation of the Sherman law * * *"

giving the citation for it:

> "* * * the defendants have applied for a subpoena duces tecum directing the Government to produce for the defendants' inspection all documents which the Government has obtained from any person who is not a party to this proceeding. In other words, the defendants seek a broad discovery of all documentary evidence that the Government has obtained in support of its case, with the exception of such material as is covered by the recently coined and apt term of 'work product' of a lawyer.
>
> "Defendants seek to support their application by reference to Rule 17(c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. This rule relates to the issuance of subpoenas duces

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tecum and contains the following provision on which the defendants here rely: 'The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.' "

The decision goes on:

"The purpose of this provision is a limited one. It is to make it possible to require the production before the trial of documents subpoenaed for use at the trial. Its purpose is merely to shorten the trial. It is not intended as a discovery provision.

"(2) In this case the proposed subpoena duces tecum is not intended to be used to secure evidence to be introduced at the trial, but is intended to be employed as a broad discovery for the purposes of inspecting all the documentary evidence in possession of the Government and which the Government intends to use at the trial.

"(3) It is well settled that in a criminal case, unlike a civil action, such a right of broad discovery does not exist. As I said before, Rule 17(c) was not intended to be a discovery provision, but merely a means to make a subpoena duces tecum returnable prior to

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the trial in order that time at the trial may be saved while documents are being examined and inspected.

"In the light of these considerations, the motion is denied."

Now let us see about this duces tecum. This is to inspect some documents that are going to be subpoenaed and look at them ahead of time by what is characterized as, out of the Bowman decision itself, a fishing expedition. I am reading now from the portion which says what the defense counsel would like to have produced here: "All books, papers, documents and objects (except memoranda prepared by government counsel, and documents or papers solicited by or volunteered to government counsel which consist of narrative statements of persons or memoranda of interviews) * * *"; then leaving out the written narrative statements or other matters enumerated within the observations as to exceptions, then it goes on:

"* * * obtained from or belonging to the defendant or obtained from others by seizure or by process or obtained by Government counsel in any manner other than by seizure or by process, * * *"

The Court has in mind Rule 16 that was invoked at the previous hearing and its limitation to seizure or process. And then it goes on:

"* * * (a) in the course of the investigation by the Grand Jury which resulted in the return of the indictment herein, and (b) in the

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course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to said Grand Jury, or (b) are to be offered as evidence in the trial of the defendant under said indictment, or (c) are admissible in evidence either for or against the defendant with respect to any of the allegations or charges contained in said indictment, * * *"

And as to that last, your Honor, I do not know how it is to be determined whether any of these are admissible in evidence until we see what the foundation is and the document is, and then:

"* * * including without limitation the books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of, the following businesses for the years 1944, 1945 and 1946, from which businesses the United States contends the defendant received taxable income as an owner during said years: * * *"

And then it enumerates some nine or ten clubs or businesses, and then goes on:

"* * * and any other businesses from which the government contends defendant received income as an owner during said years."

Well, I think the broad discovery feature, or attempted discovery, of the subpoena duces tecum is quite apparent.

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I might say the only other case I found, your Honor, that pertains to this general subject of Rule 17(c) is a decision of the Ninth Circuit Court of Appeals and it is in the case of Flynn against the United States. Decision was rendered on January 10, 1949, and reported in 172 Fed. (2), at page 12, and the decision is written by Circuit Court Judge Stevens and in the case generally a man was charged with having impersonated a federal officer and was found guilty of that charge and then he was subsequently indicted and tried and found guilty of perjury committed during the first trial, and our reading of the volume shows substantially as it relates to Rule 17(c) apply to anything like our present facts, simply that when the trial was on—I am now on page 14:

> "Before the date set for the trial of the case, appellant made a motion for the issuance of a subpoena, under Rule 17, Rules of Criminal Procedure, and for a continuance, but the court denied it without prejudice. Before going to trial appellant made a motion that the case be continued because certain letters had not been received or witnesses subpoenaed, and this motion was renewed at the close of the Government's case in chief."

And at the conclusion a similar motion was made, but in that particular case, as I read this decision, it was held to be no error because a continuance was denied in order that a certain letter might be made available or further efforts might be made

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to develop the whereabouts or contents of such a letter.

So then if we take the ruling of the United States Supreme Court in the Bowman case and restrict it to what it actually held under the proposition of law that a case is to be taken for what it holds, why it is not considered here that the holding of the Bowman case, which was this person who had refused to produce records in response to the subpoena duces tecum was not in contempt of court for such failure, we find that has no governing authority against this motion to quash, but on the contrary you can find certain portions of it that would have close application to this situation where the Court says, for example—this is on page 7 of the advance sheet, in the concluding portion of the opinion—it says:

> "Clause (c), which is the last clause in the subpoena, reads as follows:
>
> " 'are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. * * *' "

And I ask the Court to note the very slight departure made from that language, which was characterized as a fishing expedition, the language by the United States Supreme Court, from the language appearing in the concluding portion of this instant subpoena duces tecum and essentially it is a transposition of language similar and the insertion of additional clause in there and the fishing expedi-

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tion language is left there. But the Court then said:

> "This is a catch-all provision, not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up. The clause is therefore invalid."

And it held that one would not be held in contempt under a subpoena that is part good and part bad. Now possibly there has been an effort made here to take out the bad part, but I do not see where that has been accomplished and under the ruling of the Bowman case this subpoena, with its fishing expedition language, I would say would come squarely under the Bowman case. Well, I can make a comparison here. Here is the fishing expedition language, the quoted portion, as compared with the language in the instant subpoena. I refer to Clause (c). If the Court will look at the quoted portion in the Bowman decision and then look at the clause, same (c), in our present subpoena, the Court will see what I mean. On the last page of the Bowman decision. The Court has a discretion here but it is the government's contention that there is nothing in the Bowman decision that abandons that discretion of the Court requiring protection of what amounts to a discovery proposition, as stated. In the Bowman decision we have the following language:

> "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms."

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And the Court recalls there it is seizure by process. Here Rule 16 has been invoked. The motion is based on Rule 16, has been denied, and now counsel are back with Rule 17(c) and it may be that under this Bowman decision there is this right of discovery. The government contends otherwise.

The Court: We will take a recess until 1:30.

Afternoon Session—November 27, 1951, 1:30 P.M.

Mr. Pike: I had finished addressing the Court on the opening argument to quash subpoenas.

Mr. Golden: If the Court please, as counsel has indicated, there are two motions here, the first of them a motion for production and inspection of books, papers, etc., and it calls for, as counsel has stated, all these documents, with the exception of certain items which we consider to be private memorandum and inadmissible in evidence, private memorandum belonging to the government, which we are not asking for. It calls for all the material admissible in evidence which has been admitted in evidence before the grand jury, or is intended to be used in evidence at this trial, or which could be used in evidence, either for or against the defendant. In other words, I would like to make it quite clear at the outset that the only things we are asking for are things which are admissible in evidence. Now counsel says, how can you tell in advance whether something is admissible in evidence or not. What we call for, and what I think anybody reading it would understand, what we call for is anything which, under the accepted rules of this court, would be admissible in evidence.

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This motion is made in connection with the subpoena which was issued in accordance with Rule 17 of the Criminal Rules and likewise in accordance with that section the government made a motion to quash the subpoena. As counsel has indicated, the controlling portions of that rule, for the purpose of the two motions—if I may be permitted to read that again, just so we have that in mind right here. As to the government's motion, the sentence is:

> "The court on motion made promptly may quash or modify the subpoena if appliance would be unreasonable or oppressive."

In other words, I submit to your Honor respecting that, subpoenas which were issued as a matter of course under the rule cannot be quashed unless your Honor finds that the compliance with those subpoenas would be unreasonable or oppressive.

Now then our motion is made under authority of the sentence that follows in Rule 17:

> "The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects, or portions thereof, to be inspected by the parties and their attorneys."

Now your Honor will note the very purpose of this motion and of that sentence is that these documents and objects be produced either prior to the

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trial or prior to the time they are offered in evidence. We have under the rule, if the Court please, I submit a perfect right to subpoena anything which the government has, subject only to the limitation that if the Court finds that what we call for, that the supplying of what we call for, would be unreasonable or oppressive, the Court may limit us, but the purpose of our motion is not to ask for a validation of the subpoena—the subpoena is valid —the purpose of our motion is to ask that these matters be produced in advance, as provided by the sentence I just read.

Now your Honor has in mind, I am sure, and your Honor's recollection was partly refreshed this morning by Mr. Pike, that this is the last in a series of efforts by the defendant—and I do say this respectfully—to compel and force the government to tell us what this defendant is charged with and give us sufficient information to enable us to prepare our defense. Now I know that ordinarily an indictment tells the defendant what he is charged with and I know that ordinarily—although this is in the discretion of the Court—ordinarily the testimony before a grand jury is not available to the defense in federal courts. However, your Honor, I am sure, has in mind that this indictment simply charges the defendant with a wilful nonpayment or evasion of lump sums of income tax for specific years and does not give him any information whatsoever as to the basis on which the government is going to make its case, and at this point I call your Honor's attention, without going

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into any detail, to the affidavit of Mr. Spurgeon Avakian on file herein, which is one of the affidavits which was used before your Honor last week in Las Vegas, and in that affidavit, on page 5, it is set out in columnar style, so it is very easy to read, for each of the three years the returns which the taxpayer made—when I say the returns he made, I mean the amount of tax shown by the returns he made—in the first column; in the second column the amount of tax which the government claims civilly he owes and in the third column the amount of tax upon which this indictment is based, and the figures are very interesting. For example, the tax on returns for the year 1944 is 19 thousand and tax by the 90-day letter is 136 thousand plus and the tax according to the indictment is 67 thousand plus. 1945 is even more interesting. It varies between 59 thousand for figures shown by the returns to 265 thousand by the 90-day letter issued by the plaintiff in this case, and in the indictment it is down to 75 thousand. The totals show return and tax of 100 thousand that civilly it claimed it should have been almost 600 thousand and on the indictment that is something over 300 thousand. I believe the indictment, as a matter of fact, only charges about 155 thousand, but in any case there is a great variance between the figures. I am not going into any detail, your Honor, in the matter of those particulars. That matter was argued here. I do want, however, and I think I should in fairness to our client, inform the Court of an impression the Court apparently has, which we believe is

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incorrect. I refer now, your Honor, to a statement made by the Court at Las Vegas last week—we had the proceedings written up—I don't know whether the Court or the government ordered or have copies, but this copy is available to anybody who wishes to read it, and at that time your Honor, I believe the Court was under the impression that in connection with that demand for bill of particulars there dilatoriness or something of that nature on the part of defendant's counsel. Your Honor said this:

> "I have a recollection of the hearing June 15th in Carson City on motion for bill of particulars. I think at the conclusion of that hearing the Court suggested that counsel confer with Mr. Golden and Mr. Pike and the suggestion was made that certain information be furnished Mr. Golden at that time, and I also recollect that the Court at the time, in the event Mr. Golden did not receive the cooperation from Mr. Pike that the Court indicated should be given, he could apply to the Court later. Now no application of that kind has been made in relation to those proceedings June 15th."

In other words, I gather from that, your Honor, that the Court is under the impression that after the argument on the bill of particulars and after the Court's denial of it on June 15th, the door was left open to us to reapply. What actually happened, if I may refresh your Honor's recollection,

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is this. The indictment was filed on the 9th of April. Defendant was arraigned on the 27th of April and made a motion for bill of particulars. At that time your Honor suggested that counsel on both sides get together and if the government did not supply what the defendant felt he was entitled to, then the defendant could apply to the Court for an order on motion for bill of particulars. Now the motion for bill of particulars was filed on April 27th. On May 11th, hearing nothing, I wrote to Mr. Pike. I did not get an answer. I discovered later—this is not meant to be critical—that after he got my letter at Reno he forwarded it to Mr. Campbell in San Francisco, but at any rate, not hearing from Mr. Pike in answer to my letter of may 11th, on May 17th I wrote to Mr. Dickey, the clerk of this court, and he replied on May 21st, telling me that he had taken up the matter with the United States attorney. I have all those letters here and if it is felt to be of any consequence, I would be very happy to read them into the record. Now hearing nothing from the government, on June 1st I wrote to Mr. Pike and asked him to arrange for a date for argument on bill of particulars and then I got a letter from Mr. Pike telling me that the matter would have to be taken up with the Court and a date was arranged for June 15th. In other words, your Honor, the opportunity to get any information about this charge from government counsel was requested before the argument on the bill of particulars and it was pursued with dispatch and we waited an interval of some

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two weeks, wrote to them, heard nothing, had correspondence back and forth, and finally it was put on the calendar and then your Honor denied that motion and there was thereafter no indication from either the Court or counsel that we could make any further attempt by way of bill of particulars to determine just what the government is going to charge at the trial of this case, because we couldn't get that information from the indictment.

Now may I pause there just one moment, your Honor. At the time your Honor denied that motion I did not take an exception and I believe under the rules that is not necessary, but may I just for the purposes of the record at this time renew the motion for bill of particulars and except to your Honor's denial.

The Court: I have no objection to exception being noted as of that date.

Mr. Golden: All right, thank you.

The case at that time was set for November 7th for trial and by virtue of the congestion of the calendar it was continued, first to November 15th and then to November 28th for trial. Now on November 15th in Las Vegas Mr. Gillen, on behalf of the defendant, made two motions, one for continuance, one to inspect and take copies of certain material which the government had. Now I take it from the transcript of the proceedings down there that your Honor denied the motion to inspect, largely if not wholly, upon the ground that your Honor was given the impression that the defendant had had ample opportunity previously to

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inspect and take copies of the material which he was entitled to have under Rule 16.

In that connection, may I call to your Honor's attention at this point the fact that Mr. Campbell's statements before your Honor on November 15th are not positive statements, but rather either based on hearsay, you might say, or at any rate vague. There are two statements, the first is on page 26, in which Mr. Campbell says:

> "Now I might state to the Court that these records, to which counsel previously referred, the records which are still in possession of the government, have been examined, and I believe in detail, * * *"

Those are his words:

> "* * * and I believe in detail, by the representatives of the defendant Remmer."

And again on page 27 he says:

> "I am advised Mr. Friedman, together with some associated accountant in his office, spent approximately a week going over these records."

"I am advised" that Mr. Friedman did that. Mr. Campbell is not speaking of his own knowledge.

Now it never occurred to us, in preparing those motions, that Mr. Campbell might not have personal knowledge of the actual situation and therefore, to cure that what we believe was misstatement given the Court, we have prepared an affidavit in

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connection with this motion, to which I will refer in such a motion, but on connection with those motions in Las Vegas, we, for the same purpose at this time renew them and except to the Court's denial.

The Court: The exception may be entered in the record.

Mr. Golden: Now without further preliminaries, we come to these motions here. Now in discussing this I am going to talk in favor of our motion and against the government's motion all at the same time, because the motions are really contradictory to each other, in our opinion. One of the points which the government makes is that this case is set for trial tomorrow and by inference therefore our motion is not timely and their motion should be granted, because it comes too late. In that connection, your Honor, the language which I read from Rule 17 of the Rules is, I believe, a complete answer. It says that the Court may direct that these matters be produced at a time prior to trial or prior to the time when they are to be offered in evidence, which to us means that a motion could be made even in the middle of the trial that certain matters be produced in advance for inspection of the defense, and I might say to your Honor, because I expected Mr. Campbell would be here, but it is the practice in San Francisco, which, of course, is not binding upon your Honor, that those motions are accepted or entertained during the middle of a trial and in this last case which Mr. Campbell prosecuted such a motion was made and granted. I am not

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saying that as any authority, but simply referring to it.

Furthermore, your Honor, it was only on November 15, 1951, that we learned, through statements of Mr. Campbell, at that argument, that material, which they have which we are trying to see and which they do not want to let us see, is material which, according to the government, was not obtained by seizure or by process and therefore would not be available to us under Rule 16 but only under Rule 17. That appears on page 25 of the transcript, where Mr. Campbell says:

> "I might say none of the records referred to which I am referring to, or any of the records in connection with this case, were obtained by the government either by process or by seizure; all records were given voluntarily to the government by third parties."

Now we didn't know that until approximately ten days ago and immediately upon return of Mr. Gillen from Las Vegas and the delivery of the transcript of what was said there, this present motion was made.

There is one other little point I want to mention in that connection. Mr. Campbell stated at that hearing—and I am saying this in self-defense—that it appeared Mr. Semenza had been on power of attorney signed by the defendant for a long time, and by inference he indicated that he had become connected with this case only in September, 1951. The fact of the matter is, as I pointed out to the government, civilly he is claiming a

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large amount of money from this defendant, a different amount, based upon different factors than this indictment is based on, and while Mr. Semenza has been on that power of attorney and has had opportunity to do some work in connection with this 90-day letter, we are now met with an entirely different case and it was only in September that we were able to make arrangements, which are not financial arrangements, I might say, that he would express himself as willing to associate himself and work on this criminal case and at the times that the accountants in San Francisco and Mr. Semenza, according to Mr. Pike's statement this morning, were permitted to see these matters, there was at that time no indictment, there was no reason for them to look at those matters from the point of view of this indictment. They couldn't. They didn't know what the indictment said.

To go into this a little further, one of the new affidavits—and I am not going to read the ones we used in Las Vegas, they are available—one of the new affidavits is that of Mr. Gillen and I will either read it in full or describe it, as your Honor desires. Has your Honor had an opportunity to read it?

The Court: No, I have not read it.

Mr. Golden: Will it be all right if I just paraphrase it?

The Court: Yes, sir.

Mr. Golden: Mr. Gillen recites he is an attorney and one of Mr. Remmer's attorneys here and that at a time in the latter part of March, 1951——

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The Court (Interceding): I think this is practically the same as the matter we had in Las Vegas. The facts in the affidavit here this morning seem to contain facts brought before the Court in Las Vegas.

Mr. Golden: This particular affidavit of Mr. Gillen's is to a large extent to remove certain impressions that we felt the Court had as to the facts in the matter in Las Vegas in connection particularly with your Honor's statement in Las Vegas that the defendant himself had never said he was without funds, but only through his lawyers.

The Court: Isn't this motion to the same effect as that in Las Vegas?

Mr. Golden: No, your Honor.

The Court: This is a motion for continuance and——

Mr. Golden: To inspect and take copies.

The Court: What is the difference between that motion and the one now before the Court?

Mr. Golden: The one in Las Vegas was to inspect and take copies of material which was obtained by the government by seizure or process. Now they come in and say they don't have, on November 15th they say they don't have, any such material obtained by seizure or process and we now are making motion to obtain all the material which is admissible in evidence, either for or against the defendant. It is not limited to material obtained by seizure or process. It is a motion to see in advance evidence and matters which may be used as evidence. Under the Supreme Court case, which

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I am getting to in just a moment, a distinction is made between matter obtainable under Rule 16 and under Rule 17(c).

The Court: Well the motion formerly made was made under Rule 16?

Mr. Golden: Yes, your Honor.

The Court: And the present motion has nothing to do with the subject matter of Rule 16?

Mr. Golden: No, it has not, except to this extent, that as the Supreme Sourt had held the matter objectionable under Rule 17(c) may include matter also objectionable under Rule 16, but Rule 16 is more limited, more restricted, than Rule 17(c), that is, as to the type of material taken.

The Court: A motion under Rule 16 could only operate on and have effect upon matters which had been taken from the defendant——

Mr. Golden: Or belonging to him.

The Court: ——or belonging to the defendant or obtained from others by seizure.

Mr. Golden: That is right, your Honor. As I said, Mr. Campbell stated to your Honor last week that none of the material which the government has was obtained by seizure or by process; therefore, now, in view of the denial of that motion and in view of this statement, we make this motion under Rule 17(c).

There are two purposes to Mr. Gillen's affidavit. Without reading it in full, one is it points out that at all times in the matter of the defendant's financial position—and he has brought out and does have perhaps some bearing, although we do

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not think so, the Supreme Court and government has mentioned it—that he has been willing to make an affidavit that he is without funds. The only affidavit he is unwilling to make, on the advice of counsel, is the detailed statment of his assets and liabilities and the reason for that is he can not, because he has not got the information because he has not got the money.

The other purpose which Mr. Gillen's affidavit serves, your Honor, is to bring into the files of the matter and officially before the Court, the letter which Mr. Avakian wrote to Mr. Campbell, which Mr. Gillen read while in Las Vegas. This is a six-page letter. This transcript we have is the only one available, but we wanted the matter officially before the Court.

The Court: Did you ever hear of a subpoena duces tecum used for the purpose that you are attempting to use one here? Have you ever in your practice before served a subpoena upon an attorney for the government in a case of this kind, or in any criminal case?

Mr. Golden: Those are two different questions, your Honor.

The Court: Well, they are, but it occurs to me that the purpose of this rule is to require the presentation in court by a witness in the trial or to bring into court certain matters that some person has in his possession that you believe to be matters of evidence in a trial, not, as Judge Holmes stated here, for the purpose of discovery.

Mr. Golden: Well, we quite agree, your Honor,

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that the purpose of Rule 17 is not for discovery.

The Court: That is what we have here. It is what it will result in.

Mr. Golden: No, I say respectfully, that your Honor assumes that because Mr. Pike——

The Court (Interceding): In your subpoena did you point out any specific document or paper that you want?

Mr. Golden: Well, the answer is no and there was a reason for that. The chief reason is that we do not know what they are.

The Court: "* * * books, papers, documents or other objects designated therein," that is the language of Rule 17(c) of the Federal Rules. You just name papers, not what papers they are or whose papers they are or anything of the kind.

Mr. Golden: May I then, in view of your Honor's question, rearrange this a little bit and go immediately into the matter of the Bowman Dairy Company vs. United States, and I want to say right now that any decision by any district judge in 1949, no matter how great an authority he may be, is as naught compared to a 1951 decision of the Supreme Court: The law is what the Supreme Court says it is, even if this gentleman did write the rules. He may have intended one thing, but the Supreme Court said he said another thing. The subpoena in this case, your Honor is word for word with the subpoena in the Bowman case, with one exception, and if your Honor will permit me, may I tell you briefly what this case is about.

That was a Sherman Act prosecution and the

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United States attorney, or special government prosecutor, was subpoenaed by the defense, the same as here, and also a motion was made under Rule 16, as well as a motion under Rule 17(c). The motion under Rule 16 was granted by consent. The government in that case did not have any objection to giving the defendants the information. As to the motion under Rule 17(c), the government was willing to give the defendant some of the things he wanted, but not all of them. The court points out—we are using different volumes—but the court points out prior to the motion that the government made an offer, which did not include documents "furnished the government by voluntary and confidential informants." Now the district court held the government attorney in contempt. The Circuit Court reversed it, it went to the Supreme Court, and it is true, as Mr. Pike says, that the government attorney was finally not held in contempt, but the reason he was not held in contempt was because the subpoena in the Bowman case called for, sub-section (c), to which Mr. Pike referred, for material "relevant to the allegations or charges contained in said indictment," and I am quoting, "whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants." Obviously we all know, from general practice, that the defendant, despite the rules, is not entitled to get things which the government has which are not evidence or may not be admitted in evidence, so in our subpoena we changed it and our clause (c)

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refers only to matters, and I am quoting now: "admissible in evidence either for or against the defendant with respect to any of the allegations contained in the indictment," and then it goes on to say, "including * * *." Now with that exception, which makes our subpoena narrower, because we only call for what is admissible in evidence rather than everything that is relevant, whether or not it is admissible, as is the Bowman Dairy case, with that exception our subpoena is word for word, your Honor. The matter appears in the third paragraph of Justice Minton's opinion. It quotes here as to what it was in the Bowman case:

> " 'all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) * * * ' "

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as Bowman has it:

> "'* * * are relevant * * *'"

as we have it: "are admissible in evidence."

> "'* * * to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants * * *'"

Now regardless of whether Mr. Pike thinks this is a fishing expedition or any skepticism he may have by reason of his position, inclination or strong belief upon the matter, what does the United States Supreme Court say about that kind of subpoena:

> "The defendants had the right to subpoena all materials in possession of the government which were admissible in evidence, including those obtained by it by solicitation or voluntarily by third persons, but the trial court, in weighing production of materials of the latter kind, should uphold protection against disclosures of identity of persons and the method, manner and circumstance of the government's acquisition of these materials."

That is fundamental. We do not need to know who gave them or under what duress or promises. We are not interested in that. We are just interested in seeing—if I may read very briefly from the opinion. The court says this:

> "It was intended by the rules to give some measure of discovery. Rule 16 was adopted

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for that purpose. It gave discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be numerous and difficult to identify. The rule was to apply not only to documents and other materials belonging to the defendant, but also to those belonging to others which had been obtained by seizure or process. This was a departure from what had theretofore been allowed in criminal cases.

"Rule 61 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such materials so as to inform himself.

"But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be

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strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17(c)."

And then here we have other documents:

"There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17(c) to that end by its power to rule on motions to quash or modify.

"It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms. Rule 17 provides for the usual subpoena ad testificandum and duces tecum, which may be issued by the clerk, with the provision that the court may direct the material designated in the subpoena duces tecum to be produced at a specified time and place for inspection by the defendant. Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place

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before trial for the inspection of the subpoenaed materials."

Then as a matter of fact, the case it cites will be the case, the district court case, which counsel was reading from this morning, United States v. Maryland & Virginia Milk Producers Assn., 9 F. R. D. 509.

"However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. It was material of this character which the Government was unwilling to stipulate or produce or to produce in obedience to the subpoena."

The Court: What were the contents of the subpoena in this Bowman case?

Mr. Golden: You will find that, your Honor, in the third paragraph of the opinion. It says, Mr. Justice Minton:

"Petitioners also moved under Rule 17(c) for an order directing the Government at a time and place to be specified therein to pro-

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duce for inspection certain other books, papers, documents and objects obtained by the Government by means other than seizure or process. Petitioners filed and served on the Government attorneys a subpoena duces tecum, the pertinent part of which reads as follows:

* * *"

And then the following paragraph quotes the subpoena, your Honor.

The Court: What part of that subpoena did the Court declare to be a fishing expedition?

Mr. Golden: Paragraph (c), at the bottom of that paragraph. It is in quotes:

"* * * are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The Supreme Court said that was invalid and that is why I changed it.

The Court: You may proceed, Mr. Golden.

Mr. Golden: I would like to say, your Honor, that we filed, in connection with this motion, to offset the information which Mr. Pike has and which Mr. Pike had apparently from Mr. Campbell, this information to the effect that we spent about a week looking at these documents. That is the affidavit of Mr. Miller, it is only one page. He works for Mr. Friedman, and the gist of it is that that office, Friedman's office, spent altogether only twelve hours looking at government records,

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in which the affiant spent eight hours, and that all they did was to survey it to see what would be required to analyze it and then they gave up because of lack of funds, they were unable to do it.

Now is the first time I heard—of course it is true, but new to me and I think Mr. Pike is misinformed—today is the first time I heard Mr. Semenza had an opportunity to see the material the government has. It is true he saw certain records which he took away, and while I would like to defend myself in that act, I do not suppose your Honor wants to take the time to go into it now, because it is a side issue, but to my knowledge the stuff Mr. Semenza saw is the stuff he took away with him, but he never was given the opportunity, or did he see the material which the government still has. I do not think it is our fault—as I say, I would be glad to defend myself under oath or otherwise—the fact remains, however, that the material which we charge the government has seen and saw for as long as it wanted to and gave back to us voluntarily, that material which they photostated and whatever they wanted to do with it, that belongs to us. It belongs either to the defendant or to his alleged partners or to his alleged employees. It isn't the government's. That is material which is ours and they say, in effect, "We gave you back material that doesn't belong to us, although we got hold of it some way or other, and now you won't give it back to us, so we are not going to let you see it." Well, that is cat and mouse stuff. Maybe they do not trust us and I

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submit, your Honor, regardless of that so-called Semenza incident, which I am further prepared to go into, except I do not believe your Honor wishes me to take that time, that we are, under the decision of the Supreme Court here entitled, as a matter of right—and I say this *respectively*—entitled as a matter of right to see this material, under such reasonable safeguards as your Honor may provide. We do not pretend we are entitled to take it away. We do say that we are entitled to see it for the purpose of the case and we are entitled to see what they have used or are going to use or what could be used, either for or against the defendant. I respectfully submit to your Honor, regardless of what has or has not gone before, there is no escape from the plain language of the Bowman case, and again I say this respectfully, regardless of what any man or official may think of the defendant or his motives—and that is not the issue here—the point is that the government says that that rule was made and means this and we are entitled to that under such safeguards as will, in your Honor's opinion prevent it from becoming a fishing expedition. Thank you.

Mr. Pike: Your Honor, in my opening argument in support of the motion to quash the subpoena duces tecum served upon Walter M. Campbell and myself, which I made this morning, I was afforded an opportunity to speak at some length, in the course of which I undertook to analyze, to the best of my ability, the holding of the United States Supreme Court in the Bowman Dairy case,

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as well as other authorities cited to the Court. I say again, referring to the cases for authority what it actually holds, that it does not undertake to deprive the trial court of the exercise of its discretion under the particular facts and conditions appearing before the Court as to what would be the permitted course of discovery to the defendant in a criminal case, having in mind the language of the Bowman case itself, as it has been read to the Court several times in the course of this hearing.

Factually, referring to the correspondence of May 15, 1951, letter from Mr. Golden to me in my official employment as United States attorney, he did, of course, make reference to the fact that motion for bill of particulars had been filed and inquired, in substance, what might be accomplished without a court hearing and I did, in turn, discuss that with Mr. Campbell, with the result that nothing was accomplished and there was a hearing had before this Court, at which time motion for bill of particulars was presented and was denied by the Court:

As to the opportunity accorded the defendant through his authorized representatives, Mr. Friedman and Mr. Semenza, to inspect the records in question, I wish to state again to the Court that Mr. Ray Weaver of the Bureau of Internal Revenue in San Francisco is present in the courtroom, and based upon information he has given me, in addition to the statements made in Mr. Campbell's affidavit and the representations made

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by Mr. Campbell before the Court at the time of the Las Vegas hearing November 15th, it is my understanding that Mr. Semenza was given access to all of the records then in possession of the government at San Francisco, with the exception of what we could properly say the exception of the subpoena here, these narrative statements and the reports of agents and like material, referred to in the Maryland & Virginia Milkers decision as lawyers' work, or some equivalent language, and that the defendant was not only given the opportunity of inspection, but he was given the right to select from the records such records as he wishes to take with him, upon giving a receipt for the same, that he selected what he wished to take with him and that has been the last custody that the government has ever had of those records.

I feel that I have presented the government's contention that this motion to quash the two subpoenas should be granted, and as I have used the language "fishing expedition," it is not my language, as attributed to me by counsel, but it is the language of the United States Supreme Court in the Bowman case. It is not a question of my occupying the position of judge, but I said what the highest court in the land has said in relation to granting any improper discovery in a criminal case as to the evidence proposed to be used by the government. I believe that that concludes what I have to say on the merits of this motion. I do not think that this is the appropriate time to introduce evidence in the form of testimony of Mr. Weaver,

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because I think we are getting away from the point governing the legal argument that is sought to be applied to this motion to quash, and I am not going to call Mr. Weaver as a witness, because his testimony will essentially relate to Mr. Semenza's inspection of the records, and that is only part of the matter being considered. However, your Honor, I am obliged to say this, that there is another matter which I must bring to the Court. I feel I may well take up the Court's time to do it.

Mr. Gillen: Let's take up one thing at a time. We would like the motion granted or denied.

Mr. Pike: I understand the only motion before the Court now is the government's motion to quash the subpoenas served on Mr. Campbell and myself. It is not my understanding that the Court consolidated that motion for hearing with defendant's motion to produce, although reference has been made back and forth.

The Court: Aren't they the same in substance; that is, the same matters are involved?

Mr. Pike: Well, I think this might well be true.

The Court: Do you want to argue now on that?

Mr. Pike: No, I do not. I have a matter entirely extraneous.

The Court: Let us take up this and finish that later.

Mr. Pike: Mr. Golden says he wants to say something further and if I understand the orderly procedure on the motion, the moveant makes the opening and closing.

The Court: We have a peculiar situation. We

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have argued two motions in the same argument, one side was the moveant and the other side was the opponent.

Mr. Golden: Your Honor, I only want to say these two things. First, I hope your Honor did not get the wrong impression from my closing remarks about the defendant's motive. The position is that because of history, because of having been doing right along, that we did want to say these things in advance in order to say what equally we are entitled to say under oath.

The only other thing I want to say is that by accident Mr. Campbell isn't here, although I feel the matter is as much hearsay to him as to Mr. Pike. We suggest, your Honor, if there is any doubt in the Court's mind as to just what opportunity we actually had to see these records, while it is our understanding that Mr. Weaver was present, both when Mr. Friedman saw these things and when the defendant or Mr. Semenza did, we would like to have him take the stand and answer such questions your Honor has and such questions we have on the subject.

The Court: My view I take in this proposition, I don't see that any testimony would alter the result of my decision on these motions. We had a motion for bill of particulars on April 27th and there was similar discussion. I thought at the time that perhaps maybe counsel could get together and have an understanding as to certain documents and matters which might be in the possession of the government.

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Mr. Golden: Excuse my interruption. The defendant is not dissatisfied with what they offered us—they never offered us anything. They told us it was a matter the Court had to decide.

The Court: However, it seems that this subpoena could have been obtained a long time before the day before the trial. Now Rule 16 provides for a method of discovery and inspection of documents, books and objects which have been obtained by seizure or process from the defendant or from any other persons. We have an idea of what the defendant wants to see at this late date, from the affidavit presented here by Mr. Miller. In his affidavit Mr. Miller says that in the spring of 1950 he was taken by Mr. Ray Weaver, a special agent, to a room in San Francisco and shown material which was stated to be records obtained by the Bureau relating to Elmer Remmer, that this material consists of a mass of original documents, such as adding machine tape, bank statements, cancelled checks, dealer's daily reports and daily information, relating to a number of businesses in which Elmer Remmer was alleged to have an interest, that this material filled a packing box of approximately 50 cubic feet in volume, plus several smaller cartons. Now to wait until the day before the trial to have a mass of such material turned over to you for inspection and production, it seems to me would be well within the scope of Rule 17(c), where it states: "The court on motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive."

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We are going to try this case tomorrow morning. How could we examine a roomful of various documents, machine tape, etc.?

The motion to quash is granted and the defendant's motion is denied.

Mr. Golden: May we take exception for the record, your Honor?

The Court: Yes. Defendant's motion for production and inspection of papers and objects is denied; for one reason particularly, that it was noticed here by the defendant just before the trial came on for hearing, the day before the trial.

Mr. Golden: Would your Honor permit me to make one observation of condition which your Honor could impose, which would amply take away the——

The Court: (Interceding) I do not know what you want to say. I read the Supreme Court decisions in this Bowman case and, of course, I am not going to criticize the Supreme Court, but I can't understand how the Supreme Court could seriously consider a subpoena in language like this: "all documents, papers and objects." It seems to me that fairness would require a statement or description of the specific document or book that he might be arranged to see in the hands of somebody else, and as Judge Holtzoff has quoted, "The purpose of this provision (17(c)) is a limited one. It is to make it possible to require the production before the trial of documents subpoened for use at the trial. Its purpose is merely to shorten the trial." Now if we have to give you a little time

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during the course of the trial to examine any document which is offered by the government in evidence, you are going to get that time to examine it.

Mr. Golden: Thank you, your Honor. I thought we could possibly work out a way——

The Court: We are going to take plenty of time to try the case and not hurry along. You can have all the time you need.

Mr. Pike: Before the Court leaves the bench, I am obliged to make an additional statement relating to this proceeding. The Court can appreciate I had no way of knowing what the Court's ruling would be on either of these motions. Your Honor, I feel that at this time it becomes incumbent upon me to invite the Court's attention to a situation that was referred to earlier in this hearing and which, by reason of the most recent development of it, has a very direct affect upon the future proceedings in this case, and I refer to the absence of Mr. Campbell.

This morning when Mr. Campbell was not here, I turned to the Court the only knowledge that I had with reference to his absence. I did that for the reason that he had been subpoenaed along with me by the subpoena duces tecum just quashed by the Court's order, to be here today. I can refer to the telephone conversation I had with Mr. Campbell on the afternoon of Wednesday, November 21st, and my understanding, based upon such conversation, he planned to be in Reno and Carson City Friday, November 23rd. I refer to the two telegrams that had been received by Mr. Brady,

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present in court, and who is with the Bureau of Internal Revenue, with headquarters in San Francisco, both of which were signed Walter M. Campbell, the first of which indicated a necessary delay that would cause Mr. Campbell to be in Reno yesterday, and suggesting that Mr. Brady meet him there at that time, and the second of the telegrams suggesting that due to a condition of ill health Mr. Campbell was not able to be in Reno yesterday, but that he would be here today, and suggested again that Mr. Brady meet him. During the noon recess of the court, and in fact just prior to coming in to the courtroom at 1:30, I received, for the first time, another telegram which was sent from San Francisco today, according to the markings on it, late in the morning, addressed to Mr. A. V. Brady, care of United States District Clerk, Postoffice Building, Carson City, Nevada, reading as follows:

> "Due to unforeseen emergency can not arrive and therefore request postponement."

Signed Walter M. Campbell.

Now, your Honor, I might say that this request on the part of Mr. Campbell has been in no way discussed with me. It comes as a complete and altogether new expression from Mr. Campbell and I am stating my position before the Court so the Court will understand the position in which the government counsel finds himself. In the first instance, it is to be noted that I have no reason to consider the telegrams other than a bonda fide wire.

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I know of no way to communicate with Mr. Campbell except the means that I have tried within the last day or so without success. I do not know the nature of the unforeseen emergence referred to in his wire. I do know this, however, that Mr. Campbell is the regional counsel of the penal division of the Bureau of Internal Revenue and that his official address as such is 100 McAllister Bldg., San Francisco 2, California, at which address I have communicated with him. Similarly I know in my official capacity that he occupies the official position of Special Assistant to the Attorney General of the United States and there is filed with this clerk, pursuant to the authority of the Attorney General of the United States, who is my official superior, a statement designating Walter M. Campbell, Jr. as a Special Assistant United States Attorney for the District of Nevada, which designation, as I understand, is effective for the purposes of this case of United States vs. Remmer. So I now find myself in the position, as United States Attorney, where Mr. Campbell, occuping those official positions, has by this wire directed to Mr. Brady, who is present in court at this time, requested the postponement of this trial.

As the Court knows, I resisted the motion for a continuance of the trial and Mr. Campbell joined me in resisting such motion, at Las Vegas, on November 15th. Mr. Campbell has represented to Mr. Brady in his wires, and I in turn have presented them to the Court, first stating in yesterday's wire his inability to attend by reason of ill health,

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and he has now stated his inability to attend due to unforeseen emergency and he states to Mr. Brady: "Therefore request postponement."

Now that is my present position in this thing, your Honor. I know the jury has been summoned, I know the witnesses have been subpoenaed, and I might say a considerable number of those witnesses, as well as jurors, are due to report in this court room at 10:00 o'clock tomorrow morning. If the case is to be postponed, I have brought to the attention of the Court the reasons for the postponement, the request of Mr. Campbell. Mr. Campbell has long been associated with this case. I do not say this in any critical sense at all, but at the motions in Las Vegas I was impressed by those circumstances that, in addition to the representations made to the Court by respective counsel for the defendant and by Mr. Campbell, speaking on behalf of the government, there were many extraneous matters, if the Court will permit me to say so, that in my opinion were not strictly evidence in the case, but they related to the dates of hearings, of conferences, of the exchange in correspondence, and many outlying matters, with which I have no familiarity, but with which Mr. Campbell's personal connection has gone back to a period of years and as a result, your Honor, I find myself in this situation where now this request, which I have no reason to question bona fide emanates from Mr. Campbell, and I am disclosing this to the Court at this time because I wanted to talk to my associates

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representing the government and decide just what I should do.

Mr. Gillen: Have you any objection to me looking at that telegram?

Mr. Pike: None at all.

The Court: You have here agents of the Internal Revenue Department, men who have gathered evidence, prepared the case?

Mr. Pike: We have those agents, I believe most of them available, your Honor. I have been asked this question outside court and I have answered it directly, so I see no objection to my making the same statement before the Court, because it is a factual one. When I was asked as to who was going to try the Remmer case, to use the language commonly applied to lawyers participating in a trial, I told them that it was my understanding that Mr. Campbell would handle the greater part of the court presentation of the government's case. Now most certainly that was my understanding and the preparation for the trial has been on that basis, with the understanding, however, that Mr. Thompson and I would likewise participate in the trial.

The Court: By the very meager application for continuance, I am not disposed to grant any continuance, Mr. Pike.

Mr. Pike: I wanted to present the circumstances to the Court and I did not feel I was in position to move for continuance, your Honor, and yet it seemed to me the request comes from a representative of the agency——

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The Court: That is why I inquired whether or not you had gentlemen from the Internal Revenue Department who had assembled evidence and participated in the preparation of this case, so we probably can go along with the case.

Mr. Pike: I think that is true.

The Court: It may require a little more time than it would if Mr. Campbell was here, but I can't see any reason why we should continue it. If that is an application for continuance, it will stand denied.

Mr. Gillen: May we offer this telegram in evidence and have it in the court records?

The Court: I would rather not.

Mr. Pike: Mr. Brady is present in court. I asked him to observe very carefully the other two wires.

The Court: I do not see any necessity of putting it in the record. We will recess until tomorrow morning at 10:00 o'clock.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes in case No. 12,177, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, at the Hearing on Plaintiff's Motion to Quash Subpoena Duces Tecum and Defendant's Motion to Inspect, held at Carson City, Nevada,

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on November 27, 1951, and that the foregoing pages, numbered 1 to 55 inclusive, comprises a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, December 17, 1951.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed December 17, 1951.

[Title of District Court and Cause.]

ARGUMENTS DURING COURSE OF THE TRIAL IN THE ABSENCE OF THE JURY

MOTION FOR RETURN OF DOCUMENTS AND SUPPRESSION OF EVIDENCE

Tuesday, December 12, 1951, 10:00 A.M.

(In the absence of the jury)

Mr. Golden: Your Honor, these matters are with relation to the material which, in compliance with the Court's order, the defendant's counsel deposited with the clerk on Friday afternoon, December 7th, at approximately 1:30, and also other books and records and material which is in the possession of the prosecution. Without reading the list which I read in part yesterday, for the sake of clarity that list is the same list as the list of documents which is contained in the subpoena which was served on Mr. Semenza and I assume that may be considered read, as it is already in the record.

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The Court: It may be deemed to have been read.

Mr. Golden: It was already in the record when Mr. Campbell read it. Also, for the sake of clarity, I am leaving out the matter of those three checks which we discussed several times and which Mr. Campbell has——

The Court: (Interrupting) I think I should let the record show the presence of the witness Pechart and he will be ordered to appear as a witness at the conclusion of this argument at 11:00 o'clock or thereafter. You may proceed.

Mr. Golden: Now your Honor will recall that on Friday, after court had adjourned, the government made a request to go through the material which we deposited with the clerk over the week end and we all repaired to chambers, and as a result of the discussion there and some brief discussion of the authorities, your Honor instructed the clerk to keep the material inaccessible to both sides over the week end.

Now as to the material which we deposited with the clerk, which consists of corporate records of the Cal-Neva corporation, we do not claim any legal privilege, other than the fact that that material was not in Mr. Semenza's possession when subpoenaed and therefore the Court's order to produce it is not effective directed to the defendant's attorneys, which Mr. Campbell himself, on page 480 of the transcript, says is entirely improper, but our motion before in regard to those corporate records is a practical one, your Honor. All the defendant's attorneys and accountants are living

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in Reno, which is some 30 miles from Carson City. While it is a beautiful day today, the weather at times at this time of the year is inclement and driving after dark is not always as safe as it might be. Furthermore, the night, that is the period of time from adjournment of court in the afternoon until the convening of court in the morning, is not long enough to divide up between the prosecution and the defense and we can't, of course, expect the clerk to keep his office open all night, but it is necessary for us to see those records frequently and sometimes every night.

Furthermore, as the record does already show, your Honor, the government had these records for a period of time sufficient to enable them to take copies and we believe that they have taken copies, and if they have not, we say that they were dilatory in not calling for the records before the trial began. Now those are the practical questions as to the corporate records.

Now as to the non-corporate records, in addition to the practical questions, we say that they are legally privileged and I now move the Court in the following respects: as to the records and materials which we deposited with the clerk on Friday afternoon last, we move the Court for the return of that material and also for the suppression of its use in evidence by the government.

Mr. Campbell: Is that a separate motion?

Mr. Golden: Yes. There are two separate motions. We move for its return and we move the

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Court to suppress its use in evidence by the government.

As to the material now in possession of the prosecution, which was seized, was taken by the Internal Revenue agents from persons whom the government claims to have been partners or agents or employees of the defendant, or from places in which the government claims the defendant to have been a partner or sole owner, we likewise make two motions; one, for the return of that evidence to us, and the other to suppress its introduction in evidence by the government.

Now in support of those motions, if the Court please, we start out with the element and proposition that a subpoena duces tecum or a court order for direction of documents may constitute an unreasonable search and seizure and, of course, there is no distinction really between a subpoena and a court order. A court order is actually a subpoena. Authority for the proposition that a subpoena duces tecum or court order may constitute an unreasonable search and seizure is the case of Hall vs. Hinkler, 201 U. S. 43. It would be equally error for the prosecution to call for the defendant to take the witness stand and the Court's order of the 6th of December, requiring the production of his records, is in the same category.

Now we offer to prove, your Honor, through the testimony of witnesses, that the government's acquisition of these records—that is both those on deposit in court and those that we say they still have in their possession—and the government's re-

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tention of those records and the government's demand for the records which they gave back to us under a condition which they had no right to impose, namely, that we would return them when they wanted them, constitute unlawful search and seizure under the Fourth and Fifth Amendments to the Constitution of the United States. The Fourth Amendment provides that: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

The Fifth Amendment provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Now the record is clear, your Honor, and we offer to make it more clear if it is not, by producing evidence of witnesses, that these records, that is, both those with the Clerk and those which the government still has, are the defendant's own property and that he is entitled to them under authority of the decision of the Supreme Court in Bowman Dairy Company vs. United States, with which your Honor is familiar, because that was our authority on the motion made on the 27th of November and that decision was followed, incidentally, in the United States District Court of the Southern District of California, Hon. Ben Harrison judge, in the case of United States vs. Capri, 21992-Criminal. We have the transcript of his decision here, which is a District Court decision, your Honor, in the Southern District of California, Judge Ben Harrison, 21992 Criminal, and the de-

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cision was on December 4, 1951. I have here an official certified transcript of Judge Harrison's decision, which I would be very glad to leave with the Court.

Now the papers we are talking about, your Honor, are not the corporate records, which the courts have held are not privileged because a corporation is not a person within the Fourth and Fifth Amendments of the Constitution which I have quoted, nor are they records required to be kept by law, which the courts have held are really public records, in which the government has an interest and which the government has a right to inspect, such as OPA records. The OPA cases go along on the point that sellers, merchants and those who were subject to the OPA regulations, were licensed by the government and as part of their license they were required to keep these records and they really are official public records, but the papers which we are talking about are papers which the government not only admits, but insists are the defendant's private papers. Under the Internal Revenue laws the only requirement is that a taxpayer, or potential taxpayer, keep such data as will enable him to determine his income and will enable the government to verify it. He can keep it on scraps of paper, it could consist merely of a cash register tape and a check book, any record would suffice, there is no requirement under the Internal Revenue laws that any particular kinds of books or records should be kept.

Now I refer your Honor to page 396 of the

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transcript to this statement by Mr. Campbell, and I am quoting:

> "To be perfectly fair about the situation, it is the contention of the government that all of these various enterprises which, with the exception of Cal-Neva, Inc., which is a corporation, were partnerships, in which the defendant here, Elmer Remmer, was a partner, and in that respect they are the personal records of the defendant, Elmer Remmer. They were not originally obtained by the special agent from the defendant, Elmer Remmer, but were obtained from third parties. I feel it is only fair that that statement be made to the Court."

That is Mr. Campbell's very fair statement. So these are private records of the defendant, and on page 408 of the transcript Mr. Campbell makes an equally fair statement. He says:

> "Mr. Golden knows it would be highly improper to serve subpoena on him as the attorney."

Now, your Honor, the interplay of these two great fundamental American constitutional provisions, namely, the protection of the privacy of the individual and the protection of the individual against compulsory production of evidence to be used against him, resulted in what is here called in law the doctrine of searches and seizures, which is so well epitomized in the leading case which we presented to your Honor on Friday afternoon in

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chambers; namely, Boyd vs. United States, 116 U. S., 616; 29 L. E. 746, and at page 751 of the Lawyers Edition the Supreme Court says:

> "Any compulsory discovery, like compelling of production of his private books and papers, to convict him of crime or forfeit his property, is contrary to the principles of a free American government. It is abhorrent to the instincts of an Englishman. It is abhorent to the instincts of an American. It may suit the purposes of despotic power, but it can not abide the pure atmosphere of political liberty and personal freedom."

Now in an annotation covering that case, which appears at Vol. 207 of U. S. at page 541, the following appears in better words than I have at my command:

> "In the leading case of Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, Sup. Ct. Rep. 524, it is held that it does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the 4th Amendment, but a compulsory production of a party's private books and papers, to be used against him or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment.
>
> "The question remains, when such compulsory production may be regarded as unrea-

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sonable. It is remarked in the foregoing case that there is an intimate relation between the provision of the 4th Amendment that 'the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated,' and the provision of the 5th Amendment that no person 'shall be compelled, in any criminal case, to be a witness against himself;' the court saying: 'They throw great light on each other.' For the 'unreasonable searches and seizures' condemned in the 4th Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the 5th Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the 5th Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the 4th Amendment. And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him, is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form are in their nature criminal.

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"A like idea has been expressed by other courts, and the general principle may be accordingly deduced that a compulsory production of private books and papers is unreasonable where it substantially compels the owner to furnish evidence which may be used against himself in proceedings of a criminal or quasi-criminal character."

Now, your Honor, the prosecution undoubtedly will advance the argument, which it already has advanced, that since it had those records at one time, the defendant has lost his privilege. We point out, of course, that the prosecution's testimony has not contended that the defendant personally ever waived his privilege or personally delivered any of these records to the government or personally authorized their delivery to the government. As a matter of fact, in chambers on Friday Mr. Pike expressed grave doubt as to whether the defendant's absence could be waived by his counsel or had to be waived by the defendant personally and where we are here, where we have a constitutional right, it would have to be waived by the defendant personally. The fact is, that the demand for these records by the government indicates that they hope to use them, or information gleaned from them, against the defendant. Now two wrongs do not make a right, as we all know. It was wrong for the government to take those records in the first place, because their only right under the statutes is to inspect them.

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The Court: I think we can agree, can't we, Mr. Golden, up to this time, in view of the order that was made in chambers, that the records deposited in the clerk's office, pursuant to the order made the other day, have not been examined or the contents of them divulged to the government's counsel?

Mr. Golden: I believe that is correct, your Honor, yes.

We offer to prove, through the evidence of witnesses, under Rule 41(e), which requires the Court to take such evidence as is necessary to determine whether or not they have been acquired under unreasonable search and seizure, that the government's taking of those records in the first place was wrong and under the authorities here it is wrong for the Court to order us to deposit them in court for the prosecution's inspection and use in evidence.

The Court: You may present such evidence.

Mr. Campbell: I would like to be heard briefly before the evidence is presented.

The Court: All right.

Mr. Golden: The Court itself stated, when charging the jury here, a fair trial is the bulwark of America and I would like to read to your Honor one brief passage from the case in which the opinion is written by Judge Learned Hand, a very learned judge of the federal court, United States v. Coplon, 185 Fed. (2), 629, at page 638. Judge Hand says:

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"But we can not dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom, and is on the path towards absolutism."

Now, your Honor, we ask to present evidence here which, in connection with the acquisition and retention of all of these records by the prosecution or its agents, and under the ordering of that evidence, we ask your Honor to quash the court's order of December 6th and to return to the defendant the material now on deposit with the clerk, and likewise to order returned to the defendant the re-

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mainder of his personal private papers which the government has in its possession, and to suppress the use by the government in evidence of any of the material deposited with the clerk or any of the other property of the defendant which the government has in its possession. And I understand that before your Honor hears the testimony Mr. Campbell expressed a desire to be heard, your Honor.

The Court: Yes. I think the record makes it clear, does it not, that the order made the other day, ordering the defendant to deposit the records with the clerk, was made pursuant to a motion by the government?

Mr. Campbell: Yes, your Honor. The government requested that the records called for in the subpoena served upon Lawrence Semenza be produced. A hearing was held, at which time Mr. Semenza identified himself as an accountant for the defendant and that he had been an accountant for him for many years. He testified that he held, and had held for a number of years, the power of attorney of the defendant, authorizing him to represent the defendant before the Treasury Department of the United States. He stated in his testimony that pursuant to his employment he had gone to the Bureau of Internal Revenue, whom he knew to be in possession of certain records, and had asked for their use in connection with certain phases of his employment. At that time he was permitted to take away with him whatever books and records pertaining to those matters which he

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deemed useful in his work. At that time he wrote, in his own handwriting, and that was produced here in court in evidence, a memorandum setting forth or listing the various records which he took with him. On that occasion he testified that he agreed to restore those records to the Treasury Department whenever their need should appear. Subsequently, he testified, an additional account was secured for the defendant, one Nathan Friedman of San Francisco; that he delivered these books and records to Mr. Friedman, who also held, as I recall, a power of attorney from the defendant, Elmer Remmer. Subsequently Mr. Semenza was called upon, first orally, to produce such books and records in contemplation of the grand jury proceedings in this district. He stated that he made an effort to them, but found that they had been delivered by Mr. Friedman to the attorney, John Golden, who at that time, as I recall, was in the military service on annual maneuvers, or whatever they might be, but that he discussed the matter with another of Mr. Remmer's attorneys, Mr. Avakian, who advised him that he had not had an opportunity to go through the records. Subsequently, a subpoena was served upon Mr. Semenza to appear before the grand jury and produce those same records which were set forth in his receipt and which he had promised to return. He appeared before the grand jury without the records and according to his testimony gave substantially the same statements, that they were beyond his conrol to produce.

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The evidence then goes on to show, and was produced before the Court, that subsequent to the grand jury proceeding, at which time Mr. Semenza testified, that is before the grand jury as well as here in court, that the records were not in his possession, the records were restored to Mr. Semenza's possession and remained there in his possession until approximately, according to Mr. Semenza, a week prior to the time that the subpoena to produce those records in this court was served upon him. At that time he stated the books and records were delivered to the office of Mr. Lohse, a Nevada attorney and counsel in this case, who had just been associated within a few days' time, as local counsel for the defendant Remmer, and that the records were at that time in the office of Mr. Lohse where, I believe he testified, he was performing his work as an accountant for the defendant. So much for what the record shows in that regard.

Now Mr. Golden proposes two motions; that is, the return of the material and the suppression of the use of that material in evidence. Inferentially, at least, his motion would also include the use of secondary evidence obtained from inspection of those records. Since his motion is made upon the ground that the records were originally obtained through an unlawful search and seizure, he states that he bases his motion under Rule 41(e) of the Rules of Criminal Procedure. If I may, I will read that rule into the record, Rule 41(e): (Reads)

We are not concerned here, of course, with the issuance of a search warrant, so that if any of the

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grounds are applicable here, it would be ground (1), that the property was illegally seized without warrant. Continuing to read: "The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property should be restored unless. . . ." Now the last sentence, to which I particularly direct the Court's attention: "The motion shall be made before the trial or hearing, unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Now the law has been clearly established, through numerous cases, that a motion to suppress evidence, as having been illegally or improperly obtained, must be made at the first opportunity. It must be made at the time that the defendant first becomes aware that the evidence has so been obtained and that it is proposed to use such evidence against him. There have been some eight months elapsed since the indictment in this case. There have been several years elapsed since the material was in the possession of the agents of the government, to the knowledge of the defendant and his representatives, because they called upon the representatives of the government, through the instrumentality of Mr. Semenza, to obtain access and inspection of these various records.

Now if there were, and if there have been, any illegal obtaining of these records in the first instance, a timely motion should then have been

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made even prior to the indictment, but in the very latest point of time immediately after the indictment, to suppress evidence which the government had obtained, either by obtaining certain of the books or records, or to suppress evidence which they obtained by means of an inspection of those books and records, and I think the law is extremely clear in that connection.

The Court will recall that there have been several hearings with respect to these books and records and yet, for the first time and upon the trial of this case, counsel now seeks to raise the question of the original taking. There was no such claim made. For example, at the hearing at Las Vegas, when other records, which were obtained at the same time, under the same procedure, under the same method as those which are now deposited with the clerk were obtained, but which apparently were not considered by Mr. Semenza material for his examination, no such claim was made in behalf of the defendant that those records, which they sought to inspect, were illegally or improperly obtained by the government.

By making this argument, I do not mean to concede in any fashion that the government did not obtain these books properly and with the full consent and the willingness of the party who turned those records over to them in connection with their examination of the income tax liability of this defendant. As counsel has stated, the law requires that a taxpayer maintain such books and records as will adequately show his annual income for

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accounting purposes. It is true that the law does not require any particular kind of books, does not require double entry system or single entry system or even a formal set of books, but the law does require that a taxpayer keep such records as will adequately set forth his annual income for accounting purposes, as counsel says, so that the government can verify the correctness of his returns.

Now it had been my——

The Court (Interceding): Do you maintain that the records kept by a taxpayer are in the same category and would come under the same rule as OPA records?

Mr. Campbell: No, your Honor, and in that connection I am going to refer to a 9th Circuit case, but I do say once the taxpayer, either directly or through his agents, has made those records available to the government, or they have become available to the government through third parties, and the taxpayer, through his failure to assert any rights which he might otherwise have had, fails to take proper steps to obtain the return of those books and within a reasonable period of time, as set forth by the cases, then he has estopped any connection with those books because they have become books of account between him and the government.

In that connection, I wish to refer your Honor to a case in this circuit—before calling attention to this case, I might state counsel has referred to the Capri case, in which some motions were decided this month relating, I believe, to the inspec-

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tion of records, by Judge Harrison. I have not seen the transcript of that hearing, but I do know this to be a fact, that the motions made in that case were made promptly after the indictment. The indictment in that case, I do not believe, is 30 days' old and the motions I know were pending prior to the commencement of this case.

Now regarding the 9th Circuit case of Levin et al. vs. United States, reported at 5 Federal (2), 598. I might state to your Honor that this case, and several other cases upon which we rely, have been set forth in a memorandum which I wish to hand to the Court and will at this time hand counsel a copy. In this case of Levin the Court states:

(Reads from memorandum through first paragraph page 3 of memorandum.)

The Court then goes on to review the cases of Internal Revenue Agent v. Sullivan and United States v. Cooper, and finally under point (8) gives this statement:

(Reads page 4 of memorandum under (8).)

Now I also wish to direct your attention to the following case, that of Greenbaum vs. United States, 280 F., 474, a 6th Circuit case, which more nearly approaches the situation here than any case which we have been able to find. In some respects we are meeting a very novel situation, where the defendant's representatives, through promises which they either did or did not intend to perform at the time they were made, secured these books

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from the government, but at any rate, whatever the original intention was, when the time came for performance, the person making the promise had either placed himself in or had been placed in the position by others of having to say that compliance with those promises had been put out of his ability by his co-counsel or co-attorneys.

The Court: I think I will have the jury come in and excuse them so they won't have to sit around the hall.

Jury returned into court, admonished and excused until 1:00 p.m.

Mr. Campbell: Now in the Greenbaum v. United States case, 280 F., 474, apparently a contention was made by the prosecution of a similar situation which existed there, but the evidence fell short of establishing it, as it had in this case. Reading from page 478 in that case, set forth at the bottom of page 4 of the memorandum: (Reads from memorandum through line 1 on page 5.)

Now stop a moment. The evidence, of course, here shows, under oath of Mr. Semenza, that they were delivered to those holding the power of attorney, or to Mr. Semenza holding power of attorney, of Mr. Remmer, under promise to return. However, in this Greenbaum case it was simply a statement made by the District Attorney that he had been informed by somebody else. (Continues reading through line 5.) Again the evidence in the Greenbaum case has fallen short of that which is here. (Continues reading through line 8.) So I state, your Honor, the showing there fell far short.

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They were unable to establish that a promise had been made for the return of the books by the representative of the defendant, but here the showing is clear. (Continues reading through line 11.) I will not read into the record at this time the balance since I have handed your Honor memorandum stating further statements.

The Court: Does that statement of facts in that case show or refer to in that last sentence: "If a court has any power to make such an order as was here made, it should be exercised only where there is no doubt as to the facts," does the decision disclose what the nature of that order was?

Mr. Campbell: Yes, the court very simply, upon a statement of the District Attorney and without being able to substantiate it by proof that any such promise had been made, ordered the books produced and was there held to be error that he had done so and this decision which I have read to your Honor is pointing out the insufficiency of the showing which was made before the Court in that connection.

We have also cited to your Honor in government's memorandum, and which I will not at this time read into the record, inasmuch as it there before your Honor, the case of Mellett vs. North Carolina, 181 U. S., 589 and the case of United States vs. Amorosa, 167 Fed. (2), 596, a case of the 3rd Circuit.

Now the government's contention boils down to this: In the first place, the motion of the defendant regarding the suppression in evidence of these books

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or, if it be inferred that there also be included in that motion secondary evidence as to their contents, is not brought timely. The defendant had it in his power from t[illegible] first instance that he learned that these books and records were in the possession of the government, to have made timely motion. He knew it at the very latest in 1949, I believe it was, when Mr. Semenza called upon the Internal Revenue with respect to these records, as the representative of the defendant, and obtained them upon his promise to return. The very latest possible that that it would seem reasonable within which to have brought a proper motion would have been not later than the return of the indictment in this case, and yet some eight months have elapsed.

Further, while motions were made for inspection, both in Las Vegas and immediately prior to the beginning of this trial, no question was raised regarding the obtaining of the other records which are within the same category as these records referred to here.

Further, we believe, in the language cited by counsel from the Supreme Court case of Boyd vs. United States, 116 U. S., where the language is used that certain matters are abhorrent to the instincts of an American, we think the situation here presents a similar situation. If the books and records were returned to Mr. Semenza, if the promise made was made in bad faith, which I do not contend, your Honor, but if it was made in bad faith, that is important, and if their return was refused in bad faith, certainly that is important.

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The Court has made final orders with respect to the motions for inspection heretofore made, so that the last final order of this Court was the order to the defense counsel to deliver these same records, which were called for on that receipt, to the clerk of the court and which order, of course, has been complied with by counsel. So that as I see our problem, it is only in the nature of any problems which may have arisen since Friday, when the records were deposited. It is the government's position that under the circumstances, and under the somewhat peculiar circumstances of this case, it is entitled to full inspection of the records, but more important to their use in evidence in this case, and in the alternative, if for any reason the Court should conclude that the records themselves are beyond the reach of the government, then the government is entitled to produce secondary evidence as to the contents of those records. I submit, however, that with the records, the best evidence, being available and under the facts and circumstances of this case, that those records should be made fully available for inspection and use of the government in this case.

Mr. Pike called my attention to the fact that included in the motions of defense counsel was a request that evidence be taken going back to the original circumstances under which the records came into possession of the government. Now we presume that such matters, of course, were in the mind of the Court at the time the other orders in this matter had been made, both as to the inspec-

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tion of the records which are still in the possession of the government, to which counsel has referred, and with regard to these particular records within or at any seasonable time to raise these points, should clearly preclude the necessity of taking of the time of the Court as to going into those matters at this time.

Mr. Golden: If the Court please, if I may answer briefly Mr. Campbell.

In the first place, as to the timeliness of these motions, as Mr. Campbell himself points out, the defense made three motions prior to the beginning of the trial in this case, under respectively Rules 7(f)—that was for bill of particulars, 16, and 17(c). All those motions were denied.

We do not know, and never have known, just what it is that the government has in its possession, other than the records, of course, which were returned with Mr. Semenza and which were deposited with the clerk. What else they have, we don't know. This all addresses to the timeliness of this motion.

As to the records which were deposited with the clerk, Rule 41(e), which Mr. Campbell read, contains the sentence to the effect that the motion may be made at the first opportunity after the defendant becomes aware of the situation. That is down toward the bottom of the section.

Now to take this thing up chronologically—at the time Mr. Semenza was supposed to go before the grand jury with these records and at the time Mr. Campbell states I was on temporary active duty with the United States army and Mr. Se-

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menza got in touch with Mr. Avakian—this is all in the record, your Honor, it is not a gratuitous statement, it is in the record from the motion made at Las Vegas—Mr. Avakian advised Mr. Campbell as follows: that he did not know the names of the third parties from whom Mr. Weaver obtained the records or whether they were obtained in rightful procedure by law; furthermore, he did not know if they were returned to Mr. Remmer or some other party on the part of Mr. Remmer; furthermore, since Mr. Remmer, as the owner of the records, was entitled to them at all times anyway, the government at most had the right of inspection and not possession, and accordingly any condition exacted by Mr. Weaver from Mr. Semenza, acting without the knowledge or consent of Mr. Remmer and his lawyers, was of no legal effect.

Now it will, I am sure, be stipulated to be a fact here that some of these records, and particularly the ones on deposit with the clerk, were obtained by Internal Revenue agents from a man by the name of Maundrell, who years ago went to Honolulu to live and who is still living there and who has been here as a witness subpoenaed by the government since the beginning of this trial, and that is the first time that we were able to learn that he is the one from whom the government got these records. The matter of the timeliness of the motion, your Honor, is in the discretion of the Court, as far as the records are concerned, which are still in the possession of the government. If those records were obtained improperly or if their retention is im-

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proper, which we offer to show by evidence, it is not for the representatives of the United States to say that we did not complain about it soon enough. Any discretion your Honor has in the matter certainly should be exercised, the benefit of any doubt should be given to the defendant, who is raising these constitutional questions, but as to the records which are on deposit with the clerk here, our contention is, your Honor, that not only were they originally taken with a promise on the part of the agents—and we expect to show this through testimony—on the part of the agents to return them whenever called for, which is an antecedent promise to this promise, but also it is our contention that the Court's order itself does—and we say this respectfully, of course—itself constitute a violation of the defendant's rights under the Fourth and Fifth Amendments of the Constitution. That was only a few days ago, that was on Thursday, and on Friday we told the Court we wanted to present these matters and they were tentatively set for Monday and for the reason other matters occurring, they did not go on and today is Wednesday morning. There is nothing dilatory about that.

Now it appears to me Mr. Campbell's contention, from the authorities he presented here, that while ordinarily the prosecution is not entitled to private papers of the defendant, it is so entitled in this case because of the promise made by Mr. Semenza. That appears to be the gist of the matter, and he refers to the fact that Mr. Semenza was under power of attorney executed by the defendant. Well now we

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have for consideration, your Honor, the constitutional rights of the defendant. He personally must waive a trial by jury. He personally must waive any of his rights under the Constitution. Now if Mr. Campbell's logic is correct and if Mr. Semenza, or any other person acting under power of attorney, had said to the representatives of the government, "Mr. Remmer, the defendant in this case, is going to take the witness stand"—parenthetically may I say we do not know; whether he is or not depends on the case the government is putting on, I am not making any conclusions whether he will or not take the stand—if Mr. Semenza, under power of attorney, had promised that Mr. Remmer was going to take the witness stand, could the prosecution call for him to take the witness stand? Of course it couldn't. And so Mr. Semenza's promise, which we assume was made and which was made in good faith—in the first place, in consideration, as pointed out, by the fact originally the government promises to return the material to the person from whom they took it—Mr. Semenza's promise cannot waive for the defendant the Constitution of the United States, and we offer to show, as I say, the conditions upon which this material was obtained originally by the government. Like any case, like a title company, with the question of whose property this is in dispute, they go back to the beginning and they start in with the original title and they trace it back.

Now Mr. Campbell's third point, as I understand it, is this—that the government has secondary evidence of this material and he says if in-

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ferentially the motion is to suppress the use of that secondary evidence—well, I don't just follow, but in any case our motion here, your Honor, is for return of those books and for their suppression of use in evidence. If secondary evidence is offered by the government on the ground that the original evidence is not available, if it meets other tests, if it is competent material and relevant, and if secondary evidence was not obtained unlawfully it would be admissible, we are not asking your Honor at this time to rule that the government could not put into evidence, or offer into evidence, secondary evidence of those records in there. We are asking for the return of those records and be confirmed in our possession of them, so that we may use them and have them and if the government produces secondary evidence and it develops they got it lawfully and it is material and relevant, it goes in, but we say to your Honor we start out here with the fundamental propositions laid down by the Constitution and if they are to be whittled away, they are not to be whittled away by a promise made by an attorney in fact, even in good faith, and I repeat, your Honor, that we offer now to show the circumstances under which this material was originally obtained, including the fact that when obtained the persons who obtained it promised to return it to us, and we wish to call several witnesses on that point.

The Court: Now that raises a suggestion. No notice was given to the government whatever——

Mr. Golden: Notice of what, your Honor?

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The Court: Let me proceed.

Mr. Golden: Oh, excuse me.

The Court: ——of any intention to call witnesses. In other words, they have had no opportunity to prepare to meet the testimony of any witnesses who might be called at this time. There is no notice in this application that was given. It didn't appear from anything that was said in the oral motion, the oral motion having been made at this time. I could see if this request was granted, it could very likely result in a delay of this trial. I will deny that portion of the motion as coming too late.

Mr. Golden: May I interrupt your Honor? I just want to understand.

The Court: Yes. I deny the request to have evidence taken at this time as to the original custody of the books by the government or Internal Revenue Department.

Nothing has been suggested in any of the motions heretofore filed that would indicate an attack upon the government's right to have these records in its possession, an attack based on illegal search or seizure. Now the Greenbaum case lays out a pattern that I think we could follow here. There is no doubt here but there was a promise to return these books to the agent whose name was Mr. Weaver.

The motions of the defendant are denied. All motions are denied.

Mr. Golden: May I point out to your Honor

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that in our opinion the section of the rule, the sentence which says: "The judge shall receive evidence on any issue of fact necessary to the decision of the motion," is not a discretionary matter, but mandatory.

The Court: But I do not believe it is necessary to hear the evidence at this time. The motions are denied on all grounds.

Mr. Golden: The government did not raise the point they had to have notice. May I also point out in the Greenbaum case and all the cases, the defendant personally made voluntary delivery to the trustee. The essence of this case is that the defendant has not personally waived his rights.

The Court: The motion is denied and we will be in recess until one o'clock.

Thursday, December 13, 1951, 10:00 A.M.

(In the absence of the jury.)

Defendant present with counsel.

The Court: I understand, Mr. Golden, you have a matter you would like to present.

Mr. Golden: Yes, I will be very brief.

Your Honor, I would like to make the motion and state what it is to your Honor. I won't argue it unless your Honor wants argument, because the argument would be substantially as to the motion yesterday, and I assume from your Honor's ruling yesterday that your Honor will deny the motion, but I want to place the motion in the record.

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The motion, your Honor, is in connection with the testimony of the persons who have testified and introduced evidence regarding expenditures of the defendant, and I will just name them briefly without commenting on them. There is Shreve & Company, the witness Bray; Bullock & Jones, the witness Gillingham; the New York tailor, the witness Greenhouse; Stanley Furniture Company, the witness Hill; the contribution to the campaign in Alameda County, the witness was Mr. Murphy; Sulka & Company, the witness McCaffery; Franklin Hospital, the witness Oglesby; the insurance brokers, Tinneman, Bridgeford & Rainey, the witness Scollin; and the Blackstone Hotel, the witness was Mr. Strong.

Now it came to our attention over night, your Honor, that the information which led to the use of the testimony in evidence of those witnesses by the government came from papers which were taken by the government agents, the Internal Revenue agents, and we offer to show by evidence that those papers were illegally taken and retained and we move to strike out the testimony of those witnesses and the evidence introduced by them and to suppress the use of the records introduced by them and any other records which are based upon information so obtained, and particularly the evidence of the hospital bill; for this reason, your Honor, the government, we submit, finds itself upon the horns of a dilemma here. Either these expenditures are business expenditures, in which case they do not enter into a net worth case, have no bearing on the issues here, or else

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they are personal expenditures, non-business expenditures of the defendant, in which case the government, even more clearly than with regard to the record that we talked about yesterday, has no right to take the personal papers or retain the personal papers of the defendant. In other words, while a man is required to keep books or some data which shows his income, there is no requirement saying that he keep any account of his personal expenditures, when he buys a car or when he is sick in the hospital, or whatever it may be. We say the government is in that dilemma—either they contend that these matters are personal, in which event they had no right to take the information, got illegally, and under the well-known rule they can not use evidence illegally obtained, or the expenditures are business expenditures and do not enter into the case and are incompetent, irrelevant and immaterial. As I say, I won't argue the authorities in the matter, but we make that motion and we offer to prove, in support of that motion, that these personal records were illegally taken and illegally retained.

Now I just want to say this, your Honor, the records I am talking about now are not any of the records which were delivered to Mr. Semenza and which Mr. Semenza promised to return to the government. These are records which have never been returned to the defendant or any of his representatives, which we have never seen, which we tried to see by means of the three pretrial motions which were made here, and as I say, these records were obtained from people who had

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them, third parties who are named so far, without the defendant's consent or without his knowledge.

If I did not make myself clear, I offer to place witnesses on the stand who will substantiate by their testimony what I said.

The Court: I want to ask you a question or two, Mr. Golden. The basis of your contention now made, and the basis of the motion you have made in regard to the various records you mention here, is the same, that is, they arise out of the 4th Amendment.

Mr. Golden: And the 5th Amendment, your Honor.

The Court: You say that the use of these records or information derived from them would violate the provisions of the Constitution which reads: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated" and so on.

Mr. Golden: And the 5th Amendment.

The Court: Well, let us take this one first. The 5th Amendment that you deem applicable here provides that "No person shall be compelled in any criminal case to be a witness against himself."

Mr. Golden: Yes, your Honor.

The Court: The records themselves, assume that they were brought into the custody of the government without a violation of the 4th Amendment, there is no question but what they would be admissible in evidence?

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Mr. Golden: Well, you are assuming something, your Honor, which by the evidence——

The Court (Interceding): I want to take the thing as we go along. Let us assume now—I want to get your position if I can—start off this way, let us assume—I would like to have you argue if you want to; of course, you do not have to if you do not want to—let us assume that these records were properly in the custody of the government, the records of the defendant, of his accounts and checks and various books of the various business enterprises, particularly those which were conducted on a partnership basis. In that situation there would be legal objection to the introduction of evidence against him. Now I notice in the decision by Judge Hand, United States vs. Kelly, 55 Fed. (2), where in the syllabus we find this statement: "In trial for assisting and preparation and presentation of fraudulent income tax returns, taxpayer's books shown to have been kept in due course were competent evidence under the statute, though made before enactment thereof and subdivision, providing that section as a whole shall not be retroactive, does not require that documents kept in the regular course * * *" That is the general rule of evidence in Title 28 which is by the federal rules made applicable to criminal cases. Now records kept in the ordinary course of business of this defendant, I understand are admissible against him in evidence, unless they are procured as in violation of the search and seizure provision of the Constitution of the United States,

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the 4th Amendment. Now is there any fault to find with that statement of law?

Mr. Golden: May I ask your Honor a question. Is your Honor talking about business records, for example, of the Franklin Hospital——

The Court: No, I am talking about the business records of Mr. Pechart and the other gentlemen and this defendant in the 21 Club, in these various enterprises in which there is a partnership, but your argument ties in with all the other propositions you go back to of which you claim disregard of the 4th Amendment.

Mr. Golden: Well, of course, your Honor, the records which are properly kept, that is to satisfy the ordinary foundation, kept in the course of business, if they are legally obtained, without violating any of the defendant's rights, of course they are admissible.

The Court: In other words, if records, we will say, were against Mr. Remmer, could be introduced against him, records obtained of his business ventures which are the subject matter of this inquiry——

Mr. Golden: I am not contending that the prosecution cannot introduce evidence against the defendant, that would be foolish, but if your Honor assumes that the evidence——

The Court (Interceding): I am just assuming that for the purpose of getting an answer to that question. I want to see what foundation we are on here. I want to see what these rulings I have been making could rest on.

Mr. Golden: Well, I have to distinguish, your

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Honor, between the records we were talking about yesterday and the records I am talking about today. Taking up first the records I was talking about yesterday—if it be assumed for the purposes of this discussion that they were properly obtained and properly retained and that their acquisition and use by the government did not violate either the 4th or 5th Amendments, and if the records were otherwise admissible, then, of course, there is no question about it, but that, of course, assumes the whole question.

Now as to the records I am talking about this morning, your Honor, to give a concrete example, the Franklin Hospital man, Mr. Oglesby, comes here with a ledger to show how the Franklin Hospital kept them in the ordinary course of business, and so on. There is no question, apart from constitutional provisions and the law built around them, that that record is admissible, but our point is that the prosecution learned that the defendant had been a patient at the Franklin Hospital by unlawful seizure and retention of either a check or a statement or some paper which gave them that information, and of course your Honor is familiar with the recent cases of the Supreme Court which hold that there comes within the protection of the Constitution not only actual evidence, but information which will give the prosecution a lead to the evidence.

The Court: I understand, but let me ask you another question. I notice there is a case in 77 Fed. (2), Eaker vs. United States, which holds

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that when articles of business are produced by an officer there is an assumption that they are properly in his possession. Now you just make a motion here right out of the clear blue sky, that perhaps they didn't get these records properly. You do not make a statement of offer or anything of that kind. You just say you offer to show. You want the Court to have an inquiry here that is collateral, outside of this trial. Read this Adams case and some of these New York cases. The Court is not required to stop a trial and go off on a tangent on investigations such as you propose here.

Mr. Golden: Well, I respectfully disagree with your Honor, but——

The Court (Interceding): Well, let's look at the case; I can get that in a minute.

Mr. Golden: I say under 41(e) of the rules, the Court must take evidence and we can always make an offer of proof. I will be glad to make a statement of what we expect to prove to your Honor, if you permit me.

The Court: I would like to know just what you expect to prove.

Mr. Golden: All right. We expect to prove that these papers that we talked about yesterday and are talking about today were taken by the agents of the prosecution, or the Internal Revenue Service, from third parties, not from the defendant; were taken without the defendant's consent or knowledge; were taken under a promise by those agents to these third parties, to return those records upon demand, and notwithstanding that prom-

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ise ever since, in the face not only of informal demands, which were in the record, from the exchange of correspondence between Mr. Avakian and Mr. Campbell, but in the face of formal demands, by reason of those three pre-trial motions, they have refused to perform, and we offer to show further that some of the papers so taken were the records of expenditures we are talking about this morning.

The Court: Now I have Rule 41(e) of the Rules of Criminal Procedure. (Reads rule.) Now that is the reason why it is brought here in this court; otherwise it would properly be brought in the California jurisdiction.

Mr. Golden: Yes, your Honor.

The Court (Continuing): "Motion shall be made before the trial and hearing unless * * *" Now I have heard several suggestions from counsel that there is something wrong about the manner in which these records were obtained and it appears in the first place, from the testimony of Mr. Pechart himself here yesterday, that the government was given full access to all these records; in fact, they went so far as to provide a convenient place for the agents of the government to work on these records, and they were delivered to two agents by Mr. Pechart. Then subsequently Mr. Remmer requested the records and they were delivered to Mr. Remmer. Then they found their way—I don't know how they got back to Mr. Weaver, I don't know whether the records ever got back to him after that or not—but I can't see

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just on what you base an illegal acquisition of these records by the government.

Mr. Golden: Your Honor, the Court is laboring under a misapprehension of the facts. We are not talking about the records which were covered by Mr. Pechart's testimony at all. Those records are not part of this motion.

The Court: But this motion gets back to the same foundation.

Mr. Golden: No, your Honor, we are talking about records which were taken by the agents from other parties in San Francisco and some of which are now on deposit in the clerk's office.

The Court: What other parties?

Mr. Golden: We believe, although, of course, from the absence of bill of particulars we can't be certain, but want to develop it, we believe from the preceding witnesses, Mr. Maundrell, Mr. Kyne and others. Now we have no way of finding out without evidence.

The Court: Well, I am going to deny the motion. Call in the jury. The motion is denied.

ARGUMENT ON CROSS-EXAMINATION OF 15 PER CENT INTEREST

December 18, 1951

(In the absence of the jury.)

The Court: Now on the basis of the record and the last question or two of the record——

Mr. Gillen: May we have the last question read?

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The Court: Yes, you may have it read.

(Last 2 questions read.)

"Q. Look at this agreement and tell me what was meant by working interest in the amount of 15 per cent?

"Q. Mr. Kyne, what happened to your 15 per cent share of any profits of the Menlo Club during the years 1944 and 1946 inclusive?"

Mr. Gillen: That is another matter than your Honor has ruled on.

The Court: I am making a statement. On the basis of your last question and on the question or two previous to it, in the face of the expressions of the Court, in effect asking counsel to desist from pursuing the line of examination, and to a similar question clothed in a little different language, to which objections have been repeatedly sustained, the Court hereby fines Mr. Gillen for contempt of this Court and fines you in the sum of two hundred dollars and remands you to the custody of the marshal until the fine is paid.

Mr. Gillen: Your Honor is absolutely unfair about this——

The Court: And counsel is remanded to the custody of the marshal until the fine is paid.

Mr. Gillen: Am I again to be shut out from explaining my position on the record? I asked your Honor to dismiss the jury and permit me to be heard why I was pursuing, but you arbitrarily refuse to do that?

The Court: Yes, sir.

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Mr. Gillen: Now I want to be heard. I am an advocate of this court and I have a great responsibility on my hands.

The Court: You are committed to the custody of the marshal until this fine is paid.

Mr. Gillen: I will pay the fine. I will not be humiliated by being led out by the marshal. Here is the fine. I respectfully ask permission to explain to this Court what our position is, why we are attempting——

The Court (Interceding): Are you ready to proceed?

Mr. Gillen: I am ready to proceed with saying this——

The Court (Interceding): I have ruled that this contract takes care of this witness' interest in this contract and I am not going to permit you to explore that fact any further in your questions on cross-examination.

Mr. Gillen: Is this attitude of this Court fair, never to permit me to tell you why I am trying to read what happened to the profits along to the jury?

The Court: Do you want to keep on talking?

Mr. Gillen: I want to make a showing so I will have no further difficulties with your Honor's ruling.

The Court: What are you going to have to say?

Mr. Gillen: Here is what I want to have to say. Counsel has belabored throughout this examination, not only with Mr. Kyne, but also with Mr. Lando, who was a partner, asked repeatedly, "Did you ever put a cent of money into this business" and the answer was "No." Now, what I want to say is

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this—that a working interest means simply this, the working interest that was the arrangement, not only what is appearing in writing, but in all other enterprises in which these men were interested, that this was the situation—that they were given a percentage of the partnership; that as the profits came in, instead of drawing down their profits, those profits were turned back into the business, so that they would reimburse the man who put up the initial money, until such time as the profits paid back. The profits, for example, that Mr. Kyne earned, were chargeable to him, he had to pay income tax on them, but instead of taking them out, he put them back in the business until such time as his equity levelled the amount of money that had been put in by Mr. Remmer, and that is what was meant by working interest. The way counsel is reading it, it invites the jury to draw the inference that Mr. Kyne, for example, and Mr. Lando were just phonies, that they never put a penny in, and although they were charged with the profits and although they were advanced money to pay their income taxes on those profits, that the fact of the matter was they never received anything. Now that is not the fact of the matter and the books of the Menlo Club will show that at a point Mr. Kyne's interest, for example, had reached some 30 per cent of equity of what he was entitled to on his 15 per cent. Now if I can make it clear, I can do it on the blackboard for the Court.

The Court: Well, that is hardly necessary.

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Mr. Gillen: Does your Honor understand what I am getting at? I have tried to reach somehow and there is no reason that I can see, and I have not deliberately been abusive or discourteous—I have tried to reach the thing in a way to show what was meant by 15 per cent of the profits. It kept coming in, he did not draw it—the point I want to show is it went back into the business to build up his equity in the Menlo Club, until such time as he would have paid up what would have been 15 per cent of 75 thousand dollars.

The Court: Your questions were not directed to that direction.

Mr. Gillen: I did not have an opportunity—I may be stupid.

The Court: You are far from being stupid. You did not want to listen.

Mr. Gillen: I will follow any suggestions your Honor has to make to keep out of trouble, as to reach that point.

The Court: We will call in the jury.

Mr. Gillen: Your Honor has no suggestions? I would be very happy to hear from your Honor.

The Court: I do not think it is going to be a suggestion because I do not think the questions to which these objections were made and sustained had the purpose that you give to them here in this argument. You repeatedly asked this witness about his 15 per cent in this Menlo Club.

Mr. Gillen: I wanted to show what was the meaning of 15 per cent working interest.

The Court: No, you tried to make it appear in your question—I mean that is the way it would

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appear—that he had 15 per cent interest in the Menlo Club from the inception of the operation.

Mr. Gillen: He did in the profits, your Honor, and it says so in Paragraph 8, but he did not get any actual physical——

The Court: Paragraph 8 is——

Mr. Gillen: Read Paragraph 8 and you will see he had an agreement, 15 per cent interest in the profits.

The Court: Wait a minute. (Reads Paragraph 8.)

Mr. Gillen: Now you see that was retroactive as of the very date the Menlo Club was purchased, May 1, 1945.

Mr. Campbell: That should be read with the succeeding two paragraphs.

The Court: (Reads further paragraphs.)

Mr. Gillen: You see what happened there—there are two different 15 per cent items; one is the actual physical property, namely, tables, chairs, equipment, accessories of the club, the other is 15 per cent interest in the profits. Now I want to find what each of those mean and how Mr. Kyne can obtain his 15 per cent interest in the physical properties from 15 per cent interest in the profits, which were retroactive on that agreement. That agreement was signed in 1946, but that 15 per cent was conveyed over to him retroactive as of May 1, 1945, the very day the Menlo Club was purchased and during the time he was in the army, he was enjoying the benefit of 15 per cent of the profits of the Menlo Club, and that was going to-

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ward equity in the physical properties, and I think when your Honor sees my last point, your Honor should do something about your order for contempt. I have a regard for my reputation and do not like to be punished for disregard of the Court. I work very hard.

The Court: It does seem to me, Mr. Campbell, there are two different things here. Now the 15 per cent in the social bar and restaurant business: (Reads from exhibit.) However, in this paragraph 8, there is an interest in the profits, distinguished from an interest in the assets and the body of the business. Do you have a copy of this?

Mr. Campbell: I do not interpret the document meaning there is a 30 per cent interest.

The Court: No, there isn't, there is a 15 per cent interest.

Mr. Gillen: We never said there was a 30 per cent interest.

The Court: But in the 4th paragraph it recites the party of the first party to convey to the second party a 15 per cent interest in and to the social room and restaurant business.

Mr. Campbell: Then it goes on and provides, effective May 1, 1945, there is to be a 15 per cent working interest, as I understand it, in and to the profits. That money, however, is not to be paid to Mr. Kyne, but is to be applied by Mr. Remmer on the recoupment of the 175 thousand dollars; after it having been recouped, then the actual 15 per cent interest comes into being. That is my understanding. And while that 15 per cent is going

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through the channel of Mr. Kyne, he is building up an equity in the actual physical property.

Mr. Gillen: No, he builds up an equity, but not that way.

Mr. Campbell: There is a question about that.

The Court: Isn't that 175 thousand to be accumulated from 15 per cent of the profits?

Mr. Gillen: May we put this on the blackboard?

The Court: I am going to set aside that order of contempt and ask the clerk to return to you the fine and I think this is a more involved contract than I thought it was when I first heard it.

Mr. Gillen: We are very concerned about it too, your Honor.

The Court: If the Court had the same understanding as he has now, I would not have made the order of contempt, although I think still that when the Court requests an attorney to desist from pursuing a certain line, whether objections were erroneously sustained or otherwise, you ought to desist.

Mr. Gillen: I felt I was hampered in my cross-examination and asked your Honor to hear me until I could make an explanation your Honor would understand.

The Court: I think there is enough here to permit this cross-examination.

Mr. Campbell: May I suggest this, in due respect. I think we should come to some understanding at least as to what is meant by this agreement——

The Court: I have this understanding, that the second party is not to own an interest until 175

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thousand dollars is to be accumulated by the retention of 15 per cent of those profits by the first party; is that right, Mr. Gillen?

Mr. Gillen: That is not quite it, but your Honor is on the right track.

Mr. Campbell: May I make this suggestion from the government's viewpoint and possibly Mr. Gillen can agree. The evidence will show that several similar agreements were entered into with those who were active in the business, similar in every respect with the other parties. The agreement, as I understand it, has this ultimate end, that until Mr. Remmer is repaid 175 thousand dollars, there shall be credited, in this instance to Mr. Kyne, 15 per cent of the profit, but that shall not be received by him but shall be retained by Mr. Remmer, together with what he is retaining from the others under similar agreements, and what he is retaining from his own profits.

The Court: That is my understanding of it.

Mr. Campbell: Until he shall have reached 175 thousand dollars?

The Court: That is my understanding and I think he could pursue cross-examination to show it.

Mr. Gillen: I would ask Mr. Avakian to explain this matter very concisely to your Honor.

Mr. Campbell: I do not believe the witness can give a legal interpretation of this document and I think the objections which were heretofore made were properly made and properly ruled upon by the Court.

Mr. Thompson: Your Honor, it is for the Court

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and jury to decide what the agreement means under directions by the Court. It is not for the witness to rise up in the chair and tell everybody what the agreement means.

The Court: Mr. Avakian?

Mr. Avakian: I think your Honor has grasped this matter pretty well. We would like to make completely clear what we understand the meaning of this agreement. If, for instance, your Honor, I may use hypothetical figures and reduce this twenty thousand dollars, to make the example more simple. Let us suppose A and B are going to buy a business that cost $20,000. A has $20,000 and B has no money, so B and A make an agreement that A will put $20,000 up for buying the business, partner B will have a 50 per cent working interest in the profits and the understanding is that partner B will let his profits accumulate in the business to his credit, building up his equity from zero to 50 per cent. Partner A will draw more than his share of the profits, so that his equity, which is originally 100 per cent of the assets, will be reduced to 50 per cent, so that if the partnership is set up on that basis, then the initial entry in the investment account in the books will be partner A $20,000, partner B zero. Let us assume the first year the partnership has no income from the $20,000. Now because of the working interest in the profits arrangement, that $20,000 will be credited in the investment account, $10,000 to partner A and $10,000 to partner B. Partner A's investment account will then be the original $20,000 he put in,

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plus $10,000, or one-half of the profit credited, or $30,000. Partner B's investment account, which was originally zero, will have $10,000, because half of the profits have been credited, and therefore one would have an investment account showing $30,000 to A and $10,000 to B. At that point A makes a withdrawal of $20,000, which reduces his investment from $30,000 to $10,000. Partner B withdraws nothing, so his investment account remains at $10,000, so now we have B building up his equity by refraining from withdrawing his part of the profits until he has now a proportionate interest or equity in the physical assets themselves.

Now the question, your Honor, that the prosecution has been asking repeatedly of these witnesses—"Did you receive any of the profit?"—is misleading, because as your Honor knows, there are direct and indirect ways of receiving the same. If, for example, my employer deposits my salary in my bank account, in a sense I have not received my salary, but in another sense I have received it, because it has gone into my bank account, and so with these profits, your Honor, if we can show that their profits were credited to their investment accounts, so that their profits were able, in a way, to build up an investment for them, they have actually in indirect fashion, but nevertheless realistically, received the benefit of their share of profits. That is all we are trying to get at, your Honor, and for the prosecution to ask the question, "Did you receive any of this money?" and get a "No" answer and leave it there, is keeping the

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jury in the dark. We want to show, although they did not get the money to put in their pockets, they did have their full benefit, because it gave them an ownership or equity interest in the assets of the business of the particular partnership.

Mr. Campbell: I want to be heard very briefly. Counsel's proposition is all right, except it does not take into consideration the agreement which they had in this case in regard to the Menlo Club, and that is this—there was no equity, as I take it, under this agreement which was built up in these people by reason of the working agreement, that is, no real equity, unless and until the 175 thousand dollars was fully repaid. For example, in the 4th paragraph on the second page, it is stated: "In the event of the death of the second party herein during the existence of this agreement"—this agreement exists until 175 thousand dollars is paid or the party withdraws: "* * * the interest of said second party and his estate shall cease and terminate * * *," etc. And it goes on to provide that his estate shall only have an interest——

The Court: That last statement seems to refute your theory. "There shall be paid by the first party or his successors in interest, to the legal representatives of the estate of the second party, the balance remaining on the account book maintained by the first party, in which is set forth amount of profits accruing to second party."

Mr. Campbell: If the second party, at the time of his death, shall have acquired said working interest.

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The Court: How is he to acquire the working interest except from accumulation of 15 per cent profits?

Mr. Campbell: No, your Honor, he was only to acquire it when and if the first party shall have received the entire sum of 175 thousand dollars. Now that is my understanding of the agreement.

The Court: Then wouldn't that construction take any purpose out of the next to the last paragraph on page 1? What does that mean? It should be considered as having some purpose there. Your construction of that contract would eliminate entirely any consideration of that next to the last paragraph on page 1.

Mr. Avakian: That is Paragraph 8 we have been talking about.

The Court: Yes, just eliminate Paragraph 8 from consideration and you have the result that you are suggesting.

Mr. Campbell: Well, it is my belief that the construction and interpretation of the agreement is a legal matter for construction of the Court, not for interpretation of the witness. He has stated, if the Court please, that this is his sole and only agreement.

The Court: All right, but according to Paragraph 8, as of May 1st there was assigned to him by Mr. Remmer a 15 per cent working interest. I think counsel can pursue that on cross-examination.

Mr. Campbell: The prior question to which objection was sustained——

The Court: I am going to set aside those rulings

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and allow him to pursue that 15 per cent mentioned in this Paragraph 8, and I will state if I had not had the wrong idea myself, I would not have taken the position I did, but still I have ordered the record show that you are purged from contempt.

Mr. Golden: Would your Honor indicate, for the record, the date set for that hearing of this morning this morning?

The Court: I will place it on the calendar.

Mr. Golden: What does that mean?

The Court: That means it will take its regular turn.

Mr. Golden: May the record show that we requested it be heard this week or next week?

The Court: It may so show, but it won't be.

Mr. Avakian: May I raise one more point before the jury comes back?

The Court: Yes.

Mr. Avakian: I think your Honor appreciates the implication of the questions that have been asked of some of these witnesses is that these partners were phonies——

The Court: That may be so, but I think there is something substantial in that Paragraph 8.

Mr. Avakian: Yes; my point is this, if the question of the good faith of a party is involved here, as it apparently is, then we should be permitted to question the witnesses as to their actual intent, because that throws light on whether——

The Court (Interceding): No.

Mr. Pike: Your Honor, may I make this observation—it is not my understanding that the Court

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is called, at this time, to make a construction of the legal acts of the different parties under this agreement concerning the Menlo Club. The Court recognizes, as I view the rulings, that the respective parties in this particular case may proceed on their own theories as to meanings that they place upon that contract, considering that the rights of the parties are determined by the contract itself and so limited. Now what is respectfully suggested to the Court is as far as we can go, rather than to undertake, at this time, to define the rights and beliefs under the agreement itself. The cross-examination would be in accordance with the defendant's theory of this case and applications.

Mr. Avakian: Your Honor, it is a fundamental parol evidence rule that if an agreement is not clear on its face as to meaning or essential provisions which appear to call for some explanation, such as this, the working interest, the parties can explain what they mean by this provision, and that is a fundamental rule.

The Court: We have a decided difference of opinion as to the proper construction of this contract. I think counsel should be permitted to pursue on cross-examination this 15 per cent working interest in the profits.

(Five minutes' recess taken.)

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[Title of District Court and Cause.]

ARGUMENT ON ADMISSION OF 117 SERIES

December 18, 1951

(In the absence of the jury.)

Mr. Golden: Now, if your Honor please, as we understand it, Mr. Campbell is attempting to introduce here various exhibits on the theory that since they came out of one of the boxes which we deposited with the clerk last week they must be the records of the particular enterprise in question. He is trying to lay connecting links, authenticating and proving and laying the foundation for these documents in that way.

Your Honor will recall that the testimony as to these records, so far as it has gotten into the record, is that the government had everything and gave back to Mr. Semenza the material which we deposited with the clerk. Now there is nothing here to show that the material which the government got originally is, for example, the regular books of account of the Day-Night Cigar Store. There has been no foundation laid for that. The government takes this position, they say: "We had some books which we think, or which somebody necessarily may have told us, are the books of account"—for example, Day-Night Cigar Store. "We gave those books and material to Mr. Semenza. Mr. Semenza gave them to you (that is, to counsel) and the Court ordered counsel to produce them." But the

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basic foundation and identification of those books and records is not here. There is no way that we could question whether or not those are actually the books and records of, for example, the Day-Night Cigar Store. Do I make that clear, your Honor?

The Court: I think I understand your position.

Mr. Golden: So that is the reason, in addition to our legal objections and motions, that is the reason we object to the last few exhibits going in. Mr. Kyne does not positively identify them as the records of these places and Mr. Campbell says, "They must be authentic because I got them out of that box," but we don't know. All we can say is that they are the material which was given to Mr. Semenza, which he gave to us and which we deposited with the clerk, but accidentally, if it is accidental, other books may have gotten into that material before the government turned it back to Mr. Semenza, or other pieces of paper may have gotten in there other than some records of the taxpayer, and there has been some evidence here already that even the Bureau of Internal Revenue is not perfect in keeping of records and there may be some mistakes there. We ought to have this authenticated and ought to have the opportunity of cross-examination on it.

The Court: Let me remind you of this—you made an objection to the order, the order which brought this material into the court, on the ground that they were books and records of the defendant,

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taken without compliance with the 4th Amendment, or in violation of the 4th Amendment.

Mr. Golden: Yes, that is what the government contends that they were, books and records of the defendant, but we have no opportunity to cross-examine to find out if that is so, and if your Honor will recall, we wanted to put on evidence to trace these books and other material from the time they originally got into the hands of the government, and we renew that offer. That may clear it up.

Mr. Campbell: I might state, your Honor, that in the first place these books and records, and the basis of the Court's order, was necessarily the subpoena which was served upon Mr. Semenza, in whose custody the books and records had been delivered by the government. Now the subpoena did not call Mr. Semenza in so many words to produce the records which were turned over to them. He was called upon to produce certain records in relation to specific businesses; in other words, regular business records of those businesses. Now for the first time, at the trial of this case, the defense took the position that they should not be compelled to comply with the subpoena by reason of the fact that all of these records referred to were the records of this defendant. Then after the Court's order that they produce those records, the records were produced and placed in the custody of the clerk, in compliance with the Court's order that certain specific records be produced.

Now these records have been in the possession of the defendant's agents and accountant, or the

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defendant's attorney in fact and accountant, since 1949. Now counsel has delivered the records themselves, and after having had them in their possession for a period of three years, attempts to raise, by inference, that question that there may be other records contained in here that they know nothing about. I think no serious weight should be given to that, and as a matter of fact, counsel now refuses to agree that these very records were the ones that they deposited with the clerk, which is altogether incomprehensible under the circumstances, but be that as it may, these records were produced here as the records of those businesses and I think that is a sufficient foundation, when the Court has ordered that records, for example, of the Day-Night Cigar Store, which are specified in that order and subpoena and which are specified in the receipt given by the attorney-in-fact and the accountant or the taxpayer, as being the records of those businesses when he received them and returned to the Court under the subpoena calling for those official records, it certainly is sufficient foundation for their introduction in evidence.

Mr. Golden: May I just say this, your Honor, our objection goes to the matter of foundation. Now a subpoena is nothing more than a demand. Now——

The Court (Interceding): I wonder if perhaps--you used the term "foundation" which, of course, is proper, I understand that, but to get at the point that seems to be bothering us here, if we get down to this basis—the question in my mind, has there

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been a showing made here some way, a legal showing, that these are a part of the records of the particular enterprise?

Mr. Golden: We do not know, your Honor.

The Court: Now if they were produced pursuant to an order to produce the books and records of all these enterprises of this defendant——

Mr. Golden: I do not want to interrupt——

The Court: Go ahead.

Mr. Golden: This is the situation, your Honor: The government subpoenaes an agent or attorney-in-fact of the defendant to produce certain records pertaining to this entity and that establishment, and so on. Now that agent or attorney-in-fact produced, or turns over to us and we produce—that doesn't make any difference—produces certain books of say the 186 Club, Day-Night Cigar Store, and so on. There is no testimony in evidence that those are the books of that particular establishment. Before they may be used in evidence, somebody must get up on that witness stand and say this particular exhibit is one of the books of accounts of the Day-Night Cigar Store, for example. Nobody has done that. Surely Mr. Campbell cannot contend that in a criminal, or even in a civil, case that by subpoenaing something he has placed in the record evidence that the thing that is produced in response to that subpoena is what he claims it is, and that is particularly true in federal court, where a subpoena duces tecum is issued without an affidavit, not even an ex-parte sworn statement here by anybody that the particular material listed in

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the subpoena is what it purports to be. There is nothing here but a compulsory delivery by Court order or Court subpoena, which is the same thing.

The Court: The order contemplated delivery of books and records.

Mr. Golden: Surely.

The Court: The Court wouldn't assume that you had delivered something other than books and records.

Mr. Golden: Which we don't know. I hold in my hand prosecution's Exhibit 112A for identification. It shows for the place of the 110 Eddy Street and 50 Mason Street——

The Court: Wouldn't the defendant know, or the defendant's representatives know, these different institutions know that a certain book was not a record, and if that was so, wouldn't it have been eliminated from the material delivered?

Mr. Golden: No, your Honor, for four reasons: Number 1, these things were in the custody of the government for a long time; (2) the books were not personally kept by the defendant and he may well not know whether or not they are actually the records, he may never have seen them before, that is, seen them at the time they were being kept; (3) that would be compelling the defendant to testify against himself, and (4)—I have lost number 4, your Honor—just a moment——

The Court: I think there is enough here presently to show that they are part of the records of the enterprises. Now if they are not and that was

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shown during the course of the trial, we might have a different situation.

Mr. Golden: Well, my fourth reason is this, your Honor; it is recalled to mind now. Your Honor said a moment ago, we would suppose, in response to the Court's order, you would only turn over the authentic records of these various places. Can we dare to take the risk of saying to ourselves, "We don't think this is an authentic record, we won't turn it in to the clerk pursuant to the Court order"?

The Court: I think so. I do not think that you would intentionally—suppose, for instance, one of our Federal Reporter books, 114 Fed. (2), happened to get mixed up with those records, would you produce that pursuant to that order?

Mr. Golden: No, but suppose Mr. Semenza tells us out of court that he does not think that this particular exhibit, just for example, is what the label on it indicates it is. Can we then go to the Court and say we do not think this is a record, we are not going to turn it in? Of course, we cannot. We have to turn it in and the government, to get it into evidence, has to show through a witness, whoever it may be, that this is a record of that business.

The Court: I think it is a fair assumption that when material is produced pursuant to an order of the Court to produce certain material, that the material produced is that material. I think we can stand on that.

Mr. Golden: It still has to be introduced on the

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basis of testimony. Somebody has to swear that this is what it purports to be.

The Court: Well, there is some evidence to that effect. We are not entirely bereft of that. It is not clear, however.

Mr. Golden: Mr. Kyne says he does not know what business is there.

The Court: He does not go that far, that he does not know.

Mr. Golden: I wonder if we might have Mrs. McIntyre read the part where Mr. Campbell offered Exhibit——

The Court: He says it looked like Mr. Slater's writing; he didn't recognize the book.

Mr. Campbell: He also stated the books were maintained for that enterprise.

The Court: Well, the ruling will stand.

Mr. Avakian: Does your Honor want to take up the matter of the transcript on the offered series, now that the jury is out?

The Court: No, not now.

Mr. Avakian: We are ready to take it up any time your Honor desires.

The Court: Yes, but I have not had a chance to look at it. We will call in the jury.

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Thursday, December 27, 1951—2:00 P.M.

(In the absence of the jury.)

Mr. Gillen: Because of his skill and knowledge, I would rather Mr. Avakian replied to the remarks of Mr. Campbell. (Last question read: "Well, did anybody ever reject this 1945 return or statement that you made concerning it?")

Mr. Campbell: Now my objection to that, of course, is as to being incompetent, irrelevant and immaterial. There is presently pending, which I did not want to state before the jury, in the Tax Court of the United States, claim by the government against the taxpayer with relation to all these claims, all these returns, a suit involving some 800 thousand dollars. If this question is to be raised as to whether or not the government or any of its agents told him that they rejected or accepted any filing of any of these things, I think the government would be entitled to show that the government has rejected these returns and has filed such a claim against the taxpayer, which is presently pending before the Tax Court; but I made my objection for the purpose of conserving the time spent here as much as we can, because of the belief that is a collateral issue. Of course, those returns are the basis of the indictment.

The Court: Wouldn't it be possible if these returns have been rejected—I don't know, of course, they have been—would it be possible they could be rejected without knowledge of this witness, who left the employment in 1948?

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Mr. Campbell: And the acceptance or rejection is always subject to whatever later develops, so far as evidence is concerned, with regard to the government's position relating to the matter. As I say, there is pending before the Tax Court—and I do not think counsel would contradict—and presently at issue that suit involving some 800 thousand dollars with respect to the issues here. Now I do not believe, in fairness to the defense counsel, that they desire to inject the fact of that controversy before this jury, but if questions of this kind are asked, the government has a right to produce that evidence and show that, but I do believe it is collateral matter which should not be gone into.

Mr. Gillen: I think your Honor will recognize, anything said by any agent of the government to this witness——

Mr. Campbell: No agent can bind the government.

The Court: I sustain the objection as to what the agent stated.

Mr. Avakian: May I respond to Mr. Campbell's argument?

The Court: Yes, sir.

Mr. Avakian: I think it is important to bear in mind here we have two issues which this jury has to determine; one is the issue of correct tax liability, whether or not the income shown in these returns was correctly computed and reported. That is one issue. The second issue arises only in the event the returns were incorrect, and that issue is

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whether incorrect returns, if they are incorrect, were filed with an intent to avoid taxes.

Now on that second issue we feel that the last two questions asked of this witness are highly material, they are highly significant, and for this reason, your Honor. It is quite possible that the 1945 Menlo Club return was incorrect; in fact, I would say, in view of the fact that the income was based on, for reasons the witness has explained, 1944 records of income, that it would be in the nature of a miracle if the exact figure of income shown on the 1944 return was the 1945 income. The 1945 income undoubtedly varied either upwards or downwards from the 1944 figure. It was explained why of necessity they had to use something, because the 1945 records were inadvertently destroyed, so they set forth in the best manner that they could in computing income of 1945, with a letter of explanation to the Internal Revenue. That letter of explanation has bearing on the question of their good faith and their intent. In other words, the witness has testified that thereafter, while he was still employed there, four or five revenue agents, whom he has named, were there investigating the income of the Menlo Club. Now I think all of us, who have any familiarity at all with various investigations, know that ordinarily a revenue agent, who spends any substantial amount of time on a case, will call to the attention of the taxpayer's representatives with whom he is dealing, anything which appears to him irregular. We grant, of course, they can not bind the government by that,

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but in view of that practice of calling attention to irregularities as they appear, to mistakes, in view of that policy to call attention to any irregularity in connection with this matter, is a circumstance which the jury can properly consider in determining whether these people were acting in good faith and with an honest intent in preparing the return the way they did.

Now as a matter of law, they might have been wrong. That is a question which the jury will also have to determine, but if they were wrong, were they wrong honestly or justified in that? Now if they were so clearly wrong that had the revenue agent immediately spotted that and would call it to their attention, that would be some indication that perhaps they were not acting in good faith. On the other hand, if the revenue agents who spend all their time making audits, did not call their attention to this as irregular in connection with that matter, then that is a circumstance which the jury might properly consider in determining whether the action that was taken in preparing the return in this manner was one which could have been taken in good faith and on that question of good faith we feel that it is an important circumstance to show, and as Mr. Gillen has said, the case of the government here, so far as it is put in, is entirely one of circumstantial evidence, both on the matter of what the correct income was and the matter of good faith, so if the jury is going to have to determine those questions from circumstantial evidence, then shouldn't it have before it,

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as one of the circumstances, the fact that four or five agents, in auditing those returns, did not say anything to the man who prepared these or assisted in its preparation, if prepared in an illegal fashion?

Now with respect to the 90-day letter decision that Mr. Campbell refers to in the amount of some 800 thousand dollars. That is a matter which is not in the record; Mr. Campbell has correctly stated there is such a case. In view of the fact he mentions—and I do not believe it will have materiality, because there is nothing in that 90-day letter which calls attention to any irregularity with respect to the manner of computing the 1945 income. There is a statement in it, without any explanation whatsoever, that described the receipts of the Menlo Club were in a figure larger than the amount shown on the returns, but there is no explanation of that whatsoever and there is no statement concerning the fact that the manner of computing was improper or evidenced bad faith. I mention that because it was brought up by counsel, but regardless of the competency of that matter, it is an important circumstance for the jury to determine whether there was entirely good faith in connection with this particular return, to know whether four or five agents, investigating the matter, did or did not call attention to anything irregular in connection with it. Now we submit when there is a matter of intent involved, the Court should not restrict us in showing the circumstances, and all the circumstances, that relate to the matter, because after all the guilt or innocence of this defendant,

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so far as we can tell up to now in this case, is going to be determined entirely upon the basis of circumstantial evidence.

Mr. Campbell: I would like to make a very brief statement. From counsel's familiarity with cases of this kind, he must be aware of the regulation which prohibits agents from discussing with the taxpayer, during the course of investigations, what they find to be irregularities, but be that as it may, I agree that the intent of the taxpayer in filing his return is an element which must be considered and submitted to the jury, but the intent must be that of the taxpayer and must be that at the time of the return, that it was falsely filed. It is undoubtedly true there were a number of agents during the course of this investigation, because here is a very extensive groups of businesses, very extensive records which had to be examined, and therefore whether they said to this man, "Those returns aren't worth the paper they are written on, they are full of lies," or whether they said, "Those returns look all right on their face to me," isn't determinative of the issues here. They are collateral matters and I feel if this sort of thing is gone into, whether the revenue agents raised any questions as to the returns, then we will be entitled to show that the government has a suit pending of some 800 thousand dollars involving these years, and I object on the grounds that these questions are incompetent and immaterial to the issues before this Court.

Mr. Avakian: May I correct a general statement

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I made with respect to the 90-day letter and explain it in more detail? I stated the 90-day letter shows a larger amount of gross receipts for the Menlo Club than the tax return did. Actually, your Honor, the difference between the 1945 Menlo Club tax return, that is in evidence here, and the gross receipts figure shown in the 90-day letter, which Mr. Campbell has mentioned, shows a figure of seven thousand dollars; the tax returns showing gross receipts of 558 thousand dollars and the 90-day letter showing 565 thousand dollars; in terms of percentage a negligible difference, and we say this 1945 tax return was rejected by the government because of only seven thousand dollars out of more than half a million, but incidentally, whether or not Mr. Campbell would be entitled to introduce this 90-day letter in evidence later, that is a question which your Honor can pass upon when the offer is made. Incidentally, we feel if the correctness and honesty and good faith of the 1945 return of the Menlo Club is being challenged by the government here—and I take it they are challenging it—then all the circumstances relating to that should be introduced in evidence here.

Now when we go into the matter of determining anything from circumstances, it is a familiar argument that I have heard the prosecution make in many of these cases—what have you to say in reply to such statement, by saying it would be contrary to regulations. For five years I represented taxpayers in home equity cases and with very, very few exceptions—I wouldn't know more than one case

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out of ten—the agents have discussed with me, particularly things that they thought were wrong with returns and perhaps with the exception of one case out of ten it has been my practice and knowledge that agents have discussed any investigations with the taxpayers and representatives the things that they thought were wrong.

The Court: Do you contend there is no such regulation?

Mr. Avakian: I know of no such regulation.

Mr. Campbell: I am sure Mr. Avakian knows of no case where agents, in the course of investigation, have disclosed to the bookkeeper or taxpayer, or have discussed with the taxpayer, except in certain exceptional instances, their findings, and I am advised by the agents that by regulation they are not supposed to so disclose their evidence. It is true when the case comes into my office, I sit down with the taxpayer's representative and afford them an opportunity for conferences. I think they are afforded the same opportunity to come in and make an explanation to the Bureau while it is still in the investigative stage, they are offered that opportunity. However, the negative fact, which is what he is asking him—did they ever tell you anything was wrong?—I presume expecting a "no" answer—isn't proof of anything as of the time that the return was filed, which is where the intent counts, and it is the intent of the taxpayer, not the interpretation of the agent, that is material. It is the ultimate fact itself. What the agent may have said or even what he did say, unless it was said to the

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taxpayer while the return was being prepared, certainly has no probative value.

The Court: The objection will be sustained. Bring in the jury.

ARGUMENT REGARDING ADMISSION OF EXHIBIT "Z"

December 28, 1951

(In the absence of the jury.)

Mr. Gillen: Now, may it please the Court, the defendant's Exhibit "Z" for identification is a document clarifying the situation which was requested by the government, according to my information, from Mr. Schriber more than a year ago, and it is my information that this document, either the original or one of the copies of this document, signed by both of the parties involved, Mr. Schriber and Mr. Remmer, has been in the hands of the government for more than a year. Whether it reached Mr. Campbell or not, I am not prepared to say; if not, it has been in the hands of the Internal Revenue Department.

Now the reason the document is of vital importance to the defense's case is that your Honor very readily recollects that Mr. Campbell, in questioning both Mr. Schriber and Mr. Kyne, and also Mr. Maundrell, invited the inference from those who listened, that there had been a cash payment of 25 thousand dollars and that the first check payment was an additional 25 thousand dollars rather than

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a mere re-arranging of how the payments should be made. In other words, it becomes obvious that Mr. Maundrell, when he was setting up the books, decided he wanted a bank transaction, a check account there, and Mr. Schriber gave back the 25 thousand dollars and was given a check, which he put through. Now the inference has been invited—and the subject has been gone into by three different government witnesses inviting that inference—that there was an extra 25 thousand dollars paid by Mr. Remmer to Mr. Schriber. It has been explained to the contrary by three witnesses, and finally there was a statement made by both parties which was supplied to the government. That statement is identical, insofar as the transaction, of the status, is concerned, as was testified to here by Mr. Maundrell and is identical, so far as payments are concerned, with 125C, the government's exhibit, the ledger page on the Menlo Club.

Now I believe, may it please the Court, that I have laid a stronger foundation for admission, through Mr. Maundrell, of this exhibit than was laid by counsel in the matter of getting before the jury a bill of sale, or whatever the document might be called, for the purchase of a safe for 52 Mason Street by Mr. Kyne. Your Honor will recall that Mr. Kyne was on the witness stand for some four days. He was the government's witness. That the Herman Bros. bill of sale, or whatever it was, setting up the transaction, was not shown to Mr. Kyne, although Mr. Kyne was the man who purchased the safe and who signed as the purchaser

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of the safe. At the time it was shown to Mr. Maundrell, Mr. Maundrell was asked to recall from memory the description of the safe and compare it with the description in the document. He was asked to testify concerning a transaction which took place in 1944 or a year before he became identified with the Remmer enterprises, and he was asked to identify Mr. Kyne's signature. On the basis of that testimony, it was determined by your Honor that a sufficient foundation had been laid for the admission of that document.

Now I would like to read—it is very brief—from the transcript exactly what the foundation was, and then I would like to point out to your Honor how much stronger my position is with Mr. Maundrell to have an identification and lay the foundation for the introduction of this document here. This will be found, may it please the Court, on page 1262 of the transcript and it begins at line 24. It is Mr. Campbell examining on direct examination Mr. Maundrell, the present witness — Mr. Campbell asked to have an exhibit marked for identification and then several discussions, and on the next page, page 1263, starting at line 20, Mr. Campbell:

"Q. Now I am going to show you plaintiff's Exhibit 139 for identification and ask you to examine it. Can you state whether or not that refers to the safe on the premises at 52 Mason Street?"

There was an objection by Mr. Avakian.

The Court: What was the objection?

Mr. Gillen (Reads): "Mr. Avakian: Objected to, no proper foundation laid as to the witness'

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knowledge of the transaction—long before he came there. If your Honor will examine the document, I think you will see my point. You will observe the date and recall this witness' testimony as to the date of his employment."

The transaction of the safe was a year before Mr. Maundrell came to work.

"The Court: He may answer the question.

"A. It appears to be the same safe that we had there at that time.

"Q. Do you recognize the description set forth thereon? A. Yes.

"Q. And that is the safe to which you referred as having the 12 boxes?"

Objection by Mr. Gillen. My objection was:

"I think this is pretty much calling for his opinion and conclusion. I mean, there is no harm in the matter one way or another, but it is asking him to speculate on something that was purchased a year before he went to work there."

The question was read, and the Court says: "He may answer the question." I will read the question again:

"Q. And that is the safe to which you referred as having the 12 boxes? A. Yes, sir.

"Q. And do you recognize the signature hereon over the subheading 'Purchaser'?

"A. Yes, sir.

"Q. And whose signature is that?

"A. William Kyne.

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"Mr. Campbell: This will be offered in evidence, No. 139."

Now Mr. Avakian made an objection and there was some discussion about Mr. Kyne not having been questioned and the Court suggested Mr. Kyne could be called by the defense and there was a question whether he be called back as the prosecution's witness or our witness.

Mr. Campbell: I think you should read line 14.

Mr. Gillen: I will read the whole page (reads):

"Mr. Avakian: Your Honor, we object to the introduction on the ground no proper foundation has been laid for the document. The witness simply states it seems to describe a safe similar to the one that they had when he later came there and the introduction of the document in this manner deprives us of the opportunity to cross-examine regarding it. Your Honor will recall Mr. Kyne, the witness for the prosecution, was on the stand for four days and if they had presented that when Mr. Kyne was here, we could have cross-examined Mr. Kyne at that time.

"The Court: I think Mr. Kyne was excused subject to call.

"Mr. Avakian: Yes, but if we had tried to cross-examine Mr. Kyne on this document, we would have been met with the objection it was not within the scope of his direct examination.

"The Court: I will permit you to cross-examine him.

"Mr. Avakian: And you will also instruct that he is brought back at the prosecution's expense?

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"The Court: The objection is overruled. I will not make any commitments now on the expense.

"Mr. Avakian: Then we would have to bring him back at our expense to cross-examine him?

"The Court: Very well. Objection overruled. If you want to bring him back, you may.

"Mr. Avakian: We request that he be brought back at the government's expense.

"The Court: These discussions should be had outside the presence of the jury. They have no place in the record at this trial of the case."

I think that is about all on that subject, may it please the Court.

Now here we have a situation with regard to this Exhibit "Z" for identification where Mr. Maundrell was the only witness who was familiar with the transaction, just as Mr. Kyne was familiar with the safe transaction.

The Court: Do you want to use this document now?

Mr. Gillen: No, your Honor, I have it in mind, and I just want to say to your Honor that here we have a witness who handled—in fact, issued the checks—on the entire Schriber transaction, from the first check that was issued to Schriber. He set up the ledger account. He is familiar with the entire status of the thing, he is familiar with the signatures, and he is called upon to identify that statement set forth there as truly reflecting and augmenting his own ledger sheets and the cancelled checks and everything else.

The Court: Mr. Maundrell has already testified as to the facts as he recalled them.

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Mr. Gillen: Yes, your Honor.

The Court: This statement was made how many years after the transaction with which it has to do?

Mr. Gillen: Well, what is the date on the statement?

The Court: March 7, 1949.

Mr. Gillen: Well, that was made, your Honor, at the government's request, according to my information. They wanted a statement from both parties as to what the status was on the payments and both parties made that and it coincided with the ledger sheets and certainly, your Honor, this document and our foundation that we have laid, and are prepared to lay——

The Court (Interceding): 139 was used, was it not, merely as memorandum or matter to refresh the witness' memory as to the description of the safe?

Mr. Gillen: No, it was with relation to the transaction and purchase of the goods.

Mr. Campbell: The invoice of the company who sold the goods.

The Court: Mr. Maundrell described the safe on the premises. He was shown this document and stated it was the same safe which he had been describing.

Mr. Campbell: As to that, your Honor, it is my understanding when we come to this particular document, which purports to be a summarization entered into between Mr. Schriber, who was a witness here and testified at length, both on direct and cross-examination, as to his recollection of the

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transaction, and the witness Maundrell, who has testified as to what actually took place, here is an attempt at this stage to put in a summarization by Mr. Schriber, who is no longer on the stand, and by the defendant, who in effect, if that document were admitted, would be testifying without taking the stand. Now the best evidence, of course, is the witness who participated in the transaction, the checks themselves, and the books and records which were kept at that time. Here is a matter which was made up some four years after the transaction, not made by this witness, in which he is asked as to an accurate summarization but would signify nothing on that the defendant agreeing that this is an accurate summarization, and I can see no theory in law in which that would be admissible unless it was a document signed by the witness and being used for the purpose of impeaching testimony. He is here, is available as to cross-examination on this subject, as was Mr. Schriber, who were apparently two of the three parties to the transaction and that, I submit, is the best evidence. This particular document I have stated to counsel and I have stated to the Court, I have never seen before. I asked Mr. Weaver, in charge of the investigation, and he states he never saw it. However, assuming it was supplied to some government agent—I do not know—nevertheless there is no dignity by which it could become an exhibit in this case. It would come within the category, of course, of self-serving declaration and purports, according to counsel's statement—I have not read it carefully—to be

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simply a summarization of this witness' testimony. I do not think it is admissible.

Mr. Gillen: In the first place, may it please the Court, in regard to Mr. Campbell's statement Mr. Remmer is in effect testifying to a self-serving declaration without taking the witness stand, he is doing that very thing in the tax return when he signs, he is testifying to the financial status without taking the witness stand and that becomes an important part here. Now it is in effect, this statement, a declaration against the defendant's interest because if it weren't as set forth in the books and if it weren't as set forth in this statement by both parties to the transaction, then Mr. Remmer could take credit for paying out an additional 25 thousand dollars he never paid out. That would be to his benefit in that instance, and in this instance it is a declaration against his interest. Now Mr. Campbell puts a witness on the witness stand and then by another witness he appears to be attempting to impeach and discredit that former witness' testimony—well, an illustration is the Schriber situation—he attempts to show by two other witnesses, against his own witness, that Schriber received 25 thousand dollars more than he did receive, and we think it is vital and we think it is certainly accumulative and additional to the testimony that has already gone in before the jury here. Now certainly it is a stronger situation for a man who handled the whole transaction, as did Mr. Maundrell, to look at a document that was signed by two parties to the transaction which he supervised and

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handled and managed and planned and carried
with them, to say, "Yes, this truly reflects ev
thing I know about the transaction," as compa
with Mr. Maundrell being called, after Mr. K
who bought the safe was on the stand for
days—the safe was never mentioned, being ca
upon to describe it. We can not, without y
Honor's permission and making an exception,
can not call back Mr. Kyne and examine.
objection would be proper if it wasn't within
scope of Mr. Kyne's direct examination, beca
he had never been asked about it, but I imag
your Honor, that Herman Brothers and the v
ous other people, have probably built a hund
safes of the same description as the safe wh
is described in that bill of sale at 52 Mason Str
and yet they laid the weak foundation, "Does
look like the safe as described here at 52 Ma
Street?" He didn't know anything about the p
chase. He was asked preliminarily, "Is this
signature of Willie Kyne?" and on the basis
that, "Yes, this looks like the safe and signat
of Willie Kyne," that document goes before
jury. Why they didn't ask Mr. Kyne, I d
know; why they waited until some other witn
was on the stand, I don't know, but here is the n
who knows about the transaction, participated
set up the books and he is asked as to what
knows, and we feel, your Honor, it should be p
mitted to go before the jury. It is practically
identical situation in which you permitted 139
go before the jury.

The Court: The ruling will stand.

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[Title of District Court and Cause.]

ARGUMENT RE: EHIBITS 150, 150A AND "E"

Thursday, January 3, 1952—2:20 P.M.

(In the absence of the jury.)

Mr. Campbell: If the Court please, I wish to point out that this document which is being offered is offered under the certificate of the Deputy Commissioner in charge of the Chicago office of Bureau of Public Debts that a search of the Treasury Department's registrations and redemption records, which records involve bonds, disclosed no other bonds or redemptions by Elmer F. Remmer or Helen L. Remmer, either individually or as co-owners, than those shown in the information as set forth herein. The certificate of the Deputy Commissioner is followed by the certificate of Margaret B. Choppin, Records Administration Officer, Division of Office Services, office of Administrative Services, Treasury Department:

> "I hereby certify that Chas. P. Peyton, whose signature appears above is the Deputy Commissioner in Charge of the Chicago Office Bureau of Public Dept and that all final records of the issue and redemption of United States Saving Bonds are maintained in that office."

The document has been issued under the official seal of the Treasury Department and is offered on the

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basis of certified copy of a public record, under the applicable statutes herein referred to.

The Court: Do you consider Section 1733, Title 28 applies?

Mr. Campbell: No, not business records—this is certificate of public records.

The Court: Government records and papers?

Mr. Campbell: Yes.

Mr. Golden: Your Honor hasn't seen this. This is a group of pages tied together with an official ribbon and seal. The certificate is to the effect that the annexed pages were prepared at the direction of the person signing the certificate, who is a Deputy Commissioner in charge of the particular department, and he certifies, as I say, first that the pages were prepared at his direction, and second, that the registration and redemption records in Chicago, which is the main office, covering the period 1935 to 1948, don't disclose anything else pertaining to Elmer F. Remmer or Helen L. Remmer other than is in these pages.

Now this is not, your Honor, does not purport to be, any kind of an authenticated copy of any kind of an official record. This is something which was prepared by somebody—it doesn't say by whom—and this Mr. Payton, Deputy Commissioner, undoubtedly some clerk came in to him and said, "I prepared this at the request of Mr. Campbell" or some office staff, "Will you certify it." That is all he knows about it. These are not official records. This is a private record. As a matter of fact, while I may be mistaken, I am surprised at all the

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government has access to this record. Certainly if I wanted to find out what records in that office showed as to bonds purchased by John Smith, I couldn't do it unless I had a letter from John Smith authorizing me to make inquiry. These are private. These are not public records, such as the clerk of this court has, open to the inspection of anybody, so they do not photostat those records. They simply make up some marked sheets and we have here an ex-parte statement, no more than an affidavit, that these marked sheets show what the records in Chicago show. Now there is no problem in bringing witnesses whom we might cross-examine as to the records. They have brought people from Chicago, New York and Honolulu. I might say this too, your Honor, while, of course, we have no knowledge as to the particular data in here, I am sure your Honor is aware, and we are, that government agencies, like any large office, any bank, do make mistakes. Now there have been cases certainly where a man has bought or redeemed a savings bond, an United States bond, and it does not show on their records. To cite a case, where the army pays a woman on the theory that she is a widow of a soldier killed in action and he turns up alive. Now we think we are entitled to cross-examine on voir dire the person who says that this is the actual record. We would like to have that person on the stand, would like to see the records, if physically possible, or pictures of them. After all, there are a certain number of bonds in here presumably purchased at certain times and

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redeemed at certain times. There would be nothing to prevent the government from taking a photostat of the pages of official records on which these entries appear. For example, there may be some marks on these original entries which have not been copied. This is like I went into an office and made notes and saying, "I copied these down from official records" and you certified it. Certainly Mr. Peyton himself didn't do it, we know that. Will your Honor take a look at it?

The Court: I would like to see it.

Mr. Campbell: Of course, the only purpose of certification of an official record is to avoid bringing a large amount of records. There are perhaps millions and millions of bonds issued in this country that of course could not be produced here. For that reason that statute has been made. However, I will offer, in connection with that exhibit and ask to have marked for identification, a certification to which is attached photographic copies of all of the bonds referred to, which shows on their face the date and the amount of payment. I will ask to have the clerk mark this for identification. I hoped to avoid cluttering the record.

Mr. Golden: It isn't the circumstances of the bonds——

The Court: I understand your objection will go to this exhibit, the same objection would apply to this exhibit.

Mr. Golden: Yes and in addition to 150——

Mr. Campbell: I wish to submit the other proposed exhibit to the Court as well.

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The Court: Well, let us look at the statute; Section 1733 of Title 28 reads: (Reads section)

Mr. Golden: Not records; they are bonds, your Honor.

Mr. Avakian: They are photostats of bonds purchased and redeemed.

The Court: Well, those would be records.

Mr. Golden: No, records is a writing which records for history some transaction or evidence. This is evidence of indebtedness.

The Court: Doesn't this record for history that these bonds were in evidence? The objection will be overruled. Exhibits 150 and 150A will be admitted in evidence.

Mr. Campbell: I think I should offer them in the presence of the jury.

The Court: Yes.

Mr. Golden: 150 is neither a record or a transcription of a record.

The Court: Now we have heard a lot about Judge Hand and I think he ruled some time ago that we could have a summary instead of bringing in voluminous books and records, that the court could receive in evidence summaries of official records.

Mr. Golden: Sure, if the witness takes the stand and can be cross-examined.

The Court: That is why we have Section 1733.

Mr. Golden: Yes, your Honor, and that says a record or transcript of record, but this is some notes taken by somebody. It doesn't purport to show the exact record.

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The Court: I am going to admit them in evidence. Any other matters to be disposed of while the jury is absent?

Mr. Campbell: May I suggest a recess at this time?

The Court: Yes, we will be in recess for 15 minutes.

(Recess taken at 2:30 p.m.)

Defendant present with counsel.

Jury and alternate juror absent.

The Court: I want to consider a little further these exhibits, particularly 150. Now 150A is a group of records or copies of records of the Treasury Department and certified under the seal that the contents of this exhibit, photostatic copies of bonds, are true copies of records.

Mr. Golden: I do not want to interrupt your Honor.

The Court: Well, I would like to hear from you. Under Section 1733 these books or records or account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the transactions or occurrences as a memorandum of which same were copied or made. And then in (b), "Properly authenticated copies or transcriptions of any books, records, papers or documents of any department or agency of the United States should be admitted in evidence equally with the original." Now the documents comprising Exhibit 150A would fall within the provisions of subdivision (b) of Section 1933. Now

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I am not so sure about the subject matter here, Exhibit 150.

Mr. Campbell: May I be heard on that at the proper time, your Honor?

The Court: Yes. Now 150 is composed of a number of sheets and I can't read that word—I suppose it is "information regarding United States savings bonds" and the certificate reads that the annexed reports, form CO 1596—and that seems to be the same form of these different documents—certifies that the annexed reports on form CO 1596, consisting of 10 pages, were prepared at the direction of this officer, contain information regarding certain United States savings bonds, derived from the Treasury Department records on file in the Chicago office. The Treasury seal. Now whether this exhibit, these documents, could be considered transcripts of records——

Mr. Campbell: That is the point we make. So far as these being private records is concerned, they are not. These are public records. They are bonds which have been issued. By law and regulations the Treasury Department, the proper function thereof, is required to keep records showing the outstanding bonds, the person to whom those bonds are outstanding, the purchase price and in the event of redemption by the United States, the amount of such redemption. The document itself, that is, certified copy itself, purports to be a transcript obtained from the books and records of account which were kept by that office in Chicago, which is certified to be the office where all such rec-

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ords are kept for the Treasury Department relating to such bonds. As a matter of fact, a comparison of the two exhibits, 150 and 150A, discloses that the information in 150 is the same as that disclosed in 150A, with the exception of one bond, which 150 shows has not been redeemed, or was not redeemed at the time that the transcript was prepared and is therefore not set forth in 150A. 150A are photostatic copies, or photographic copies —I don't know the exact process—of the redeemed bonds, showing the original bonds. On the face of the bond, if redeemed, there is placed the stamp of the redeeming agency. In most instances, I believe, they are banks which redeem those bonds; showing the amount paid by the bank on account of the United States for the redemption of those bonds. Under the laws and regulations pertaining to bonds, various financial institutions are made authorized agencies of the United States, including banks who are members of the Federal Reserve, to redeem those bonds and they are, as a matter of fact, I understand, paid a small fee for that service performed in behalf of the Treasury, so that as to the Exhibit 150A, which are certain photostats of the original records themselves, they are the original record of invoice between the United States government and the purchaser of that bond—the only original record—in the book of account. As to 150 itself, it is a transcript of the records wherein pertinent information is gathered in a concise or precise form.

The Court: Now let me ask you this. Is your

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understanding of the meaning of the word "transcript" as used in this section a summary? Is a transcript a summary of a record?

Mr. Campbell: Yes, your Honor. As this is used in the context of 1773(b) indicates that, when it says transcripts of any books, as compared to copies of books.

The Court: If that is so, then that seems to me to reach the objection counsel made as to a lack of opportunity to cross-examine the individual who prepared the summary or transcript. Right now the statute contemplates that a transcript of a record may be admitted in evidence. If a transcript is something which is prepared from a record, the statute does not contemplate that it would be admissible, only on condition that there is an opportunity to cross-examine the person who made the summary so transcribed. That is the thought that I had.

Mr. Golden: Well, your Honor, as to that point, if a transcript meant anything other than a true and exact copy——

The Court (Interceding): Tell me what you mean by transcript. What is your understanding? I don't take it it means a certified copy. I don't believe the word "transcript" means a certified copy of an instrument or a document.

Mr. Golden: It means, in my understanding, an accurate excerpt, complete in itself as far as it goes, that is, including whatever dates it includes or whatever material it includes. If it is in any sense a summary or involves to any degree what-

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soever the discretion of the person preparing it, who is not under oath, then we have extra-judicial discretion.

The Court: Let us see what this certificate is. Now he certifies that the annexed reports were prepared at his direction and contain information regarding certain United States savings bonds, derived from the Treasury Department records on file. Now a transcript would be nothing more or less than information from records, would it not?

Mr. Golden: It would be more than that. It would be all the information from the records. For example, your Honor, I am sure your Honor during the war purchased bonds of this nature—you will recall that the person who makes the purchase, the person who actually steps up to the window and buys the bond, can buy it in some one else's name or he can put some one else down as purchaser, or I can take my associate's money and buy a bond in his name. That would all show on the entire record.

The Court: The thought I have is that that objection perhaps goes more to the weight than to the admissibility of the offered exhibit and if such a condition exists, why the defendant could show it.

Mr. Golden: We could show it if we had the man here, yes, but how could we show it under these circumstances? Your Honor, I had a divorce case a few months ago, in which one of the bonds, or some bonds were in issue and I wrote to this office in Chicago and the reply came back that if the person who, according to the records was the

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owner of the bonds, authorized it, they would let me have the information. Now these are not—Mr. Campbell says they are public records—they are not. It is true a bond is indebtedness of the United States, but it is also an asset of the owner, but no one can get that information without the owner's authority. It is a government record, but it is not a public record. Any one can walk into the clerk's office and ask to see the record of any case filed in this court.

The Court: But the government might be in a different position than a third party individual.

Mr. Golden: They might be, but I do not know any authority for that right.

The Court: It would seem in cases where the government is a party, the government could use its own records in support of its action.

Mr. Golden: For example, in order for some Congressional Committee or the Federal Trade Commission or some State Department of the government to obtain income tax returns of a certain individual, they have to get the permission of the President.

Mr. Campbell: I beg your pardon, that is not quite correct.

The Court: I just wanted to make sure that I had the right view of the application given Section 1733 to the exhibits, and I think I have.

Mr. Golden: Of course we do not think those exhibits are records or transcriptions of records.

The Court: I feel certain as to 150A but I have some doubt as to 150, but I think——

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Mr. Golden: Mr. Peyton says there the attached pages contain all the pertinent information. Who is Mr. Peyton? Maybe he doesn't know what pertinent means, for all we know. There may be some information which he thinks is not pertinent and which we think is pertinent.

The Court: I fail to see that word "pertinent" here.

Mr. Golden: I think it is there.

The Court: He certifies that the annexed reports were prepared at his direction and contain certain information. He further certifies: (Reads from exhibit.)

Mr. Golden: Of course, I did not have it in front of me.

The Court: There is no conclusion there so I feel that these statutes have a purpose and the purpose is to make it more convenient to introduce documents of this nature. So I am going to admit the exhibits when the jury comes in.

Mr. Golden: As long as the jury is out, there is an entirely different matter that would take just a moment.

The Court: Yes, certainly.

Mr. Golden: It concerns defendant's Exhibit "E," which is the amended income tax return for Helen Remmer, it is Exhibit "E" for identification.

Now if I can refresh your Honor's recollection on that, because this happened several weeks ago. Mr. Mooney was on the stand and he testified that he had prepared amended returns for 1944 for

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Helen L. Remmer and Elmer F. Remmer, at which point we introduced for identification the Exhibit "E," and he stated that at the time he was a witness before the grand jury Mr. Campbell had the amended 1944 return of Elmer F. Remmer and Mr. Campbell said at that time he had some recollection of that, he would check on it further. Mr. Mooney testified that those two 1944 amended returns had been filed and subsequently he said he was almost positive they had been filed and he was positive that the additional tax called for by those returns had been paid into the Internal Revenue coffers. Now we had no direct answer from Mr. Campbell as to whether he had found such document, but he did subsequently produce Mr. Forrester, the local deputy here, who testified that he had not found any record of the filing of those amended returns. Now on the basis of Mr. Mooney's testimony we offer in evidence defendant's Exhibit "E," which we overlooked at the time offering in evidence and found on reading the transcript we had not, and we also would like to inquire whether Mr. Campbell has located, among his papers, the corresponding amended return for Elmer Remmer.

Mr. Campbell: I will state for the Court I have examined the grand jury minutes and have also refreshed my recollection, and I find that my recollection coincides with that of Mr. Pike and Mr. Thompson, who were also present before the grand jury. Mr. Mooney used before the grand jury the same pencilled written document which he produced here and which has never been in the posses-

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sion of the government, except during the course of his questioning before the grand jury, when he was questioned about that document. So far as any record, we have found no such document was ever filed with the government of the United States.

Mr. Golden: Well, the testimony of Mr. Mooney, your Honor, appears in several places. First on page 440 of the transcript, the last line of page 439:

> "Q. Now, Mr. Mooney, I hold in my hand defendant's Exhibit E, which I will identify for you as amended return for 1944 for Helen Remmer, made out in pencil, in your handwriting, which you said was a counterpart of identical one for Elmer Remmer. * * *"

And then a little farther down, line 16, the question is asked again:

> "Q. These were filed and collected?
>
> "A. So far as I know. They might have got lost. The money was paid.
>
> "Q. But the money was paid?
>
> "A. Yes, I think I turned the money in on two slips, two credit slips, and the returns were filed two weeks afterwards or maybe a month."

Then, if your Honor will recall, at the time that occurred he testified Mr. Remmer bought the stock in Mr. Mooney's mining company, thereby reducing the amount of the check that he had ready to pay the income tax and stating that he would forward that money in a few days, before the tax was

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due. You recall Mr. Mooney testified that when he looked it up in the office, he found Mr. Remmer had a credit, so it wasn't necessary to collect that further money from Mr. Remmer, which is certainly sufficient evidence to go to the jury—in fact, it is undisputed, uncontradicted evidence. And also Mr. Forrester is the one who testified, although his records did not show that credit, it was apparent from the records that nothing was done about trying to collect that additional tax from Mr. Remmer, so the evidence is really undisputed there was that credit there, which could only arise if these amended returns had been filed and the money paid, and we think that is ample evidence to place in evidence before the jury Exhibit E.

The Court: Mr. Mooney testified he could not recall whether Mr. Remmer's amended return was filed. I have it under my note on Exhibit E. He was talking about contributions Mr. Remmer had made, something about a 15 per cent contribution, that was in 1944 amended returns for Helen Remmer, Exhibit E.

Mr. Golden: May I read this one sentence here, your Honor. This is Mr. Gillen questioning Mr. Mooney and Mr. Mooney's answer:

"Q. It is true, is it not, that you filed both of these amended returns and that you collected what was due, the additional money that was due, and turned it in on those amended returns and that that created the credit?

"A. Yes, there is a book charge, interest, probably two years in there, 1944."

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Of course, we haven't Elmer Remmer's amended return and we are not offering that, but there is in evidence for identification Helen Remmer's amended return and the only purpose of these proceedings is to offer in evidence the exhibit which is already in for identification and which we overlooked offering in evidence on December 6th.

Mr. Campbell: To which we object. That does not purport on its face to be a return ever filed. It was never received by the Collector's office. It purports to be some pencilled writing——

Mr. Golden: Oh yes, this purports to be a copy, not the one that was filed.

Mr. Campbell: Pardon me. The Collector's records do not indicate any amended return for either Helen Remmer or Elmer Remmer was filed for that year. As I said, further at counsel's request, Mr. Mooney made some statement about having been examined on that purported amended return before the grand jury, but examination of the grand jury minutes refreshes my recollection, which was confirmed by Mr. Pike and Mr. Thompson, who were present before the grand jury, that Mr. Mooney produced this document at that time.

The Court: So that he did say the records of the department disclosed no such filing. Doesn't that present a question for the jury—have this exhibit admitted in evidence and it is a question for the jury to determine whether or not that return was ever filed.

Mr. Campbell: That is true if Mr. Mooney's

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testimony goes to the point that he claims to have filed it.

The Court: Well, what is his testimony?

Mr. Golden: Start at the bottom of page 439:

"Q. Now, Mr. Mooney, I hold in my hand defendant's Exhibit E, which I will identify for you as amended return for 1944 for Helen Remmer, made out in pencil, in your handwriting, which you said was a counterpart of identical one for Elmer Remmer. It is true, is it not, that you filed both of these amended returns and that you collected what was due, the additional money that was due, and turned it in on those amended returns and that that created the credit?

"A. Yes, there is a book charge, interest, probably two years in there, 1944."

The Court: I think that is sufficient to admit this exhibit.

Mr. Campbell: Yes, if you refer to the answer. The question contains a number of elements, including the filing and whether or not there was a credit. His answer is: "Yes, there is a book charge, interest, probably two years in there, 1944." Certainly that is not a statement that such a return was filed.

The Court: I think it is.

Mr. Campbell: He is answering, as I take it, one element. Pardon me just a moment—I do not find immediately what I was looking for. May I suggest that your Honor defer the ruling on this until we have a further opportunity to examine the record?

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The Court: Very well, but I am inclined to admit it. I take Mr. Mooney's testimony to be that this was filed, and if that is his testimony I think it should be admitted and then the question as to whether or not it was filed is a question for the jury.

Mr. Campbell: So your Honor will defer the ruling?

The Court: Yes, I will. So I guess we are ready for the jury now.

[Title of District Court and Cause.]

ARGUMENT RE: EHIBIT 153

Wednesday—January 9, 1952, 10:30 A.M.

(In the absence of the jury.)

Mr. Campbell: Now, if the Court please, your Honor will recall the state of the record, wherein Mr. Kyne was asked as to the ownership of 110 Eddy.

Mr. Gillen: Is Mr. Kyne here? I think it might be well, your Honor, if Mr. Kyne is here.

Mr. Campbell: I do not think his presence in the court room is necessary during the argument.

The Court: I do not think so either.

Mr. Gillen: I only had in mind in other instances the witness involved was present. I thought you might want to do that again.

The Court: Well, we will see if it is necessary to have him in, he may come in; while it is necessary that he remain here.

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Mr. Campbell: He was not excused yesterday. The matter was deferred until this morning.

Mr. Gillen: I believe he intends to be here.

Mr. Campbell: Very well. Your Honor will recall the record as it existed when Mr. Kyne was on the stand. Mr. Kyne was asked as to the ownership of 110 Eddy Street in November of 1945. He stated that he had no personal recollection. First he said he referred to the books and records and then asked as to his own recollection, he said he had none. He was then shown the exhibit, purported to be affidavit executed by him in November of 1945. He was shown the document and asked if it refreshed his recollection as to the situation as it existed then. He stated that that did not refresh his recollection, but that the affidavit, the document which he had signed—he identified his signature, the fact he had sworn to it—spoke the truth of the facts as he knew them at that time, although he had no present recollection. The document was offered in evidence as past recollection recorded.

In that connection I wish first to call your attention to Warden on Criminal Evidence, reading from page 1384 of Vol. II, which is paragraph numbered 803, 11th Edition, 1935 Edition, the heading of Memorandum: (Reads) Now the witness here has testified it did not refresh his recollection, and the text writer, Warden, goes on as follows: "However, in some cases * * *" citing State vs. Easter, 185 Iora, 7 N. W. 748.

Now in Volume III of Warden's Criminal Evi-

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dence, also the 11th Edition, paragraph 1276, appearing at page 2143, Warden writes as follows: (Reads) Which is the situation in the record here.

The Court: He did not testify here to the effect that he recalls by means of the memorandums those facts stated, but he did state the affidavit was true.

Mr. Campbell: Yes, he said the affidavit was true and truthfully stated the facts as he knew them at that time.

The Court: Is that in the record?

Mr. Campbell: That is my understanding of the record. Now may I read further from this text?

The Court: Yes.

Mr. Campbell (Continuing): "He may then testify——" It goes on to point out that the rulings are not harmonious as to the admissibility of the record, citing Bates v. Preble, 151 U.S., 149.

The Shoborg case, 264 Federal Reporter at page 1——

The Court: What circuit?

Mr. Campbell: From the 6th Circuit. Reading from page 9: "The court received in evidence * * *"

The Court: Those were reports that were required to be made, weren't they, in the course of their employment?

Mr. Campbell: The particular reports in that case, as I recall, were made by the investors. My recollection is that they were listening in on telephone conversations. This is decision prior to the time of the restriction now placed by the Interstate

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Communications Act. They were making notes as to the conversations and then summaries of those notes at the end of the day.

Mr. Gillen: Before we lose the thought of those citations, I would like to ask counsel, through the Court, if it isn't a fact that Shoborg disagrees with Bates vs. Preble and says it is the contrary?

Mr. Campbell: Yes, I so read from the Shoborg case.

Now I wish to also refer to the case of Putman vs. Moore, reported in 119 Fed. (2d), at page 246, a 5th Circuit case, in which the decision is written by Judge Foster of that circuit. Reading from page 248: (Reads) "The general rule * * *" Now the transaction involved in that case, concerning which the testimony was sought, was, as I recall, not one required to be kept.

The Court: The effect of that case is that the witness might testify from memorandum.

Mr. Campbell: Even though he has no recollection.

The Court: What does that mean, that he might read it?

Mr. Campbell: He might read it into evidence or it might be read into evidence or received in evidence.

Now some question was also raised on the matter of best evidence and the books. Of course, the best evidence rule is applicable when the contents of a particular document are attempted to be established by evidence of the contents of that particular document when that document is available.

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That is not our situation here. Here we are attempting to establish the ultimate fact, the ownership in that particular business.

The Court: I want to get that.

Mr. Campbell: Now in that connection I wish to refer your Honor to the case of in re Ko-Ed Tavern, Inc., which is reported at 129 Fed. (2d), at page 806, an opinion of the Circuit Court of Appeals for the Third Circuit, where one of the issues was as to the ownership of a bankrupt corporation. In that connection the Court, on page 810, states as follows: (Reads) And incidentally Lyon's stock ownership was not denied at any time.

In this connection also I wish to read from a decision by Judge Jerome Frank of the Second Circuit, Hersey v. Swift & Company, 146 Fed. (2d), at page 444, reading from page 445: (Reads) We are not called upon to decide this question.

Now we submit, if the Court please, that in the present state of the record, wherein the witness has testified that, while he has no present recollection and while his recollection is not refreshed by his examination of the affidavit, but that affidavit which was given in 1945 spoke the truth as he then knew the truth, that such affidavit is admissible in evidence here as a past recollection record and that the matter of the best evidence here has no application to the instant situation, and we offer the document in evidence.

The Court: However, from your argument I take it that, assuming that your argument presents

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the correct view of law, there is a question here as to whether or not the witness may testify from the affidavit or whether the affidavit itself may be admitted in evidence. Now that is a pretty nice distinction, but there is that question.

Mr. Campbell: Well, I take it the better rule is that announced by Warden and which has been followed in federal jurisdictions.

The Court: If we should go on the other theory, that the witness may testify from memorandum, what would that mean, that he could be asked, his attention called to that portion of his memorandum, this affidavit, and be asked to read what that states?

Mr. Campbell: It would be a question, as I take it, the distinction would be whether he would read the affidavit, in effect, to the court and jury, or whether the affidavit itself would be admitted before the Court and jury.

The Court: However, there might be other matters in that affidavit. I haven't it before me or I did not look at it. There may be other matters in that affidavit which would have no bearing on this situation.

Mr. Campbell: As to the ownership.

The Court: If I went along with you on this proposition, I would limit it merely to reading that portion of the affidavit which concerns this one point.

Mr. Campbell: Yes. I think the entire affidavit, if your Honor will examine it, is directed to that

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one point as to the ownerships and the nature of the ownerships in the business.

The Court: However, have counsel any different ideas?

Mr. Avakian: So I may not be under any misapprehension, it is my understanding, both from what was said this morning and what Mr. Campbell said yesterday, that the affidavit which he is offering is offered not by the way of impeachment by way of testimony of Mr. Kyne, not by way of contradiction of anything already covered, but apparently as a memorandum made in the past, concerning some facts beyond what is already in this record. If I am incorrect on that, counsel should correct me.

The Court: Let us see if we can all agree on it. I understand it relates to a matter of which the witness has no present recollection. He has no present recollection who the owners of 110 Eddy were at this particular time involved.

Mr. Avakian: No, I do not think that is correct. There are two elements involved in this ownership. As to one, he has testified, as to the other, he said the books are the best evidence. Now I presume the questions put to him regarding this affidavit, as to questions which he said he did not now recall, those questions and his answers went to that element to which he said the books were the best evidence as to value of interest which each partner has built up in the business, whereas, insofar as the other element of percentage and share is concerned, we have already had testimony.

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The Court: I would like to get the question from the record.

Mr. Avakian: First of all, I would like to read the testimony on that latter, given by Mr. Kyne on December 17th.

Mr. Campbell: I think we are concerned with matter which occurred here yesterday.

Mr. Avakian: This is part of Mr. Kyne's testimony.

The Court: You may read it.

Mr. Avakian: On December 17th, commencing on page 904 of the transcript, Mr. Campbell asked these questions of Mr. Kyne and Mr. Kyne gave the answers as I will read them. The question related to Mr. Pratt in connection with 110 Eddy:

"Q. Now how long did Mr. Pratt remain interested in the business?

"A. I don't remember. The books should show." Mr. Campbell then obtained the books and there was an identification of those and then he said:

"Q. Now in whose name were the liquor licenses at 110 Eddy Street?

"A. I think they were in my name.

"Q. Over what period of time?

"A. Oh, about a year, I guess.

"Q. What year was that?

"A. I don't know whether it was '42 or '43.

"Q. And in whose name were they after that?

"A. Remmer, Kyne, Cavani and Turner.

"Q. How long did they continue in those names?

"A. Until the place folded.

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"Q. When was that?

"A. I believe it was '47.

"Q. What was Turner's first name?

"A. Clarence I think.

"Q. And it is Frank Cavani?

"A. Frank Cavani, yes sir.

"Q. Now during the years 1944, 1945, and 1946 did Cavani and Turner continue throughout that period to be active in the conduct of the business?

"A. Yes sir.

"Q. What were their duties in respect to the business?

"A. I believe that Cavani was there in the day time and Turner used to be there at night time.

"Q. What duties did they perform there?

"A. Manager.

"Q. And what share of the business, if you know, did Cavani have?"

And I call your Honor's attention to the fact he was questioned there as to the share of the business:

"Q. What share of the business, if you know, did Cavani have?

"A. One-fourth.

"Q. And what share of the business did Turner have?

"A. One-fourth."

So that there he is being questioned by Mr. Campbell as to 1944, 1945, and 1946 and when he is questioned as to the share that the partners had there as in 1944, 1945, and 1946, he states directly, in response to a question, if you know, he states di-

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rectly that Cavani had one-fourth share and Turner had one-fourth share. Now that is a part of Mr. Kyne's testimony in this case and he had no difficulty in stating from present recollection, from personal knowledge, what the shares of the business were.

Now we come to the questions that Mr. Campbell asked yesterday on further examination. I am reading now, being page 1836 of the transcript, Mr. Campbell's questions and Mr. Kyne's answers:

"Q. Mr. Kyne, with relation to the 110 Eddy Street as of the month of November, 1945, will you state what the interests were in that concern?

"A. Well, the money put into the place was supposed to be met with and then we would be partners."

That is a significant answer to the whole matter here:

"A. Well, the money put into the place was supposed to be met with and then we would be partners.

"Q. Now as of that date, as of the month of November, 1945, who owned the business?"

And after an objection and ruling, the answer:

"A. The books would show that.

"Q. Would you answer my question? I am asking you?

"A. I say the books would show that.

"Q. What was your interest at that time?

"A. The books would show that.

"Q. What is your recollection of your interest?

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"A. I forget.

"Q. You do not recall what your interest was then?

"A. No, I don't.

"Q. Did you know at that time what it was?

"A. No, I don't.

"Q. Did you at that time in November of 1945?

"Mr. Gillen: What was the question?"

And Mr. Campbell said: "Did he know in November of 1945 what his interest was, and after an objection Mr. Campbell withdrew that question and said:

"Q. Does this Exhibit 153 for identification, which you identified as being your signature, refresh your recollection in that regard?"

And after discussion between Court and counsel he answered:

"A. It does not refresh my memory.

"Q. Mr. Kyne, will you examine this document. Will you read it through——

"A. I have read it through.

"Q. ——and state whether or not it sets forth the truth as you understood it at the time you made that affidavit?

"A. Yes."

And then after further discussion between Court and counsel, the question was:

"Q. Now will you state at this time your understanding as to the ownership of the business known as 110 Eddy in 1945?"

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There was an objection by Mr. Gillen and Mr. Campbell said:

"I will withdraw the last question * * *"

So that question was never answered, your Honor, and we never did get the answer as to what his understanding is at this time as to ownership of the business.

"Mr. Campbell: I will withdraw the last question and offer the document in evidence on the basis of the witness' testimony that he does not recollect at this time but that this document states the truth as he knew it at that time, and submit the document to the Court."

Now an examination of the document shows, your Honor, that it contains not one single statement as to the amount in dollars of the interest that had been built up in this business. When Mr. Kyne was questioned as to percentage share, as I read to your Honor, he answered directly what the percentage share was, but then yesterday, after he had stated that these shares were to be paid for by money in the place being met with, then immediately after that—in other words, after the witness was talking about amounts they were to be paid, immediately after that Mr. Campbell started questioning him as to what his interest was in November of 1945.

The Court: What is the question before the Court, the question which it is objected to this exhibit will answer? Is it what is the percentage or what his share is or who the owners are?

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Mr. Avakian: My interpretation of it is—has the investment been paid back so that the partners, who are going to buy their shares, have become owners, or have they not yet become owners or partners in the business.

The Court: Let us refer again to the questions yesterday.

Mr. Avakian: Page 1836. You recall this further examination. Mr. Kyne has already been questioned on the shares of the business. This is something additional that comes up after he testified on the shares.

The Court: The question now upon which all this discussion arose yesterday was this: "Now as of that date, November, 1945, who owned the business?" That is the question before the Court.

Mr. Avakian: That's right. Now, your Honor, bearing in mind all that has gone in in this case about arrangement of these partnerships, how the partners were brought into the business, and your Honor will recall that that question was withdrawn——

The Court: Not this question.

Mr. Avakian: But the question just before the offer in evidence.

The Court: This question is still before the Court: "Now as of that date, as of the month of November, 1945, who owned that business."

Mr. Campbell: That was my inquiry that brought this up.

The Court: The court ruled and went on to say the books would show.

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Mr. Avakian: That is where it is referring to the amounts credited to each partner and the books will show whether each partner has built up his equity to the point where he becomes an owner in the assets. There is nothing in this affidavit which states what the amount of interest in it is. The only thing in his affidavit is covered by his direct testimony. That is all he testified to, are the things that are in the affidavit.

Now my point is this, your Honor. Mr. Kyne has already testified as to shares that each of the partners had for the years 1944, 1945 and 1946. If this affidavit is offered to discredit that testimony, to impeach it, the testimony he gave on December 17th, which was direct testimony on the shares of the business and who the partners were, then if it is offered for that purpose, we have a different question as to whether the proper foundation has been laid for impeachment. If it is offered for the purpose of showing whether the partners had by November of 1945 paid for their interests, bearing in mind their interest in the business as distinguished from interest in the profits was to be paid for out of the profits that would come to them in the books, if it is offered for the purpose of showing whether by November, 1945, that interest had been paid for, then this affidavit does not throw any light on that and the books are the best evidence, because they show what has been accumulated in November, 1945.

The Court: Let me say this now—I think I see your point, but yesterday he was asked, "Now as

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of that date, November, 1945, who owned the business," and he told us he didn't remember, had no recollection.

Mr. Avakian: That is the context, your Honor, of his present answer, that the ownership was to be acquired when the investment had been paid.

The Court: Well, he didn't recollect who the owners were. He said that yesterday.

Mr. Gillen: Your Honor will have to read the preceding question and answer.

Mr. Avakian: And also the preceding testimony as of December 17th as to who owned the shares in the business.

The Court: All right. "Q. Mr. Kyne, with relation to the 110 Eddy Street, as of the month of November, 1945, will you state what the interests were in that concern? A. Well, the money put into the place was supposed to be met with and then we would be partners. Q. Now as of that date, as of the month of November, 1945, who owned the business?"

Mr. Avakian: And he said the books would show that. It is obvious then he is talking about these amounts that had been built up, which would pay for the original investment. If by interest Mr. Campbell meant percentage rather than dollar amount, that has already been answered.

The Court: You want to know as of a certain date, in November, 1945, who owned the business.

Mr. Avakian: Right, and that involves the question of whether the credits had been built up enough to pay for it, and the books are the best

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evidence of that, as the witness said. Now if there is any uncertainty about what this means, a question of Mr. Kyne on voir dire would clarify as to what he meant.

Mr. Campbell: I submit the question was a very simple one asked of Mr. Kyne. He states he has no present recollection, that that document speaks the truth, and certainly that document answers that question as to who owned the business.

Mr. Avakian: Just a moment. I do not know whether counsel means when he says what the interests were, whether he means percentage or dollar amount. I interpret this as to dollar amount and I think that is clear because as to percentage he has already questioned him and it has been answered and I submit the further questioning refers to the other aspect, namely, dollar amount.

The Court: Now I am speaking about this question and answer. He merely stated he can't recall, he has no recollection of the matter involved in this question. Now, "As of the month of November, 1945, who owned the business?" He answered that, he said he can't recall. That answer itself might not be sufficient to warrant a showing that this witness is hostile.

Mr. Avakian: I do not think they are attempting to show that. I asked if they are trying to impeach and they have not answered that.

The Court: If the showing was or the contention was here, and the Court went along with it, that this was a hostile witness, then this affidavit, of course, could be included.

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Mr. Avakian: But we submit, your Honor, the question—are we talking about dollars and cents interest or talking about shares?

The Court: I don't believe counsel is confined to be restricted in his examination of a witness by prior questions he might have asked. Suppose we would eliminate from consideration these other matters that occurred when Mr. Kyne was on the stand before and just take what occurred yesterday. We have a situation there where he was asked as of some time in November, 1945, who owned the business and he said he had no recollection, the books were the best evidence. So that brings us squarely down to this question of law that we argued here this morning.

Mr. Avakian: Well, your Honor, the point is this, as a part of the examination and as the preceding answer, he talked about——

The Court: That is what I am getting at. Are you committed, when you begin the examination of a witness and ask two or three questions and those questions might be said to cover a theory, are you committed to that theory or to that line all the way through your examination of a witness?

Mr. Avakian: No, I do not mean that, your Honor. But if I question a witness on apples and then on oranges and he said, "I don't know anything about oranges," then I produce an affidavit which talks about apples—I have already questioned him about apples and he has answered—what does an affidavit having to do with apples have to bear on the question he says he doesn't

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know regarding oranges? My point is if the affidavit relates to share of business, it would be a proper question as impeachment. If the question relates to dollars and cents, the affidavit is immaterial; the books show, not the affidavit.

The Court: On the authorities stated, I am going to admit the exhibit.

Mr. Avakian: May we question Mr. Kyne on voir dire as to what he meant?

The Court: I am going to admit it. It is admitted.

Mr. Campbell: May we have a short recess?

Mr. Avakian: May I inquire on voir dire on the affidavit? We would like voir dire examination on it. That is customary practice, I believe.

The Court: I know, but this offer was made yesterday.

Mr. Avakian: And then the witness was withdrawn, and we would like voir dire examination in connection with it. No further question will be put to the witness.

The Court: All right. You may put him on the stand.

Mr. Avakian: For voir dire, and you will reserve ruling until the voir dire?

The Court: Yes, I will reserve ruling until the voir dire.

(Short recess taken at 1:20 a.m.)

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OFFER OF PROOF ON CROSS-EXAMINATION OF WITNESS HARKNESS

Thursday, January 10, 1952, 1:00 P.M.

(In the Absence of the Jury.)

The Court: Now an offer of proof on cross-examination is what you propose to make.

Mr. Avakian: That is right; and may I say, your Honor, after that is made, there is an unrelated matter which will take only a moment of your Honor's time, which we would like to mention.

Through the cross-examination of the witness on the stand, we offer to prove, your Honor, these following matters which we believe are proper cross-examination of expert witnesses: First, that in the preparation of the 1946 partnership return of 110 Eddy Street, a deduction for salaries was taken in amount of $22,450, whereas this witness' examination of the books show that the salaries total $27,650. Secondly, we offer to prove through this witness that that difference in amount of $5200——

The Court (Interceding): Let me ask you this—I do not want to interrupt, I don't intend to cut you off—you say that the return shows the matters that you desire to prove by this witness, is that what you mean?

Mr. Avakian: If you will let me finish my offer and see what I am driving at. That difference of $5200 represents salary paid to one Frank Cavani, partner.

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Next we offer to prove through this witness, as an expert tax accountant, that in the preparation of partnership income tax returns, the proper treatment of a salary paid to a partner is to exclude the salary from item designated "14" on the face of the return, Salaries and Wages, but to include that salary payment as distribution of profits for that particular partner in preparing Schedule I on the back of the return.

Further, we offer to prove that if this partnership return were prepared in a proper manner, from the viewpoint of tax accounting, from the figures shown in the books, Schedule I of the partnership return for the year 1946, which I believe is Exhibit 83, instead of showing a profit to Elmer Remmer of $474.86, would show a loss of $825.14; that that same schedule, instead of showing a profit to William Kyne of $474.86, would show a loss to Mr. Kyne of $825.14; that that same schedule, instead of showing a profit to Thomas C. Turner of $474.86, would show a loss to Mr. Turner of $825.14, and that with respect to Mr. Cavani that the schedule, instead of showing a profit of $474.85, would show a profit of $4374.86, and that the reported share of Mr. Remmer on Exhibit 83 actually was an overstatement by the sum of $1199.99, in comparison with what the figure would have been had the proper tax accounting been used in preparing Exhibit 83 from the books and records which this witness analyzed.

Now in connection with that offer of proof, your Honor, I would like to renew my request that your

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Honor permit us the scope of cross-examination of an expert in the matter of these tax accounting matters of salary.

The Court: Well, we will take up this offer of proof. As I understand it, this offer of proof does not concern any other matter embraced in the cross-examination. As I understand it is direct. The direct examination had to do, and all had to do, as far as I can see, is to show the source of this Exhibit 163.

Mr. Avakian: That is not all, your Honor.

The Court: Now you could prove these matters if you want to make this witness your own witness.

Mr. Avakian: Your Honor, this witness will also testify he made examination of these returns. That was direct.

The Court: Very well, but the purpose of this cross-examination, as I understand, is as to the reliability and authenticity of Exhibit 163.

Mr. Avakian: No, that is only part. He was assigned these particular returns for analysis and he testified that he examined these returns and these books. Now that is his testimony.

The Court: Yes, that is true.

Mr. Avakian: This offer of proof relates to his direct testimony that that was what he did.

The Court: Have you anything to say, Mr. Campbell?

Mr. Campbell: Yes, I submit these matters are not within the scope of proper cross-examination. This witness stated he had before him, when he

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drew this schedule, these figures and returns. Some figures he drew from the books and where the books did not have figures, he took the figures from the returns. That is the entire, and in my opinion, all his testimony. The matters which counsel seeks to adduce, if true, can properly be adduced through his own case and through his own witness.

The Court: The offer will be rejected.

What is the other matter?

Mr. Avakian: When Mr. Schriber was on the stand, he was excused subject to call and the defense reserved the right to recall him and we would like to know if a time could be suggested agreeable to the Court and others to get him back up here.

The Court: That is a matter to take up with counsel and if you can not agree I will hear the matter.

RE: CROSS-EXAMINATION OF EXPERT WITNESSES

Friday, January 11, 1952, 1:00 P.M.

(In the Absence of the Jury.)

The Court: I understand counsel desire to present some matter?

Mr. Gillen: May it please the Court, the matter that we desire to take up with your Honor, the defense is convinced that we are suffering irreparable harm in the case of the defense by reason of the rulings that have been given in regard to so-called expert witnesses.

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We are just entering the stage of expert witnesses in this matter. The prosecution has introduced three, four, I guess, members of the office of the Internal Revenue Department. Three of them are accountants and one a certified public accountant and one man—I do not know whether Mr. Mooser was an accountant or agent in the particular type of work he was doing.

Now, may it please the Court, we feel that we have fallen short of appreciation here of the rules in regard to expert witnesses in whatever line they may be called as experts, and it is our opinion that a man who is either a public accountant or who is a certified public accountant more so, is in no different position as an expert in his particular field than a physician and surgeon. Now your Honor knows and must know particularly—I know there were some railroad cases tried here and that experts in the operation of railroads and mechanical matters are called as witnesses, and it is a fundamental rule that a witness may be examined first as to his qualifications, to determine whether or not he can depart from the hearsay rule and give his opinion, and thereafter if he presents testimony gives his conclusions. He may name, for example —I think the best illustration is that of a doctor—a doctor is called upon to examine a man who has been injured. The doctor might relate what he discovers about the man, relating symptoms, some of which may be objective, some subjective. He might, as to both symptoms, give his opinion, what they mean, how they occurred, what might be the prog-

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nosis; then as to substantive symptoms, the ones the doctor must rely upon the patient for, the doctor gives his expression and opinion, whether they are sound, whether there is merit to the complaints made, and so on, and then he describes his conclusions as a result of his findings, both subjective and objective, as a rule, and then he describes what mode of treatment should be given and he might also be called upon to give a prognosis as to the man's future. Of course, your Honor realizes that he can then be cross-examined concerning any type of treatment that might be applied. He can be cross-examined as to symptoms that might have been present in the record by reason of testimony of some other expert, a symptom he might overlook, just like a certified public accountant might overlook a notation or particular ledger, and he can be asked if those matters were called to his attention would that in any wise change his opinion or change his conclusions. Or a doctor might be called upon to give expression to his opinion as to whether or not the treatment could be resorted to in another manner and whether or not, in his opinion, that would be better or worse or whether in his opinion that would change the picture from his point of view—the man is an expert —still using as illustration the physician or surgeon, a doctor may sit in the courtroom and listen to testimony of another man on the witness stand and then he might be called and asked on cross-examination, "Did you hear Dr. Jones," for example, "testify and do you agree with what Dr.

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Jones said?" He might say, "I agree (or disagree) with Dr. Jones because I found a symptom Dr. Jones did not mention and if Dr. Jones had found that symptom or was cognizant of that symptom, his opinion might be as to what I figured. I would agree if the symptoms Dr. Jones found are true, but I found additional symptoms."

We have an illustration in connection with Mr. Mooser. He stated it was his opinion, from everything he had found that the rent of the 186 Club and various other accounts had been paid in cash. Then comes another expert, in the person of the gentleman who is now presently on the stand, a certified public accountant, and what does he say? He says he found record of running account of payment of rent and utilities by check through the Day-Night Cigar Stand, because the 186 Club did not have a check book and various accounts, including tax and social security payments, were made by check through the Day-Night Cigar Stand, which was debited to the account they carried in their books with the 186 Club.

Now, may it please the Court, it is true, as your Honor said this morning, one witness can not be called upon to pass upon the credence of another witness' testimony, but the fact of the matter is that that is not the rule with regard to experts, because an expert listens to the testimony of another expert and then gives his opinion and conclusion within the realm of his speciality or field. We know it is complete departure from the fundamental hearsay rules and everything else because

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of the particular skill and experience and so of the expert, and it doesn't make any difference whether it is an account or a doctor or a dentist or even a lawyer, which is probably the most inexact science we can conceive of, but the fact of the matter is that anything that has been gone into the record, that appears in the record, can be put together into a hypothetical question or may be called upon for testimony from an expert from what he has heard another expert testify to and it is perfectly proper for us to probe those things.

Now your Honor has suggested to us from time to time, and particularly with reference to this gentleman and perhaps Mr. Mooser yesterday, you can call him as your own witness. Of course, your Honor knows in the first place we have to preserve a certain status until the conclusion of the prosecution's case, because for obvious reasons, and following your Honor's suggestion, we wouldn't be permitted to examine any witness at all by way of cross-examination, just sit and listen and then call the same or some other witness back to attempt to refute what has been established; something that is left before the jurors, the triers of the fact. It is an impression and if it is left there and no attempt to remove that impression, unless that particular subject, fresh in the minds of everybody, can be fully and completely probed at that time and any refutation be accomplished, it should be accomplished at that time.

We respectfully submit, your Honor, that an accountant who is called upon to examine books

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should be in no different position than a doctor who is called upon to examine the body of a human being. The accounts sets forth, from what he has examined the symptoms and prescribes or adopts, for substantiation of the opinion that he is going to give, the way the matter should be treated and then he gives his conclusion and result of his examination. Absolutely no different from the doctor.

Now we feel that we should be—in fact, we are satisfied, your Honor, it is fundamental—we should be allowed to probe into any other matter of approach or to question upon past records in evidence. It must always be within the record. For example, Mr. Weaver, the other day, said because it was after a holiday, the first banking day, I believe the year was 1946, your Honor will recall, that Mr. Weaver said the account at the bank reflected a certain thing as of January 2nd. He said he didn't know, but he assumed the money must have been in the hands of the taxpayer on December 31st. It then developed he did not have in mind that particular business was open on a holiday, not closed like a bank, and Mr. Avakian attempted to pursue the probe by asking him, "Suppose it were open and a lot of business done on New Year's Eve, would that change your opinion?" and as a result of objections made, he was limited in his probe into that particular phase. Now we say he had just as much right, as if he were to say to a doctor, "Suppose, Doctor, that man did not have these symptoms or so on at a certain time, would that change your opinion?" and it reflected

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an altogether different picture for the doctor. So we certainly urge that some consideration should be given to the very nature of these witnesses now —and I assume that we are going to have more— and we be permitted to probe from every possible aspect to determine whether or not they may not have found other things, if other symptoms are present and in that way then the jury is left with a set of facts that can be determined one way or another. We maintain, if the Court please, that this case is based entirely upon circumstantial evidence and your Honor knows when a case is based upon circumstantial evidence, in order for a conviction, then the circumstances must be said that they point only to the guilt of the defendant and not conceivable of any other rational determination. Now certainly if an expert accountant says, "The way I treated it * * *"—of course, here to start an accounts must set up certain ledgers with regard to accounts, so that he may be able to fit them into the picture—sometimes an account is not clear, as indicated here, and he has to set up a ledger, well, I assume this was done because of this reason. It might be wrong and it might be right, but he does the best he can at the time to set up some basis for him to inaugurate his diagnosis of the whole situation, and we feel, your Honor, that any the situation, any the factual situation, that might show alternative assumptions, based on the hypothetical questions or the facts in the case, should be left to the jury, so they may draw their conclusions with all of the other circumstantial evidence in the

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case, and adopt whatever assumptions they think to be the reasonable theory, or to afford them an opportunity to determine whether or not there is some reasonable doubt in their minds because of the two theories that are equally conceivably the right theory.

We submit that matter to your Honor.

The Court: Let me make an observation. Supposing these exhibits which are summaries—I think those are the exhibits you have in mind.

Mr. Gillen: Together with other evidence, your Honor.

The Court: Suppose those exhibits, of which it might be said they are either deductions or assumptions or expressions of opinion or an expert witness—well, I really think your point is well taken as to that class of material.

Mr. Gillen: That is what we are addressing to your Honor, yes.

Mr. Campbell: I would like to be heard as to those exhibits, however, your Honor. I think if your Honor will recall the evidence, and let us take the last when Mr. Harkness was still on the stand. He was not asked on direct examination for any opinion or conclusion whatsoever. His testimony was entirely elicited.

The Court: I do not want to interrupt, but I want to understand that statement. But the exhibit which was introduced in evidence, pursuant to his direct examination, contained within it assumptions and deductions, not merely extracts or copies or transcripts from records——

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Mr. Campbell: That wasn't his testimony, your Honor.

The Court: But the exhibits themselves—he arrived at certain items or statements contained in Exhibit 164 that were not copied from the book or records but were the result of some deduction of his, isn't that true?

Mr. Campbell: No, I do not believe that to be the case, your Honor.

The Court: Is that your point, Mr. Gillen?

Mr. Gillen: Your Honor has my thought exactly.

The Court: I do not mean to interrupt, but I want to get started thinking.

Mr. Campbell: As I see the situation and understand the evidence, first as to direct examination—he stated, in response to questions, that this summary had been drawn from specific books which are in evidence and specific records which are in evidence, that these represented the accounts and figures in the books.

Now on cross-examination he was asked if, in addition to the book, if there was anything in the record which also substantiated—this was as to cross-examination—and he said, "Yes, I heard the testimony of Mr. Kyne," and his direct testimony led to the introduction of the document and Mr. Harkness identified that and said the figures in that were drawn from the records which were identified as being in evidence here and did not represent his conclusions or opinions. He did not state whether, in his opinion, those entries were correct.

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He did not state in his opinion, as a certified public accountant, except possibly on cross-examination, but not direct examination, he did not state that as an accountant those were improper entries or that the entries were false in any regard. He was simply asked to put into evidence, in a schedule form, that which was contained in the exhibits which have been produced here.

Now your Honor permitted, and has permitted, the fullest and widest latitude in cross-examination as to the sources from which he got that figure, as to the total, where he had total accounts in the books, and that is not a matter of conclusion, it is a matter of mathematics, which can be done by the jury, Court or counsel, as well as by a witness and a witness in this case and in connection with this type of evidence, is only used for convenience and assistance, rather than compelling the jury, or asking the jury, to take the books themselves and make the additions and put them down in the schedules, so that this is in a shorter and more concise form than going through a lengthy ledger.

Now I agree, if we were asking for opinion as to the accuracy of the books, as to the handling of matters on the books, as to classifying of accounts, whether proper or improper, as to entries of partnerships that were set up in there, which are matters of opinion and would be matters of opinion, then I would agree that they were testified as expressions and would be subject to all examination of expressions, but under the circumstances of this case, at this point, these men have

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not called upon for opinion at this stage, they have only been asked what do those records show as to those accounts, which for convenience have been put on schedules and introduced, and under those circumstances I do not agree with counsel.

Now so far as passing on testimony which counsel pointed out some discrepancy between Mr. Mooser and Mr. Morgan, I submit that is not the case. Mr. Mooser testified he went in and examined the records of the 186 Club, not of the Day-Night Cigar Store. He did not examine those, only the 186 Club. He said their expenses were paid in cash through the Day and Night bank account. Mr. Morgan's testimony is in harmony. He said the 186 Club expenses were paid by check by the Day-Night Cigar Stand and they were reimbursed in cash by the 186 Club, which is substantiation of Mr. Mooser. As a matter of fact, the 186 Club did pay expenses in cash because some they paid to the Day-Night and I presume some they paid direct, but there is no difference there. Nor was Mr. Morgan testifying in the roll or capacity of an expert to pass upon the weight or the credence to be given to any other witness. That is a matter within the province of the jury, as one of the instructions, that they are the sole judges of the weight to be given and the credibility to be given the witness, and I submit, your Honor, that in the orderly procedure of this trial, that your Honor's rulings have been correct under the law, that the cross-examination in the first place must be con-

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fined to the scope of direct examination, that unless an opinion is sought and received in evidence, then, and not until then, would the rules which Mr. Gillen refers to as to expert testimony apply. Now take the situation of a doctor which he refers to. Medical testimony, of course——

The Court (Interceding): May I ask a question? Take this summary, 164. The purpose of it is, as you stated, to get into a narrative and easily accessible form the effect or contents of a great many books and records. Not so far as an item in the summary can be traced down to an item in a record, we have no opinion or deduction.

Mr. Campbell: That is my position.

The Court: But suppose there is an item or two here in this summary that he adduces from a fact that there was not something entered at a certain time and something else was carried into it. We have heard of those situations. I am going to ask Mr. Avakian, or any one of counsel, let us get in our minds some of these questions which this court has ruled against you on and let us see if they can be said to come within the category of an opinion. If any of these witnesses in any of these exhibits have an item which is not set forth on the account, but is the result of his opinion of what that account means, or what the item is by some expert knowledge of his or knowledge of accounting, then I think we ought to pursue the same line of cross-examination as to any other witness, so let us look at some of these questions of which counsel seem to feel the ruling should have been otherwise. I

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would like to hear them and examining them in that light, I am willing to retract and let you go ahead with it.

Mr. Avakian: I can give you two examples, your Honor, if I may have 163. Exhibit 162 is Mr. Harkness' exhibit and he shows, for example, at the end of 1946 certain amounts as capital accounts as per books at December 31, 1946, of the various partners. Now let us bear in mind this, your Honor, as a preliminary statement, that when the witness presents a summary of this kind, he is not only stating these particular items are figures that are found in the book, but he is also stating that these figures represent what the book show as to capital accounts of these partners and that also involves then, your Honor, an analysis of the various entries in these various books to determine what is material and relevant in determination of the amount of the capital account. Now in this particular example that I am using, we find that capital account shown on Exhibit 163 for the partners at the end of 1946 did not include any allocation of profit or loss for the year 1946. Now Mr. Harkness testified that a capital account, to be correct, should include the profit and loss both and it further developed in my cross-examination on January 1st—or maybe the 2nd, but on the following January—an entry was made in the books crediting the 1946 profit, so that from the books themselves he had available the data which would have made a correct figure to enter into this exhibit under his statement of what is correct, so that it would have

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been proper then to show that, instead of using December 31, 1946, capital account of the partners, the last entry that was made in 1946, he should have included the entries made in the books early the next year to reflect the 1946 profits. Furthermore, your Honor, the books themselves show what the profit or loss for the year was, according to the books, the books that he used.

Now your Honor will remember in connection with my offer of proof I stated in the preparation of the return, whoever prepared the return, overlooked a $5200 salary payment made during the year 1946 to Cavani. Now that payment showed in the books, so had he used the data shown in those books in a different way from the way he used it, he would have come up with a different answer. Now, I wasn't asking him to speculate as to things not in the record. I wasn't asking him to speculate as to things that were not in the very books upon which this exhibit was based. I was simply asking him if, instead of picking out the particular figures from the particular page of these books that he did pick out, had he used other figures that are found in that book and made a proper accounting treatment of those figures—not picking figures out of the air—but making a proper accounting analysis of the figures that were in the books themselves, what answer would he have come up with. That is what was involved in my offer of proof. That, your Honor, is where we disagree with Mr. Campbell, that they are simply summarizing the books.

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Now if the books themselves which were used, would support a different answer than the one in the exhibit, we feel we are entitled to show that, so that when the jury decides the facts, if it decides to interpret the facts in this direction, it will know what Mr. Harkness' conclusions would have been as to the amount of capital account. If it decides to interpret this way, it will likewise know what Mr. Harkness' opinion and conclusion was on that interpretation of the facts. That is all we are getting at, your Honor, and I do not think that we should be limited in treating these people as expert witnesses, when in fact they are presenting testimony which represents conclusions on accounting questions, which we can not expect the jury themselves to work out. You might say an expert witness is one who is called for the purpose of putting together for the jury difficult and complex matters, on which the jury has not either the experience or ability to reach completely, questionable conclusions without some assistance.

Mr. Campbell: I would like to answer that. I think Mr. Avakian's statement pretty well answers itself in this record. Mr. Harkness was asked to put on this sheet, and he stated that he had, the capital accounts as shown on the books as of December 31, 1946, and from Mr. Avakian's statement, that is exactly what he put in. He made no adjustment. Mr. Avakian is attempting to argue with him that when he makes this summary, which only purports to be a summary of what the books show, that he should make adjustments as an ac-

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countant. He wasn't asked to make adjustments; he was asked to put down what the books show as of that date. I submit if the defense contends that the books should have been adjusted, they are at liberty to produce evidence in that regard, but Mr. Harkness was not asked if in his opinion did these capital accounts correctly reflect the capital of these various individuals, and I have no doubt that counsel would object to that immediately.

The Court: Let me put this thought to you—probably it is crudely expressed—if there is any item of figure in that summary and it has a certain designation and it can not be found in the same designation in one of the records, I would say that the defendant could go into that and treat that as an opinion of an expert?

Mr. Campbell: Yes, sir.

Mr. Avakian: But I recall exactly that situation, your Honor. Page 1966 of the transcript, I was questioning Mr. Harkness on Exhibit 163. Mr. Harkness had an entry in the account of Mr. Kyne of $4985.44, and the last date in the account showing that the balance was May 31, 1945. There were no further entries in the account after that date, yet Mr. Harkness used that figure in Mr. Kyne's capital account as of December 31, 1946, and I asked this question, and I am at line 15, page 1966——

The Court: Don't pass one ruling that you will probably say was correct—I found a ruling in your favor, so you don't want to overlook that.

Mr. Avakian: We appreciate every ruling in our favor. The question was:

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"Q. Now would you eliminate—and I will give you a sheet of paper if you want to work this out—would you eliminate from Exhibit 163 the item of Wm. E. Kyne, trustee account, $5,985.44, as of December 31, 1946, and tell me what the total of the capital accounts would then be?

"Mr. Campbell: To which I object as not proper cross-examination.

"The Court: Objection sustained.

"Mr. Avakian: Aren't we entitled to see what the result would be if he had not made the assumption he did?

"The Court: That is a matter not within the scope of direct examination. It is a matter of calculation.

"Mr. Avakian: It is a matter of testing what the results would be if he had not made the assumption that he made."

The Court: Stop a moment. Let me look at that please. I don't see how I can go along with you on your contention in regard to that question.

Mr. Avakian: Because, your Honor, he assumed a figure that was entered as of May 31, 1945, represented the balance of that account on December 31, 1946. Now there was no entry as of December 31, 1946. The last entry in the account was May 31, 1945.

The Court: You could ask him on cross-examination, go into the reason why he made that deduction, but to ask him to accept your theory and then figure out the exhibit to suit your theory by it, is a different thing.

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Mr. Avakian: That is plain if the evidence would support two interpretations, one that it was still there on December 31, 1946, and the other it wasn't.

The Court: He testified the item was there May 31, 1945, but he said he treated it as if carried all the year through.

Mr. Avakian: A year and a half later.

The Court: And you might inquire as to his reason for so assuming, but to go farther and ask him to accept your theory and work a mathematical problem here to the jury on your theory, I can't see where that is proper.

Mr. Avakian: That is exactly the same as asking a doctor, did you make a certain assumption in your examination of this patient, and he says yes. Maybe the testimony in the record would permit another interpretation which would make that assumption incorrect, then it is proper to say, "Now, Doctor, if you had not made that assumption, what would your diagnosis have been? Would it be any different?" To the extent that the witness has relied upon his experience as an accountant in drawing certain conclusions and to the extent that the jury might properly conclude that his assumption was wrong and something else was true, it is proper to ask the alternative question—if your assumption is wrong and the fact is this way, what would your conclusions be, and then the jury has before it the conclusions of this expert on both alternatives.

The Court: If you have a doctor on the stand

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and he gives his opinion as to the cause of an injury, you are examining first what he bases that upon, objective or subjective symptoms.

Mr. Campbell: I think it is a matter of common knowledge to all of us, not requiring an expert and not calling for conclusions, that when an accountant leaves open a particular date that then that record shows the balance would be the same, just like our bank accounts. We might make our last deposit in our account on December 15th and our last withdrawal made December 20th, and yet the balance would be the same.

The Court: The question was, what should the doctor prescribe or do for a certain condition or injury. Then you ask him if a certain symptom had not appeared, what would he prescribe for the patient? That is what this amounts to.

Mr. Gillen: May I give your Honor a very familiar illustration that your Honor has probably encountered in railroad cases? A doctor has examined a man injured on the railroad and the doctor will assume or draw his information as to certain symptoms—the man suffered pain down his right leg, and the doctor says, "I assume, because you have no other history of previous injury or anything else, that all this pain comes from this injury" he received on a certain date. Then comes along cross-examination—"Doctor, if you were informed that a year and a half before this man fell off a locomotive and at that time suffered a fractured rib, and so on, would your diagnosis be different?" Of course, that brings into play another

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symptom that the doctor wasn't aware of or another set of facts that are existing and of course nine times out of ten that will change the doctor's opinion, or in other instances, the doctor will ask questions back and forth and say, "No, I do not think that injury would bring about the symptoms that now appear."

The Court: I agree with you, but I don't think that applies to the ruling shown in line 13, page 1966, of this transcript. I still think the ruling to that question is correct, that ruling beginning on line 13.

Mr. Avakian: The objection, of course, was based on the ground it is not proper cross-examination and it is an assumption which he obviously made, because there is no entry in the book subsequent to that date, so——

The Court: You want the jury to accept your theory and then work out the problem on the basis of your theory?

Mr. Avakian: No, it is not a mathematical question. It isn't asking the witness to accept as true the hypothetical statement. All it is stating is if the facts are accepted as different by the jury, which is to decide the facts, what would your opinion be?

The Court: You are asking the witness to accept your theory and work out a problem?

Mr. Avakian: That is right. That is not binding on anybody.

Mr. Gillen: We did that hypothetically when the doctor gives his opinion from his own findings

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and then takes this set of facts and decides what his opinion would be under those circumstances.

The Court: Well, what will we do now, proceed?

We will bring in the jury.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, plaintiff, vs. Elmer F. Remmer, defendant, No. 12,177, at the trial of the case commencing November 28, 1951, and that the foregoing pages comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability, of arguments held during the trial in the absence of the jury on December 12, 13, 18, 27, 28, 1951, and January 3, 9, 10, and 11, 1952.

Dated at Carson City, Nevada, January 22, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed January 23, 1952.

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[Title of District Court and Cause.]

HEARING ON DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Be It Remembered, That the above-entitled matter came on regularly for hearing before the Court at Carson City, Nevada, on Friday, the 15th of June, 1951, the defendant not being present in court but represented by his counsel, John R. Golden, Esq., and the plaintiff being represented by Bruce R. Thompson, Jr., Esq., and Walter M. Campbell, Esq. The following proceedings were had:

Mr. Golden: I have here a memorandum of points and authorities I would like to hand the Court.

This is motion for bill of particulars made under Rule 7(f) of the Rules. At the time of the arraignment, your Honor read the indictment carefully, but may not recall that it simply alleged that as of each year the defendant wilfully, etc., understated his income in a specified amount and failed to pay income tax in a specified amount. There is no detail whatsoever. Now the old form of indictment, before the new rules, had something the appearance of an income tax return to show the income from various sources, that is, earnings, rents, royalties, what not, and it showed the exemptions and deductions and what the government said the income should be. The new form of indictment simply says——

The Court: The defendant is present?

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Mr. Golden: No, he is not.

The Court: Is there any question about the propriety of proceeding here without him?

Mr. Golden: Well, the situation is this—at the time we were here for the arraignment, I asked the Court whether he need to be present and your Honor reserved decision on that and then when I had some correspondence with the clerk regarding a hearing date, I again asked the question and I assumed, I think, from my letter, if I didn't hear to the contrary, he need not be here. So far as we are concerned, we will waive his presence and there never will be any question about raising it, I assure you.

The Court: Any objection on the part of the government?

Mr. Thompson: No, we have no objection.

The Court: Very well.

Mr. Golden: In other words, your Honor, there is nothing in the indictment here to show whether the defendant did not return all his income or whether he overstated his deductions. There is nothing to show the nature, source or amount of any item claimed in the indictment to be increased or decreased or the type deductions, whether allowed or disallowed, and nothing to show whether the income which the government claims the defendant receives is reflected in his books or not, and if not, where it might be reflected. The position is the same as in a civil case. If the plaintiff in a civil case were to sue the defendant for one thousand dollars for goods sold and delivered, the

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defendant would be entitled to bill of sale, assuming the merchandise was shoes, at such and such a price. That is what we want. We need a bill of particulars in an effort to make this trial run smoothly, to permit us to prepare for trial and, of course, in addition to protect us against second prosecution for the same offense, which could well be had were there not a bill of particulars, because there is nothing to identify these sums of money and the cases, as cited in the memorandum, your Honor, show that under these circumstances we are entitled, as a matter of right, to such a bill.

Now I know we are not entitled to the evidence. We are not asking for evidence. We want to know, for example, whether the government claims that the defendant received in such and such a year such and such income from such and such an enterprise of his. We do not know whether they have a witness who will say that was the money, or another witness who will say, "I made up the books," or "I was told to make an erasure in the books," or something of that sort. We do not care what their evidence is, but we want to know on what they are going to proceed. If the particulars to which we are entitled happened to disclose some evidence, under the case cited under paragraph 5, nevertheless we are entitled to it. Although we are not entitled to evidence, the fact that the information may include evidence, would not preclude us from getting it. I have cited a number of cases, your Honor, in which the courts have held that we are entitled to a bill, and in particular I have set out

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at length in the memorandum an opinion of a district judge, Judge Reeves of Missouri, in full because I am not sure whether it is shown in the official reports, and commencing on page 3 of the memorandum that sets out very fully an opinion which is typical of the cases.

Now these matters, of course, are in your Honor's discretion. If this defendant were charged with a particular single transaction such, for example, as unlawful extracting gold bullion, then I would say we would not be entitled to a bill of particulars as to the details of the transaction, because he would know those things himself, and there have been cases in which defendants have asked for those particulars in such circumstances. However, in these tax cases there is no case which I have found which does not give the defendant the information which we have asked for in the bill of particulars.

The indictment in the Kelly case, your Honor, is practically word for word like the indictment in this case. The indictment set forth on page 4 of the memorandum, it says: On or about a certain date the defendant did wilfully and knowingly attempt to defeat and evade, and so on, a large portion of the tax by filing with the Collector of Internal Revenue a false and fraudulent return, and so on:

> "* * * wherein he stated that his net income for said calendar year was the sum of $5,017.42 and that the amount of income and victory tax due and owing thereon was the sum of $890.46, whereas, as he then and there well knew, his

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net income for the said calendar year was the sum of $33,855.33, upon which said net income he owed to the United States of America an income and victory tax of $15,621.72."

Apart from the figures and the years, the indictment is practically the same and Judge Reeves analyzed the authorities exhaustively and closed by saying that:

"The obligation is upon the Government, either in the indictment or by a bill of particulars, to inform the taxpayer concerning the facts employed as a basis for a charge of income tax evasion."

Now I do not know whether your Honor will agree with me or not, but I think that is sufficient for the moment, until we get into the detail of what I believe we are entitled to and your Honor may wish to hear from Mr. Campbell first on the general proposition.

Mr. Campbell: Possibly I should identify myself. My name is Walter M. Campbell, Jr. I am regional counsel, Penal Division, Bureau of Internal Revenue, and I have heretofore been appointed Special Assistant to the United States Attorney to assist in the prosecution of this case and the official appointment has been filed with the clerk of the court.

The Court: I think when we were in court before it was suggested that Mr. Golden and Mr. Pike should confer on certain matters that should or should not be agreed upon. Was there such a conference?

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Mr. Golden: No, your Honor. The chronology of the matter is this. I heard nothing whatsoever—we were here on April 27th and on May 11th I wrote to Mr. Pike and asked him to give me some word as to his intentions.

The Court: I wonder if we could recall—would it show in there what those matters are? I was inclined at that time that I thought the defendant ought to have some of those specified matters and I thought that we could work out by agreement with Mr. Pike. It might be worth while to see what they were. Maybe we could get some kind of understanding on this.

Mr. Campbell: I may state, your Honor, prior to that date we have had a number of conferences relative to these matters, I believe in Mr. Pike's office, shortly before the indictment was returned, and it was my opinion, expressed to Mr. Pike, that we should have an order of the Court, because we did not believe that what we would voluntarily supply to Mr. Golden would probably satisfy him, as I told Mr. Golden orally the other day.

The Court: Perhaps we could be in this situation—could you state at this time the extent of the matters which you would not object to if the Court made an order?

Mr. Campbell: Well, we are in this position, your Honor—as Mr. Golden is aware, the government's case here is what is termed a net worth case. The income which the government alleged was received by the defendant, net income and not reported, is represented by actual figures and net

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worth, comparing his assets at their cost at the beginning of the year and the assets held at the end of the year at their cost and excluding non-income sources. In support of that, of course, the defendant had various enterprises, some of which had books and records and some of which we have found no books and records. To disclose the exact nature of the government's case; that is, to provide a net worth statement, would, of course, disclose evidence which does support the government's case.

Now all of the requests of the defendant, in his motion for bill of particulars goes to pertinent facts, with the ex-deductions. Of course, they are not applicable, I believe, in a net worth case, because all expenditures have already been eliminated during the course of the year when the net worth of the defendant was ascertained at the end of the year, with the exception of outstanding liabilities which, of course, must be given weight.

I might add this statement, your Honor. During the course of these many conferences we had offered, prior to the indictment, to make available to the defense a copy of the government's income statement, if the defense would also supply the government with a net worth statement and the defense's position was that they were unable to do so because of accounting difficulties and lack of funds, I believe, with which to complete their accounting. Of course, the matter of granting or refusing bill of particulars is undoubtedly within the discretion of the Court and the extent to which a

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bill of particulars will be given is within the discretion of the Court. However, we feel that many of the requests made here, in view of the nature of the government's case, are not requests which can be met, because they are not applicable to the theory of the government's case, which is that of net worth case, and which is almost always the situation where inadequate books and records were maintained or made available to the government.

I do not think there is merit in Mr. Golden's point of the possibility of the defendant being placed a second time in jeopardy on the same charges. The gravamen of the offense in each count is that for a certain calendar year he attempted to defeat and evade a large part of his income tax. The decisions, of course, hold that the government need not prove a specific amount set forth in the indictment, so long as a substantial amount of understated income is proved a combination, so we think under such an amount as here would bar any further prosecutions with respect to his income tax for that particular year.

Now, of course, we will provide to the defendant whatever the Court deems proper should be given to him. However, these are all matters which are, of course, peculiarly within the knowledge of the defendant, who knows more about his income and sources of his income than any one else. The leading court case, of course, on the matter of the court's discretion, is that of Wong Tai vs. United States, reported in 273 U. S., page 77, and particularly from page 82, wherein it is stated:

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"The application for bill of particulars was one addressed to the sound discretion of the court, and, there being no abuse of this discretion, its action thereon should not be disturbed."

Now I am familiar with the opinion by Judge Reeves, which is cited in the memorandum of points and authorities. However, the tendency in the district courts here in the Ninth Circuit, so far as I have observed, and I have personally participated in all of these cases in the Northern District of California, has been where the taxes involved are those of the defendant or of the entity of which he is a party, that request for those particulars have been denied. Of course, however, there are no written opinions by the various judges on that subject and, as I say, it is a matter solely within the discretion of the Court.

The Court: Mr. Golden?

Mr. Golden: Your Honor, regardless of any possibility of double jeopardy, the other main reason for the bill of particulars is so the defendant can prepare his case.

Now Mr. Campbell has told your Honor that this is a net worth case, that the defendant has a number of enterprises, that there are books for some of them and not books for others, and at the same time he says these matters are peculiarly within the defendant's knowledge. Now that is not consistent. The defendant can't know, for example, if the government says in the beginning of 1944, the first count of the indictment, which is the year

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1944, the defendant returned an income of $9500, when he should have returned an income of 33 thousand plus, now that does not tell the defendant anything. The government may say at the beginning of 1944 his net worth was zero or a million dollars or any other amount and at the end of 1944 it was a number of $33,934.61 more than that. It doesn't give him anything to go on at all, and we say we are entitled to know, if he has a net worth case, what net worths they are using. That is not divulging any evidence. We want to know what net worth they use for the start of the period. We want to know what the items are which make up that net worth. We want to know what acquisitions or receivables there were of each year which the government claims increased the net worth or constituted income. For example, if they say this man received ten thousand dollars from Cal-Neva or the Menlo Club in San Francisco, that isn't divulging any evidence. That is just telling us what they are going to try to prove. It may be if he is prepared that he can show that ten thousand dollars received from Cal-Neva was not income, but was a loan or repayment of debt, or whatever it may be. In other words, if we come in here the way this stands and went to trial tomorrow, we wouldn't have the remotest idea. As Mr. Campbell knows, this defendant has been connected with a number of different enterprises; the government has most of his records. They have permitted us to look at them at the government premises and we have, to some extent, looked at them, but by telling you it is a net

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worth case, he tells you that they are not relying upon those records.

As far as the offer to exchange net worth statements is concerned, that is not material here. There were reasons why we could not accept that offer, and furthermore, the government would not be bound by any such offer made to us unless by any such statement he could say it was given to us in response for a demand for bill of particulars and even then they can at any time amend their bill of particulars any time before the trial at least, if not during the trial.

If I may respectfully suggest so, your Honor, I think your Honor is absolutely right in stating that we are entitled to something in the face of this indictment. I think we ought to get down to brass tacks, as the saying is, and see just what it is your Honor is prepared to order that we receive. We take up the demands one at a time——

The Court (Interceding): You made a statement here in repeating Mr. Campbell's statement, the government is not relying upon the records. It would follow from that that if a bill of particulars was given, there is a question whether it would be almost impossible to give that statement without disclosing evidence.

Mr. Golden: I do not think so, your Honor. For example, this is what I had in mind and slipped my mind a minute ago. In the civil assessment made against this defendant by the government for these same years, one of the bases for those assessments is that he considered certain enterprises to

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be partnerships and the government says they are not partnerships. Now that is in a civil matter. In this criminal matter, we have been told officially in conferences that that is not any part of the basis of the criminal case, that the criminal case is simply on a net worth case, and we are absolutely in the dark as to any of the things which the government might claim here. They do not have to tell us the evidence to give us the net worth, they only have to tell us what was the result of their evidence would be.

The Court: Let me make this observation. In Count 1 of the indictment it is charged that the reported net income was $9500.

Mr. Golden: Yes, your Honor.

The Court: I would take it that that is what the books disclosed and was the actual report made in the return and perhaps supported by the books, but in view of the statement made by Mr. Campbell, and in view of your repetition of that statement, that the government is relying upon matters not in the books, to disclose any facts concerning that couldn't be done without disclosing the evidence.

Mr. Golden: Yet if your Honor will look at this Kelly decision of Judge Reeves, the same thing arose. At the bottom of page 7, your Honor, the court states what the government's memorandum was in that case. It says (Paragraph 3, line 23):

"* * * it is to be noted from the briefs of counsel for the government that:

" 'The defendant was engaged not only in the liquor and grocery business, but also in

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farming activities, real estate speculation, and rental of real estate. The defendant failed to present accurate and complete books and records covering all of these business activities for inspection by examining officers of the Bureau of Internal Revenue at the time of their investigation of the defendant's returns for the years involved. Due to the incompleteness of the defendant's books of accounting and records regarding all of these business activities, the examining officers, pursuant to Section 41 of the Internal Revenue Code, to determine the taxable income of the defendant for the years covered by the indictment, were compelled to resort to the records of various banks in which the defendant had made deposits, or had otherwise transacted business, plus expenditures evidenced by his returns or acknowledged by him.'"

That is what the government said in that case. Then the Court says:

"It was of course proper for the government to obtain information in this way and the courts have upheld such procedure and, as noted, the evidence thus obtained is competent. However, this is information that may or may not have been available to the defendant. Apparently his books did not disclose these facts. Under such circumstances and from an examination of all of the authorities the obligation is upon the government, either in the indictment or by a bill of particulars, to inform the

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defendant concerning the facts employed by it as a basis for a charge that defendant had evaded or attempted to evade his income tax."

Now I say very sincerely, your Honor, we are not asking them to tell us who their witnesses are going to be or what they are going to testify to or what documents they are going to bring in here. All we are asking them to tell us is what they expect and hope to prove as the net result of all the testimony; namely, started out with such and such net worth, composed of such and such items on the cost basis, as Mr. Campbell says, and during the years in question he accumulated income at such and such time from such and such places and such and such amounts, giving him a resulting higher net worth. That is all we are asking for and that does not give us any inkling as to how they are going to prove it. If they say they are going to show in the year 1944 he got a check from Cal-Neva for ten thousand dollars, that doesn't tell us what man is going to come in here and testify against him or what they are going to claim that the prosecution—I don't mean that exactly—let me put it this way—suppose we knew they were going to claim a ten thousand dollar receipt and suppose we built up a defense explanation for it and they had something that would knock that explanation out, they do not have to tell us that, but they do have to tell us what we have to meet. That is our position.

The Court: In Judge Reeves' decision I notice this, Judge Reeves' opinion:

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> "Due to the incompleteness of the defendant's books of accounting and records regarding all of these business activities, the examining officers, pursuant to Section 41 of the Internal Revenue Code, to determine the taxable income of the defendant for the years covered by the indictment, were compelled to resort to the records of various banks in which the defendant had made deposits or had otherwise transacted business, plus expenditures evidenced by his returns or acknowledged by him."

Now that was the statement from the brief of government's counsel. The Court goes on to say:

> "It was, of course, proper for the government to obtain information in this way and the courts have upheld such procedure, and, as noted, the evidence thus obtained is competent. However, this is information that may or may not have been available to the defendant."

I can not understand that reasoning. If a man makes a deposit in the bank he would know it.

Mr. Golden: Yes, if he made it himself and somebody did not make it for his account. But suppose a man is passing through and stops in a bank and breaks a thousand dollar bill because he does not want the government to know he has a thousand dollar bill and five years later he is indicted and the government is going to bring in a witness to testify to that transaction. We do not want to know that, that would be evidence, but we do want to know what they claim is his income and the deductions.

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The Court: The thought I have in mind is it would be impossible to order a bill of particulars here which would not include within its contents evidence. The motion for bill of particulars is denied and the state of the record is that the defendant has heretofore entered a plea of not guilty to all the counts in the indictment, is that correct?

Mr. Golden: Yes, your Honor.

The Court: And the case is set for trial in this court November 7, 1951.

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had at the hearing on Defendant's Motion for Bill of Particulars in the case entitled, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, held at Carson City, Nevada, on June 15, 1951, and that the foregoing pages, numbered 1 to 17, inclusive, comprise a full, true, and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, January 24, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed January 25, 1952.

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Vol. II

TRANSCRIPT OF RECORD

(Pages 499 to 999)

Supreme Court of the United States

OCTOBER TERM, 1949

No. 304

WILLIAM F. REMMER, PETITIONER,

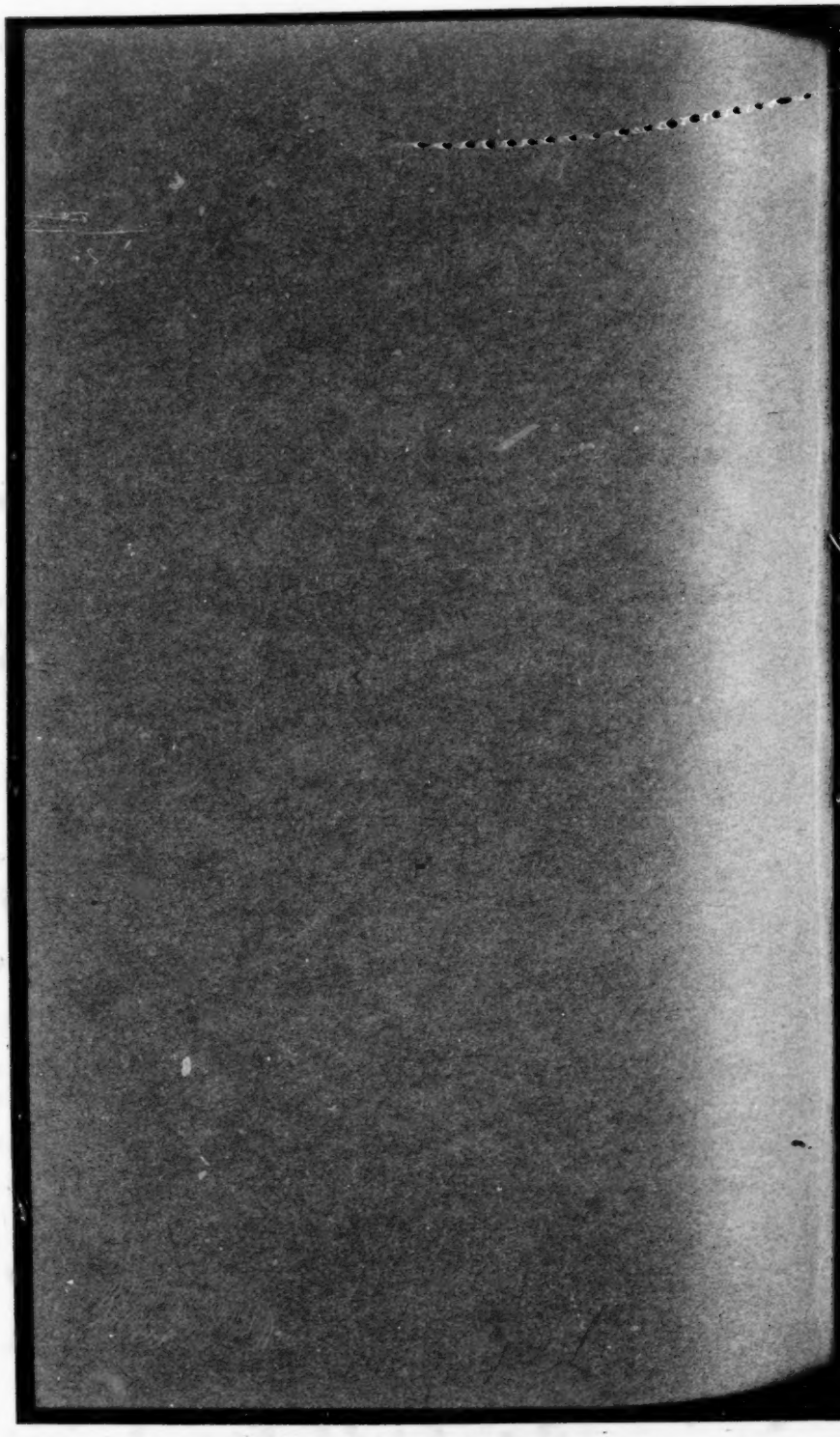
vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1949

CERTIORARI GRANTED NOVEMBER 14, 1949



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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes
Volume II
(Pages 449 to 900)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Title of District Court and Cause.]

ARGUMENT RE: EXHIBIT 176

Monday, January 28, 1952, 3:15 P.M.

(In the Absence of the Jury.)

Defendant present with counsel.

The Court: I understand you desire to take something up.

Mr. Golden: We requested that your Honor take the bench in the absence of the jury. Inasmuch as the jury was already outside for the usual recess, I thought this might be an opportune time to discuss this matter.

Now we are handicapped, in a sense, your Honor, because, of course, we do not know what the witness on the stand, Mr. Weaver, would say in connection with these checks which are marked for identification No. 176, and in that sense we may be premature, but so long as the jury is out, I would like to call this to the Court's attention.

At Mr. Campbell's request, we were handed just now by the clerk certain—at least, one letter from a medical man, which apparently was filed here with the clerk on the 21st of January, and also a second letter from that same doctor, this Earl I. Laskey, a doctor in Beverly Hills, California, and also an original and carbon undated letter, apparently written by F. C. Stewart, Medical Director, who signs himself as Medical Officer in Charge of Public Security Agency, Public Health Service, in Los Angeles, California. Now we assume, your

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Honor, that the purpose of showing us these certificates from these doctors is to attempt to lay some sort of foundation for admission of hearsay testimony, consisting apparently of a conversation between the man Villaudy, who is named in the certificates, and the witness Mr. Weaver.

Now all that we actually know about the matter is that during the two weeks' recess we read in the newspapers that Mr. Campbell had stated that he had had this Mr. Villaudy examined by a government doctor and that the representations of Mr. Villaudy and his doctor that he was in ill health and unable to attend the trial in Carson City were groundless and just an excuse and that he was going to be subpoenaed as a witness. I say we read that in the newspaper. Now we find that the medical director of the Public Health Service apparently agrees with Mr. Villaudy's own doctor, to the effect it would be detrimental to Mr. Villaudy to come to Carson City at this time.

Now the rules provide a recognized procedure by way of depositions for taking of the testimony of a witness who is unable to attend or prevented from attending a trial at the hearing, Rule 15, your Honor. My suggestion is that we might here, in the absence of the jury—if this meets with your Honor's approval—what this hearsay testimony which is proposed consists of and it may well be that we would stipulate to the facts in that regard.

Now I call your Honor's attention that the three checks which have been marked Exhibit 176 for identification, the first check, chronologically, is

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dated May 13, 1943, in the sum of two thousand dollars, apparently written on the account of Albert Villaudy, payable to the order of the First National Bank of Nevada. There is nothing on it whatsoever to connect it with this defendant or this case and the only way it could be connected, in the absence of Villaudy, would be by hearsay testimony. The other two checks, one September 6, 1944, in the sum of $2,600, and one January 8, 1945, for the sum of two thousand dollars, are made payable to the defendant Elmer Remmer and one of them is endorsed with that name and with Mr. Maundrell's name and the other is endorsed with the defendant Remmer's and another name, I can't read—looks like F. W. Guiss. In any case, particularly in regard to the first check, it could only be connected up by hearsay and we do not think there is sufficient showing to produce some letters, the first of which is dated the 17th of January and the second the 21st of January and the third the 25th of January, to the effect that this witness can't come here without giving us an opportunity to determine that ourselves and the effect would be, of course, to deprive us of the right of cross-examination as to these checks.

Now as I say, in a sense it is premature. There is nothing offered yet, but it is reasonable to suppose that the purpose of showing the letters from the doctors and introducing these checks for identification is to ask Mr. Weaver some questions about them, and it would be hearsay. Now we might stipulate to these checks if we find out what the

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contention of the government is and that is why we suggested we might take it up in the absence of the jury.

Mr. Campbell: I don't know what appeared in the papers. I might state we haven't had the newspapers down here for the time counsel referred to. The fact is the subpoena was issued for the presence of Mr. Villaudy and in response to that subpoena his attorney in Beverly Hills telephoned me and advised me that he was that day forwarding a certificate to the clerk of the court, which in due course was received by Mr. Pratt. After that had been received, I made the request, through his attorney, that he be examined by the doctor of the Public Health Service and he was so examined. The conclusion of both doctors is that Mr. Villaudy is too ill to appear, suffering from a large variety of ailments, including heart trouble and acute gout and arthritis, high blood pressure, shortness of breath, and other disabling ailments. I do not intend to take the time of the Court in requesting that the proceedings be had under the rule to suspend the trial while deposition is taken from this man. The evidence has heretofore shown that Mr. Remmer was charged on the books of Cal-Neva with certain monies which he advanced to Mr. Villaudy. We have here certain checks—of course, it is hearsay—which Mr. Weaver identified as having been paid on account of that loan. Now they have not been offered in evidence. If the objection is made that they are hearsay, of course, the objection is good. However, for what they are worth, we

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have produced these and are advising the Court that we have advised counsel of these letters, which I ask to leave with the clerk as to Mr. Villaudy's condition. That is the government's position.

Mr. Golden: Well, our position is this, if your Honor please—an article appeared in the press from some source, not from us, that this Mr. Villaudy was faking and pretending he was unable to come here. Now that didn't come from us. Now we don't say who it came from, but those things do not help the defendant any in a case like this. Now afterward it would appear from the fact from what Mr. Campbell states and from the dates of these letters, that no effort was made to subpoena the proposed witness until some time this month, and this case started in November.

We are prepared to do this, your Honor. We are prepared to stipulate that the two checks which are payable to the order of Elmer Remmer on their face may, by stipulation, go into evidence as representing repayments to the extent of the amounts of the checks and on the dates that they bear on this eight thousand dollar total amount of loans which Mr. Campbell has mentioned. However, in respect to the first check, which is payable to the First National Bank of Nevada and in no place appears anything pertaining to the charge here, we object to that on the basis it is incompetent, irrelevant and immaterial. We are perfectly willing to take at their face value the two checks which bear the defendant's name.

Mr. Campbell: We will accept the stipulation.

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The Court: Very well.

Mr. Golden: Then there will be no testimony by Mr. Weaver as to any conversation he had with Mr. Villaudy.

Mr. Campbell: No, none whatever.

The Court: That ends all question as to any possibility of deposition.

Mr. Golden: Yes, your Honor.

The Court: Let me ask as part of the information for the Court, I do not understand a deposition could be taken of government witnesses. If you notice this Rule 15 (reads rule).

Mr. Golden: Yes, I notice that, your Honor. Of course, the next subsection (b) says the party desiring to take the deposition——

The Court: Then the stipulation takes care of the whole situation.

Mr. Campbell: I do not understand there is any manner in which the government could take the deposition.

The Court: No, I wouldn't think so.

Mr. Golden: Unless we are willing to stipulate.

Mr. Campbell: May I ask the certificates of Dr. Laskey and Mr. Stewart, the medical director, be placed in the official files.

Mr. Golden: May these checks be separated and the one which we have not stipulated to be removed from the exhibit?

The Court: Yes, sir.

Mr. Campbell: May they be given a number, 176A for identification?

The Court: And Exhibit 176 will be admitted

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in evidence and will express the two checks mentioned by Mr. Golden.

Mr. Campbell: My understanding of the stipulation, so we may repeat it in the presence of the jury, is that it be stipulated that these two checks represent repayments by Mr. Villaudy on account of his loan in the amounts and upon the dates stated.

Mr. Golden: That is correct, your Honor.

The Court: Are we ready for the jury?

A. Yes.

[Title of District Court and Cause.]

ARGUMENT RE: HYPOTHETICAL QUESTION

Tuesday, January 29, 1952, 2:00 P.M.

(In the absence of the jury.)

Defendant present with counsel.

The Court: In view of the fact that the jury is not present, we can open the whole question as to all the objections proposed by counsel.

Mr. Avakian: May I suggest, your Honor, you might follow my argument more specifically if you have before you prosecution's Exhibit 165, which is the net worth statement of the Menlo Club presented by this witness.

The Court: I think we ought to hear from Mr. Campbell on his objection.

Mr. Campbell: As well as I can with the question in mind, which contained a great many elements—I will ask counsel if he has prepared writ-

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ten copies of the question. Usually in a long hypothetical question, the question is handed in written form to the witness, in order that he may have it.

The Court: I think my notes will help me somewhat here.

Mr. Avakian: Perhaps in the absence of the jury I could put this chart on the blackboard.

The Court: Then you would have to take it off again in the event it is not admitted.

Mr. Avakian: I would be very happy to do that too.

The Court: There is another point that occurred to me, whether or not this is a question which goes to an ultimate point that might have to be submitted to the jury. I do not think that we should have witnesses here deciding the case for the jury. That is the point that I have in mind.

Mr. Campbell: Now Mr. Avakian's propounded question is based upon the supposition that various individuals—he gives them names but in his question refers to them by letters—entered into a partnership in a business purchased by one of the individuals named for 175 thousand dollars on May 1, 1945. Now the evidence in the case shows that any agreements which were drawn were drawn in November of 1946.

Mr. Avakian: May I inject—I did not refer to written agreement.

Mr. Campbell: The evidence further shows that one of the individuals, Mr. Kyne, was in the service in May of 1945 and did not learn apparently of either the acquisition of the business, and specifi-

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cally as to any share which he might have in it, until his return from the service, by his testimony, when he was given this written document, copies of which are here in evidence.

The question purports to interpret the documents relative to the acquisition of the lease and premises from Mr. Schriber in the name of the witness Billington, as to what was purchased for the 175 thousand dollars, and is further predicated upon facts which are not here in evidence, in that the question postulates the proposition that a capital account was opened in the name of Remmer, crediting him with 175 thousand dollars. The question goes directly, not only in these respects but in other respects, into matters which must be determined, issues which must be determined, by the jury, and attempts to supply an answer based on counsel's theory to those issues.

I wish further to make the point—I do not have all the elements which were contained in that question, aside from those to which I have referred—his reference to the fact that the agreement provides that Remmer was to withdraw 175 thousand dollars before the others were to participate, and relative to the setting up of this capital account.

Now my objection goes further, that is, it is not within the scope of the direct examination. This witness was not asked the hypothetical question, nor was he asked to give an opinion as an expert witness on any such matters, and I submit it would not be a proper scope for cross-examination, even

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though it were a proper subject to inquire into or a proper opinion to seek from an expert called as his own witness.

On the other hand, we are here to determine certain specific matters. This man was called and was asked on direct examination, not as to opinion based upon the findings by others, but what his specific examination, for example, of the Menlo Club, to which counsel has made reference, to what he found in the books and records which are here in evidence. Government's Exhibit 165 is, and purports to be and so testified to be, figures which were drawn from the books here in evidence. The capital accounts at the bottom of the page, and to which I believe counsel was referring, were denominated and were testified to be the capital accounts as shown by the books. The rules with respect, the law with respect, to cross-examination of expert witnesses is generally covered in Corpus Juris Secondum, Vol. 32, which I have before me, and which is embraced in paragraphs 549 and following. That——

The Court: You had better give me the page number.

Mr. Campbell: Yes, the page number is page 342 of Vol. 32, continues for a number of pages.

Now the article deals first with where an expert is called, skilled or expert witness, by one side or the other and asked in his direct examination to give an opinion from the facts stated to him, which facts must be in evidence before the Court, although the selection of the facts, if reasonable, can be con-

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sistent with the theory of the party that is calling. We are not here faced with that situation, however. Mr. Weaver was not asked for opinions on his direct examination, but was requested to, and did, testify in these matters as to specific entries in the books and records which are here in evidence. He was not asked to give interpretations of partnership agreements or what rights were created under those agreements, either present or future rights, which this question would contemplate and which are a matter not of legal interpretation, but instruction of the court and finally a factual determination by the jury in this case, under the instructions given by the Court.

I submit, your Honor, that upon cross-examination that it is improper for counsel to propound a question of this kind. I do not believe that if the witness were his own witness, the question itself would meet the requirements that all of the elements of the question be in the record, and if it would not meet the requirements upon a direct examination of his own witness, it certainly would not meet the qualifications required under cross-examination, even though it were within the scope of the direct examination, which this question is not.

Upon those grounds, we submit that the hypothetical question, in its present form, is improper, both on the grounds that it includes elements which are not in evidence, includes elements which call for an invasion of the province of the Court and of the jury, the interpretation of legal matters and determination of issues in this case, and finally that it is

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not within the scope of the direct examination of this witness.

I do wish to call the Court's attention to one other thing. Referring to the agreements, which are in evidence, specifically plaintiff's Exhibit 130, which purports to be one of the partnership agreements as to the Menlo Club, this particular one being between Elmer Remmer and Harold H. Maundrell. This agreement is dated and reads: "Made and entered into this 4th day of November, 1946," and it nowhere purports to be even a recitation of a prior agreement, oral or otherwise, entered into by the parties as of May 1, 1945, as assumed by the question. It is true the agreement recites that this agreement entered into November 4th, or the assignment set forth there, shall be effective as of May 1, 1945, but the question assumes that an agreement was entered into on May 1, 1945, which is contrary to the evidence in this case.

Mr. Avakian: Your Honor, first of all may I respectfully disagree with Mr. Campbell's statement that on direct examination this witness was not expressing opinions, but was simply eliciting evidence that he had extracted from exhibits in the testimony, and if you will refer, your Honor, to Exhibit 165, I can call your attention to the particular things which represented, not extracts from testimony, but rather the results of Mr. Weaver's accounting analysis, with the result that he came up with things which were not covered by any previous testimony or by any other exhibit.

Let us take, for example, the item which is on the

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10th line of the assets: "Improvements in 1945. Exhibit 133K $920" and "Improvements in 1946, Exhibits 134-135 and 136, $2,355.16." The exhibits that are referred to there, your Honor, go to the checks which show the expenditures for these particular amounts, and in the books of the Menlo Club these expenditures were deducted as current expenses. Mr. Weaver, in preparing Exhibit 165, determined that those should not be treated as current business expenses, but rather should be treated as capital items and so he capitalized them and set them up as assets. Now there is no other evidence, besides Mr. Weaver's testimony, that those were capital assets. The books do not treat them as capital assets. Mr. Weaver, as an expert accountant, based upon his own opinion and judgment as an accountant, determined that these should be treated as capital assets. Now that, your Honor, is not extracting a figure from an exhibit and putting it in a summary. That rather is a conclusion reached by him in his capacity as an expert.

Then let me go down farther, your Honor. Under liabilities there is the matter of reserve for depreciation. Now there is nothing in the books, or in other evidence, that contains any of those figures or that item, your Honor. That represents Mr. Weaver's judgment as an accountant, that on the facts which have come into this case, the particular expenditures, which were treated as current expenses, should be capitalized and reserve for depreciation should be set up in respect thereto. Those are two items in which he exercises judgment as an expert.

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Let me go on, your Honor. He listed as an asset of the Menlo Club partnership——

The Court: Suppose you could find four or five more of the same example, I can't see why the mere presence of those—my question is, they are computations which I think he stated were put there through his understanding of proper accounting practice, how they could at all be the basis for a hypothetical question that would refute in total what purports to be a considerable quantity of evidence and present the question which is one of the questions which the jury in this case will have to answer.

Mr. Avakian: I do not think the question of intent to evade would be any ultimate question the jury would have to answer. The jury would have to answer the ultimate question of what was correct accounting of this taxpayer and what was the correct tax liability based on that income. The questions I asked of this witness are, under correct accounting practice, under this set of facts I have stated to him, what would be the proper accounting treatment of certain items I am going to ask him about, certain things that occurred. Now I made my first statement prior, your Honor, on this matter in answer to Mr. Campbell's statement that Mr. Weaver was not exercising his own judgment in his examination or in his exhibit, but simply extracting figures. Perhaps I should make this statement of the matter under which I consider this is proper. I am quoting now from Wigmore, Third Edition, Vol. II, Sections 682 and 684. I will read them in that

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order; Section 682, which deals with hypothetical questions of witnesses says: (Reads section.) And Section 6846, headed, "Hypothetical Questions on Cross-Examination," reads as follows: (Reads.) My understanding of that, your Honor—and that is taken from Wigmore, but that is my understanding the uniform rule of application in questioning witnesses.

The Court: Will you read that statement again.

Mr. Avakian: (Reads.)

The Court: All right—judgment of germane matters, on matters germane to the direct examination.

Mr. Avakian: That is right, your Honor.

The Court: Now he hasn't answered any question on direct examination which could be considered an opinion as to the effect of a considerable quantity of this evidence.

Mr. Avakian: Yes, your Honor he has, and may I explain it in this way. I think we all recognize that the hypothetical question which I asked, and which if the Court permits me I intend to chart on the board, relates to the Menlo Club. Mr. Weaver presented an exhibit which purports to be a net worth statement——

The Court (Interceding): If you want to ask some hypothetical question that had some relation to the matters which we see in Exhibit 165 of accounting opinions or deductions, it certainly would be within the scope of the direct examination and it would not in any manner invade the province of the Court or the jury.

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Mr. Avakian: Your Honor, that is what I want to do. I only ask this indulgence, that the Court give me some liberality in analyzing and selecting here of my questions and to indicate to the Court, in the absence of the jury. One of the things I want to get at, which relates primarily to this exhibit and which represents my contention that this exhibit which he prepared is not correct accounting practice is this item he showed as asset of the Menlo Club, the partnership, 175 thousand dollars as the cost of it. Now the books of the Menlo Club show a liability against that asset, depending on which of the two sheets are taken, either 100 thousand or 125 thousand at the end of 1945.

The Court: An answer to this question would not be proper.

Mr. Avakian: What I am trying to do is to explain the subject I am going into, so you will understand what I am going into is germane. The witness testified that notwithstanding the fact that the books of the Menlo Club did show that liability, he omitted the liability from Exhibit 165 on instruction of Mr. Campbell, and he specifically stated that an accounting justification for omitting the liability was that the transaction with Mr. Schriber, by which that liability with Mr. Schriber was incurred, was a transaction personal to Mr. Remmer and not a transaction to the Menlo Club. Now, your Honor, I believe if I am permitted to ask this witness a series of questions, upon which I want to be heard, that he will answer under proper accounting practice if one of the partners individually has assumed

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a liability for an asset which he contributes to a partnership, and if that asset then is treated as a partnership asset in the partnership balance sheet, a corresponding entry should be made, crediting the capital account of the partner who had personally purchased the asset and was contributing to the partnership. In other words, what I want to show through this witness is that, having determined, as an expert, that he should eliminate from his partnership net worth statement a liability shown on the books that it was a private liability of one partner, he should then be consistent and make a corresponding adjustment in the capital account of the partner whom he considers having the personal liability, to give that partner credit for having contributed the asset to the cost.

Now it is fundamental, you might say, in accounting that one entry calls for a counter entry. You cannot give the partnership credit for an assist without showing something in the liability side somewhere. Now the books show the liability as a partnership liability. Mr. Weaver says, "No, I conclude"—or at least Mr. Campbell concludes—"that that was a personal liability to the partner, not partnership liability, so I am eliminating it." All right, your Honor. It is eliminated, but if, as a matter of proper accounting, the elimination of that liability as a partnership liability, would call for including a corresponding adjustment to a capital account, then wouldn't it be proper to show that?

The Court: Have you inquired of the witness on cross-examination as to whether or not that

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should have been considered as a credit to Mr. Remmer?

Mr. Avakian: To his capital account?

The Court: Yes.

Mr. Avakian: That was the very question that I put to him?

The Court: Can't you do that with a hypothetical question?

Mr. Avakian: No, we cannot, for this reason—the question is meaningless except in a context of facts, so we have to set up a factual factor. In this hypothetical assumption I have made, I am assuming the same thing that Mr. Weaver and Mr. Campbell assumed, namely, that Mr. Remmer, through a personal transaction with Mr. Schriber purchased the club. All I want to show is this, by this particular question, that if Mr. Weaver was correct in assuming that liability to Schriber was not a partnership liability, but Mr. Remmer's personal liability, then he should have made another adjustment in preparing this net worth statement. Your Honor will recall that I tried to go into this on voir dire at the time this was offered and the objection was made to it that those questions as to that matter were not proper voir dire, and I would like to read a few of the statements——

The Court (Interceding): I think it would be proper cross-examination.

Mr. Avakian: Your Honor said it would be proper cross-examination and you would allow——

The Court: But I do not think this is right.

Mr. Avakian: On page 2986 it says—as to

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whether hypothetical question is proper, I call your Honor's attention again to Wigmore, the statement that it is proper in cross-examination of one who takes the stand as a skilled witness to test his judgment upon germane matters.

The Court: Take this question as a whole, sum it all up, it doesn't amount to a germane matter brought out on direct examination.

Mr. Avakian: Your Honor, it relates specifically to Exhibit 165 and adjustments he made of it.

The Court: I am going to sustain objection to the question. Going back to that question of voir dire, if there was anything in this Exhibit 165 which amounts to a conclusion as to what proper accounting practice is, or amounts to this witness' opinion as an expert, I think you are entitled to go fully into it on cross-examination.

Mr. Campbell: I agree to that, but not in this method.

The Court: Not in this way. I do not believe you should get before this jury a question which embraces a considerable portion of this question and then have this witness, on the assumption of certain parts, give an opinion. You could put one or two more witnesses on here and send the jury home—the case has been decided. In other words, it is invading the province of the jury.

Mr. Avakian: Your Honor, perhaps while the jury is out it will save time if I could ask further clarification of the Court on that point.

It has been my understanding—I want to be corrected if your Honor disagrees with me—it has

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been my understanding to offer an expert witness to testify as to matters of opinion and judgment, and if that opinion and judgment is exercised on the basis of any set of facts covered by the evidence—it cannot go beyond that, but based on his analysis and judgment of any set of facts in evidence—that it is proper in cross-examination of the witness to ask him to assume a different set of facts, likewise in evidence but bearing on the same point, and ask him what his conclusion would be based on that set of facts, and I think these quotations from Wigmore which I just quoted specifically cover that, but I want to be guided by the rules of this court, and that is why I am asking.

The Court: I think Mr. Campbell—perhaps he will—will agree that there are some items or figures in Exhibit 165 which are determinations of this witness in the exercise of what this witness considers proper accounting practices, isn't that true, Mr. Campbell, or is it?

Mr. Campbell: I think that is true of one or two items.

The Court: Some of these items that you mention, this 10th item, improvements and so on, capitalization of that, I think it is perfectly proper for you, on cross-examination, to inquire into this witness' method of arriving at that conclusion, and if you have a different theory as to the application of that 175 thousand dollars, whether it should be a credit to Mr. Remmer personally, go into that and discuss that with him.

Mr. Avakian: Your Honor, would it be proper

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to ask this question—if I ask the witness to assume an agreement between the partners, whereby one of the partners would contribute to the partnership an asset worth 175 thousand dollars, would it be proper then to credit capital account of that partner with 175 thousand dollars.

Mr. Campbell: I suggest that that is not the proper method of approaching it. The witness should be asked why certain figures were used here if they are not within the books, and then that question explored and if counsel has then a different theory of what the books or the records or the sources from which he drew it, if he has an opinion, proper questions can be put testing the validity of that, but to do as counsel would propose with these various assumptions, which include interpretations of documents that may or may not, depending on the witness' answer, have been taken into consideration, is a different subject.

The Court: I think we had better stay on this one point we have under discussion. I will sustain the objection to this question and we will meet these other matters as they arise. I realize that cross-examination has a wide scope and I do not want to improperly restrict it.

Mr. Avakian: I think your Honor appreciates the importance in this case of the particular points we are exploring now and I think your Honor is also aware of the fact that testimony of an expert witness is generally recognized by the courts as relating to matters which the jury must ultimately decide.

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The Court: When you talk about expert testimony, I want to see what there is in any of these exhibits or any direct testimony which amount to opinions.

Mr. Avakian: No, what we want to cover in addition to that is this, when the witness bases opinion upon a certain set of facts, I think the government witness has been basing his judgment on opinions, which opinions may be correct, I am not criticizing the correctness of the method, but opinions which are based on facts favorable to the government, if the evidence would permit a different interpretation also, we want to know whether he, as an expert, would reach a different answer, on expert judgment, if the facts are found by the jury to be not facts he assumed, but a different set of facts covered by the evidence. Then the jury would know whether there was disagreement between experts on matter of expert judgment, or simply disagreement between them on the facts they assume at the basis of forming their opinion.

Mr. Campbell: It seems to me we will have to reach those difficulties when we come to them.

The Court: Well, I think so. The objection to this question is sustained. We will take a short recess for about 10 minutes.

(Recess taken at 2:40 p.m.)

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[Title of District Court and Cause.]

OFFER OF PROOF RE: REGULATIONS OF SECRETARY OF THE TREASURY

Wednesday, January 30, 1952—10:45 A.M.

(In the absence of the jury.)

Defendant present with counsel.

Mr. Avakian: Now, your Honor, in addition to the particular question that I raised to this objection, I also plan, if the Court will permit me, to ask with respect to the witness' familiarity with certain other sections of the regulations. Would it be proper to include those with our offer of proof while the jury is out?

The Court: All right.

Mr. Avakian: And then if your Honor would care, while the jury is out, I would like to state our position to the Court as to why we think it is material and proper.

The Court: Very well.

Mr. Avakian: Our offer of proof is to show that the Secretary of the Treasury had issued certain regulations under the Internal Revenue Code, entitled generally Regulations 111; to show that under Section 29.23(a)-1 of those regulations it is provided that incidental repairs are deductible as business expenses; to show that under Section 29.23(1)-1 the proper allowance for depreciation of depreciable assets is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan, not necessarily at a uni-

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form rate, whereby the aggregate of the amounts was set aside plus the salvage value to allow at the end of the useful life of the depreciable property equally the cost or other basis of the property determined in accordance with Section 113; to show that under Section 29.23(1)-2 the necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a plane where its usefulness is exhausted and the allowance should be confined to the property and the allowance for depreciation applies to property which is subject to wear and tear, decay, decline by natural causes, exhaustion and obsolescence, due to the normal progress of the art, as where machinery or any other property must be replaced by new inventions, or due to the inadequacy of the property to the growing needs of the business. And in addition to showing these provisions of the regulation, to show this witness' familiarity with the application of those provisions, to show that this witness, as an expert in the field, knows that there is necessity for exercising judgment in determining, first of all what particular expenditures should be utilized as a depreciable asset, and secondly, to show the necessity for exercising judgment in determining the life of the property over the period of which the depreciation deduction is to be spread, to show the various factors that enter into the exercise of that judgment, to show that the common experience of himself and of the Bureau of Internal Revenue, to the extent that he knows it, is that there is frequently

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disagreement among experts and frequently disagreement between the Bureau of Internal Revenue and the United States courts as to just how and in what respect that judgment should be exercised in any given facts existing and through this showing, your Honor, to develop the fact that it is possible for taxpayers to be in error on matters of this kind, simply through the exercise of incorrect judgment, as distinguished from the existence of any fraudulent intent.

Another purpose of our offer is to determine the qualifications of Mr. Weaver as an expert witness on these matters where he admits he has exercised judgment, by testing his familiarity with the regulations and by testing his familiarity with the experience of the Bureau of Internal Revenue with respect to such problems.

Now in connection with the offer and explanation of our purpose of it, your Honor, I want to call attention to the fact that there are two ultimate issues which are to be decided by the jury in this case. One is the question of the correct amount of Mr. Remmer's income during these three years. If we were dealing only with that question; in other words, if this were a civil question, in which the only issue was to determine how much taxes were due, no question of intent at all, then, of course, it would be proper to restrict the proof to questions of what is the proper accounting in this case and to determine that answer and that answer alone, but we have here another issue, and that is the issue of whether, if there is shown to be

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any deficiency, that deficiency resulted from any fraudulent intent on the part of the taxpayer to defraud.

Now it may be, and it is frequently the case in tax evasion cases, that there is a deficiency, but there is no fraud, there is no intent to evade. The question of intent to evade will have to be determined in this case and I think it is quite apparent, at least principally and perhaps entirely, on the basis of circumstantial evidence. Now the courts have held that the matter of whether a deficiency was due simply to neglect or to incorrect application of the law and so on, is material in determining whether the circumstances show fraudulent intent. In other words, your Honor, one of the circumstances which could indicate to the jury that any deficiency which they might find to be due was not fraudulent, was not due to any intent to defraud, is the fact that the deficiency arises, in part, from adjustments made of a kind which are subject to judgment and in which common experience shows disagreement between experts as to how the judgment should be exercised.

The particular significance of it is this, your Honor—these particular items that Mr. Weaver has capitalized for the Menlo Club amount to approximately $3200 and another item on this exhibit, which falls in somewhat the same category of the expenditures made at 50-52 Mason Street, amount to a total of approximately $8600.

Mr. Campbell: On this exhibit?

Mr. Avakian: Yes, it is in the accounts receiv-

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able item, which is explained in detail by another exhibit. So these two items together, your Honor, total almost $12,000 and by capitalizing that $12,000 of expenditures, the government is increasing by $12,000 the amount of income that will be computed for the three-year period in question on the net worth method. Now suppose, your Honor, that the jury finds that there is an understatement of income in this case of $12,000. Then the whole case would turn, your Honor, on whether there was any fraud in connection with that understatement of $12,000. Now we feel it would be proper for the jury to have before it, in considering the question of intent, the circumstances of whether the $12,000 that Mr. Weaver has added to the net worth computation by capitalizing these expenditures, represents a matter of judgment, on which there is no clear-cut defined or positive rule to be applied, but rather on which there is simply a general rule, as indicated by the term "Incidental repairs." The word "incidental" we all know is not specific but rather generic. Mr. Weaver has used the term major repairs, should be capitalized. The distinction between major and minor is likewise generic rather than specific. It would be proper for the jury to have before it the fact that $12,000 of the income which has been built up by the government in its net worth computation does represent application of rules of judgment upon which experts disagree and upon which the regulations themselves set up general rather than specific lines of demarcation.

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Now I do not want to be understood, your Honor, as contending that in the matters that we desire to go into we are going to challenge the correctness of the allegations and the capitalizations which Mr. Weaver made. That is not the purpose of this questioning. The purpose of the questioning is to show that these things which he did do, which have the effect of increasing the amount of income that is going to be computed by the government on the net worth method, represent an area in which the exercise of judgment is essential.

Now your Honor will recall that we had some discussion earlier in this trial regarding the matter of the scope of cross-examination of expert witnesses and I guess on two or three occasions we have gone into that. Your Honor stated to us on those occasions that where it was shown that an expert witness had exercised judgment, you would permit us to cross-examine the witness with respect to that matter. Of course, on those occasions we did not have before us these particular matters, but it occurs to us that the cross-examination of the witness in the manner in which we desire to proceed would fall within the principle that your Honor stated here earlier, to the effect that where the expert did exercise judgment, you indicated that you would give us fairly liberal opportunity to cross-examine regarding the matter. We tried to draw a parallel, your Honor, of cross-examination of a medical expert. If a doctor is on the stand and he is testifying regarding his judgment and conclusions, it is proper to ask him if he is

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familiar with a certain work in that field. Now that is proper for two reasons—one is that it tests his qualifications as an expert, by showing the extent to which he is familiar with the literature on the subject——

The Court (Interceding): May I understand, Mr. Avakian, just what is the substance of the question that you would like to propose to bring out the points of your offer here?

Mr. Avakian: First of all I would like to find out whether the witness is familiar with the provisions of the Treasury regulations that deal with the particular matters to which he has exercised judgment. In other words, your Honor, as he himself stated yesterday, the preparation of this exhibit, preparation of net worth statement in this kind of a case involves——

The Court (Interceding): I will be glad to go along with you to that extent, at least as far as there are regulations which necessarily would be brought into use by such an expert witness as we have here in arriving at determination made by him; I will go along with you to that extent.

Mr. Avakian: I think that will probably serve our purpose then, your Honor. I might say this——

The Court (Interceding): But I don't want this witness to instruct the jury as to the law in this case.

Mr. Avakian: I understand that. We do not want that either, your Honor. We do want to find out, your Honor, whether he is familiar with the provisions of the regulations that are applicable

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to the particular matters of judgment which he exercised.

The Court: How far would you go along? Suppose his answer was yes. Then you would want to produce the regulation and try to point out to him in what respect he may or may not have properly followed the regulation.

Mr. Avakian: No, I don't think that, your Honor. I would like to read him the particular pertinent provisions and ask him whether he is familiar with them.

The Court: That would not appeal to me in view of the present situation of your argument. How would it be to ask him if he is familiar with certain regulations, referring to them by some denomination which he would recognize; if he did not recognize them then describe it a little more completely. If he said yes, all right; if he said no, all right.

Mr. Avakian: Well, your Honor, I do not think that would serve the proper purpose of bringing out what we consider proper on this question of intent.

The Court: I think the interpretation of these regulations or any section of this statute, if they are going to be made for the benefit of the jury, should be made in the form of instruction by the Court.

Mr. Avakian: I think they should certainly be done that way too, but I think it is proper, your Honor, to ask an expert witness—here is an authentic document as recognized authority in the

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field—I think it is proper to ask the expert whether he is familiar with the statement, reading it, in that recognized authority. I will be glad to put the regulations in evidence if that would obviate any objection of your Honor, but the point is this, if this expert is familiar with a particular provision of the statement made in a recognized work in the field, that has a bearing on his qualifications, and we think it is proper to read that statement in that recognized authority to the witness, to ask him whether he is familiar with it and to ask him whether he took that particular Treasury regulation into consideration.

The Court: I will go along with you this far, and I say that without cutting you off—in any case where any of this testimony amounts to a statement of the witness' judgment and opinion, I think you are entitled to examine fully as to what he thinks and you could ask if, in forming his opinion on any of these matters, if he did depend upon or consult or consider any regulations or the statute, but to hand him the regulations and you, as attorney here, engage in a speech before this jury as to what proper interpretation be made of a regulation, of a section, or to have either one of you attempt to instruct the jury as to matters of law in this case, I am not going that far with you.

Mr. Avakian: I certainly would not want to go that far and certainly did not intend to imply that I wanted to.

The Court: I do not mean that you would have

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any intention of doing that but you might do something that would amount to the same thing.

Mr. Avakian: Would this be proper—if he did state that he took the regulations into account, would it be proper to state what particular section he took into account and to have him read the particular provision?

The Court: No, I do not want it read before the jury at all. When I say I do not want it read, I mean I do not think it is proper.

Mr. Avakian: I understand that. It has been customary in our experience, your Honor, to be permitted——

The Court (Interceding) For instance, this matter of dispute, which means this difference between courts of interpretations of this law, when we come to settle instructions, listen to arguments and decide those various decisions, then I am going to choose which one of them I am going to follow, but I do not want opinions of a great number, or one or more, different judges, of the different judges of this court, to be presented to this jury.

Mr. Avakian: Your Honor, there is a related matter. The witness made a statement yesterday that under law such and such a thing was required and I intend to question him later with regard to that. The statement was made as a statement of the law and I appreciate an expert witness can't divorce himself from things of that kind, but I had intended to ask him what particular portion of the law he based that statement on and also intended to ask him whether he was familiar with

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another portion of the law that relates to that subject, because I disagree with him as to what the law is and I want to test the basis of his knowledge there. For my own guidance I raise the point, so I can approach the matter in a way that would be acceptable to the Court. Would it be proper there for me to show him, without reading to the jury, the particular portion of law that I have in mind and ask him whether he took that into consideration?

The Court: What particular answer have you in mind? What was it?

Mr. Avakian: It is a matter—I forget the exact question, but it is a matter that relates to the circumstances under which a taxpayer may or may not use the cash or accrual method of accounting.

Mr. Campbell: I think that was on cross-examination.

Mr. Avakian: That is right. He made the statement under the circumstances a taxpayer could not use the cash method of accounting.

The Court: That is a matter to be argued before the jury after the case is concluded, or if it is a matter of law, the Court should instruct on it.

Mr. Avakian: That I understand. Would it be proper, without reading anything to the jury to hand him a particular thing and ask him whether he was familiar with that provision in reaching his conclusion?

The Court: No, I do not think so. We are going to have the jury accept its law from the Court, not the witnesses.

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Mr. Avakian: There won't be any statement to the jury on that. It would be simply asking the witness whether he is familiar with certain provision——

Mr. Campbell: That is by indirection.

Mr. Avakian: No, your Honor.

The Court: I am not going to permit that. Of course, that is not included in this offer. I will meet it when it comes.

Mr. Avakian: We will, of course, want to make our record on that when the time comes.

The Court: I am not sure you understand. I do not feel that would apply but we will meet that when it comes. This present situation here, we will dissolve that by saying any matters of opinion expressed by this witness, you may inquire as to what he bases his opinion on, but as far as having this witness interpret the law, we won't go that far.

Mr. Avakian: The witness' statement is this—I am quoting from Mr. Weaver's testimony: "Every accounting treatment must, to some extent, be based upon a legal interpretation. I do not see where you can make a distinct dividing line between law and accounting, because accounting treatment necessarily rests on the proper interrelations which are legal matters and as accountants, the accounting treatment must follow whatever legal interpretation they give to certain facts." That means then, your Honor, that the witness himself is admitting that he is applying provisions of law. Now all we want to do is to test his knowl-

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edge of the law that relates to that, because if he is applying provisions of law, without having in mind all of the applicable provisions of law, his accounting answers are, to that extent, wrong. Now we do not want to argue between counsel and the witness as to what the law is, but we do want to bring out whether or not the portions of the law that he considered—first of all, bring out what portions he did consider, so we can determine ourselves whether we think he went far enough, and then ask him if he is familiar with other provisions that we think material, without going into the content.

The Court: In other words, the idea that you seem to voice is this, that when he said legal that he meant some specific statute or rule of law. Sometimes people use the word "legal" as a synonym for right, something of that kind, right or wrong or whether proper. I do not know whether he meant it that way or not.

Mr. Avakian: Your Honor, there are particular provisions in the law which relate to the matters to which he has exercised judgment. Now obviously a judgment which is based on provisions of law is not good judgment unless it is based on all the pertinent provisions.

The Court: Wasn't that answer given in response to a question as to how he determined between replacements and capital investments, something of that kind?

Mr. Avakian: That particular answer was given in connection with the decision as to how he should

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classify the liability to Schriber, but his statement —you recall I read it—"Every accounting treatment must, to some extent, be based upon a legal interpretation. * * *" Obviously the decision to classify a particular expenditure as current or capital is based upon what the law says you must do in that regard.

The Court: I think we are going too far here. In the first place, this case would resolve itself into a discussion of legal principles.

Mr. Campbell: The question was asked when the witness had testified that he put the particular item in the document under my instruction and counsel was questioning the matter of how he went to me, what advice I gave regarding the repair, and so on and finally in reply to one of Mr. Avakian's questions, Mr. Avakian asked him if he wanted to change his testimony and he said no and volunteered this other information. It seems to me we are straining at gnats in this matter and going into collateral matters that have no bearing.

The Court: This present question, the purpose for which we excused the jury, I think we can allow the question to the extent I have indicated, that on any matters which have to do with any evidence of this witness which constitute his opinion, you may inquire as to the source, what he bases his opinion upon. So we are going to take a recess now. The offer is rejected, except as I have indicated.

Mr. Avakian: Does that mean we can ask him whether he took particular sections of the regulations, without going into it?

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The Court: Ask him what he bases it on.

Mr. Avakian: Suppose he states generally the law without being specific, can we then ask him what particular provision?

Mr. Campbell: It seems to me we have to meet those matters as they arise.

Mr. Avakian: That is the purpose of the discussion in the absence of the jury, to straighten this out, so when the jury comes back we can proceed in accordance with the Court's ruling. In other words, the witness may say, "I based it upon law." Are we to stop there or can we show the particular section or provision of the regulations or particular authority which he relied upon and have him cite to us, so we can know and so the record for any reviewing court would show what particular portions of law he bases it on.

Mr. Campbell: It seems to me the witness has previously stated on several occasions on cross-examination on what he bases in analyzing those particular increases—on checks, records and testimony of Mr. Maundrell.

Mr. Avakian: Well, the testimony of Mr. Maundrell does not say this should be capital asset and this is showing he has taken facts as given by the testimony and analyzes those facts and determined that they should be put here instead of there.

The Court: There might be a certain item, or group of certain items, all of which you contend are not capital items. So that is the situation, that we find there are a certain group of items which

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the witness has designated as capital and you say they are not.

Mr. Avakian: That is true to a limited extent. As to some items I agree, your Honor, on the question of what should be done, but I want to show the second issue of intent.

The Court: Isn't it contemplated by counsel for both the government and the defendant that some one propose an instruction to the Court explaining that situation?

Mr. Avakian: Yes, your Honor, but we have from this witness statements that proper accounting calls for this, this is the right way to do it.

The Court: All right, suppose he said that and under the law he is clearly wrong. Wouldn't the jury be so instructed in effect?

Mr. Avakian: No, your Honor. That is the point I am trying to get at. If we have a law which said a certain line of demarcation is to be drawn between people 21 years old and those less than 21, your Honor can take care of that in the instructions, but when we have a law which uses generic terms, for the witness to say proper accounting calls for this treatment and to leave it there, without showing that provision that he relies upon is section so and so, and the Court can later on instruct the jury that section so and so contains a generic——

The Court (Interceding): Suppose he says, "I base this opinion upon my interpretation of the section." You can ask him what regulations, point it out.

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Mr. Avakian: Yes, that is all right.

The Court: I do not see anything wrong so far, but I do not want that read to the jury and have discussions of whether his interpretation is correct or yours is correct.

Mr. Avakian: We will accept that ruling, your Honor, and abide by it, but we feel——

The Court (Interceding): If it gets here where it gets right down to a situation where one of his entries on one of these exhibits is based upon his interpretation of the regulation or a statute, you can ask what regulation or statute did you base it on.

Mr. Avakian: I want to make it clear for the record that my own personal feeling is that it would be proper to go farther, but of course I am going to accept the Court's ruling and be guided by it and not go beyond what your Honor has indicated. To the extent that your Honor has ruled on that, our offer of proof is denied and in part is granted, is that right?

The Court: Yes. We will take a recess for 5 minutes.

(Recess taken at 11:20 a.m.)

January 30, 3:00 P.M.

(In the absence of the jury.)

(Defendant present with counsel.)

Mr. Avakian: Your Honor, I understand at this time I may make the offer mentioned earlier.

The Court: Yes, sir.

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Mr. Avakian: In that connection, your Honor, the defense offers to prove, through the examination of Mr. Weaver, that approximately in May of 1948 the business of the Menlo Club was terminated, as a result of action taken by the San Francisco Police Department, pursuant to an interpretation made by the District Attorney of the City and County of San Francisco, at or about that time, to the effect that the business conducted by the Menlo Club was in violation of an ordinance which had been on the ordinance books of the City and County of San Francisco for many many years, approximately 43 years, and which had not previously been interpretated in such a manner as would make that business unlawful, and our purpose, your Honor, in desiring to prove that is that the amortization deduction taken in the Menlo Club return and reflected in the net income which has been reported by Mr. Remmer in his 1946 return, which is in issue here, was based in part on the possibility that action of that kind by the public authorities might be taken, in justification of the use of a five-year amortization as set forth in the return.

Mr. Campbell: To which we object, in the first place that it is not material and competent and cannot be proved by a witness of this kind, and further contemplation of such action would not be a matter of contemplation in 1946.

The Court: Further, I can hardly see how it would be proper cross-examination.

Mr. Campbell: No, that is correct and not within the scope of direct examination.

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The Court: The offer is rejected. Call in the jury.

Mr. Avakian: May I take up one more matter?

The Court: Yes.

Mr. Avakian: I am not entirely sure that I understood your Honor correctly when your Honor made this statement, but I believe the statement was made from the bench during the examination of Mr. Weaver, to the effect that your Honor hoped to get through with this examination pretty soon.

The Court: No, I hoped that we had reached the end of the examination as to his qualifications.

Mr. Avakian: Well, I just did not feel it might be proper in the presence of the jury to imply that we were dilatory.

The Court: I do not think that implies any dilatoriness on the part of counsel. The only thought I had was I wished we would get through with that part of the cross-examination.

Mr. Avakian: I have never been accustomed to the practice, your Honor, where a witness testified at length on a number of matters of having to test his qualifications on all those matters before I cross-examined specifically. It was my understanding when you came to a specific matter, you could test his qualifications on that matter.

The Court: What is your problem?

Mr. Avakian: I fear the jury may be prejudiced by your remark that you hoped we would reach the end of the particular matter.

The Court: I do not believe the jury even heard it or noticed.

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Mr. Avakian: We just thought we would have to call it to your Honor's attention.

The Court: I will call it to your attention as I have on four or five or six occasions, attempted to admonish the jury and instruct them that they are not to decide this case on any exchanges between the Court and counsel or between counsel or upon anything except the evidence, oral or written, admitted in evidence. I have told them so many times and I think we have an intelligent jury and I feel certain that they will not decide this case on anything else and I will find occasion, before the trial is over, to call that to their attention.

Mr. Avakian: We thought we ought to note our exception to the matter as promptly as we could, your Honor. That is all, your Honor.

The Court: Call in the jury.

Thursday, January 31, 1952—10:40 A.M.

(In the absence of the jury.)

(Defendant present with counsel.)

(Last question read.)

Q. If we assume, as you have assumed, that the Menlo Club was not a partnership but that it was a sole enterprise of Elmer Remmer, and if we assume further that Mr. Maundrell's employment there was on the basis of a fixed salary plus 10 per cent of the profits of the business, and if we assume further that the Menlo Club was on the accrual basis of accounting, would the Menlo Club not be entitled

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to a deduction in amount of the annual salary paid to Mr. Maundrell plus the 10 per cent share of the profits to which he was entitled under his agreement?

The Court: Very well, Mr. Campbell.

Mr. Campbell: The basis of my objection is, as heretofore stated, that it assumes facts not in evidence. I am referring first to the assertion that you have assumed that it is not a partnership. The testimony on that point is the witness, in response to one of counsel's questions, said it was not a true partnership, that is true, but it goes on to assume that the books of the Menlo Club were on an accrual basis, which has been the subject of considerable testimony this morning, that they were on a cash basis and could not be on the accrual basis by reason of the lack of and non-existence of certain records.

I make my objection further on the grounds that the question itself not only assumes matters not in evidence here, but is also not within the scope of the direct examination of this witness.

The Court: Mr. Avakian, the thought I had when I sustained the objection, I thought there was no evidence here to support the assumption that the books were on an accrual basis.

Mr. Avakian: Here is the basis for the question, your Honor: The witness has testified that proper accounting, where inventories are a factor, as is the case in the Menlo Club, will under the regulations call for the use of the accrual method of accounting.

The Court: Repeat that statement.

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Mr. Avakian: The witness has stated that under Treasury regulations, where inventories are a factor—and they are a factor in the Menlo Club, as the evidence shows—the regulations require the use of the accrual method of accounting. That was his testimony this morning. Now, as your Honor stated yesterday, the duty of an expert witness is to do what is proper on the evidence, whether for or against the taxpayer, to do what is proper from an accounting point of view, so if the witness is correct in his statement that the Treasury regulations require the use of the accrual method of accounting, that in order to construct a proper net worth statement, of the Menlo Club of that business, we would have to cure any deductions he had during the periods of time that were covered by the net worth statement.

The Court: Let me make an observation at this point. I do not understand the evidence to show they were so kept. It may be true that the regulations require keeping in that manner, but if they were not kept in that manner, how could you say that it is proper to assume that they were kept on the accrual basis in this question?

Mr. Avakian: My point is this, your Honor. It is apparent from the statement your Honor made yesterday that expert witnesses should make whatever adjustments were proper. This witness has, your Honor, made certain adjustments in preparing net worth statements of the Menlo Club, which differ from the books. He has ignored certain things that were in the books, on the theory what he did was

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what proper accounting calls for. If I may go first to what the benefit would be and then get back again to the basis, perhaps I could make myself more clear.

The Court: Well, the point that is bothering me, I don't understand that these books were kept on the accrual basis.

Mr. Avakian: He testifies they were not kept on any truly consistent basis and he says the return was prepared in part on the cash basis and in part on the accrual basis.

The Court: Then you can't very well assume that they were kept on the accrual basis in the questions.

Mr. Avakian: What I am asking him to do is to construct for me the net worth statement based on the use of the accrual method. I do not remember the exact wording of the question, but that is the theory of the question.

The Court: That is where this last point made by Mr. Campbell comes into operation, not proper cross-examination.

Mr. Avakian: Your Honor, may I answer on that?

The Court: Yes.

Mr. Avakian: It is proper cross-examination, your Honor, because this witness has himself first of all, in preparing Exhibit 165, assumed that the Menlo Club is not a partnership, but is a sole enterprise of Mr. Remmer's, and although Mr. Campbell made a statement to the contrary, I would like to recall to your Honor's attention the fact

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that Mr. Weaver's justification for excluding the liability to Schriber from Exhibit 165 was that the Menlo Club was Mr. Remmer's entirely separate business and not a partnership, and therefore it was immaterial whether you show his personal liability to Schriber in that exhibit or somewhere else and he even offered, "I will be happy to write it in Exhibit 165 if you want," so his justification, your Honor, for his method of constructing Exhibit 165 is that this was not a partnership. Now we would like to show to your Honor that if he is correct in that, if that assumption of his is correct, that the Menlo Club is not a partnership, then on the accrual method of accounting, which he has said is the proper method that should be used here, there should have been certain adjustments made which would have resulted in Mr. Remmer's net income from the Menlo Club being exactly the same as shown on the partnership return.

The Court: I did not understand him to say that the regulations require that the net worth had to be on the accrual basis. It was the accounting should have been kept on the accrual basis.

Mr. Avakian: It is the same thing, your Honor, and after all what he is doing here by the net worth method is trying to compute the correct income and the net worth computation has to take into account either the cash or accrual method or it has no meaning. You can not take a taxpayer who is on the cash basis and reports on receipts and disbursements and make a statement on accrual basis and have any comparison. They are not com-

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parable, so when you use the net worth method, you have to be consistent in using either the cash or accrual method. You cannot compare cash accounting with accrual accounting and make any comparison. It is meaningless.

Now the witness did say the Treasury regulations require the use of accrual accounting, so I would like then, your Honor, if that is his position, and since that is a part of his education and training which forms the foundation for what he has done here, I would like to have him tell us what the result would be if he did apply the accrual accounting and if he did apply his assumption that this is Mr. Remmer's sole business, because that would mean then, your Honor, that the obligations to Maundrell at the end of 1946, which were actually paid in 1947 and 1948, would be cured as deductions as deductions in 1946. In other words, if I may put it this way—during 1947 and 1948 Mr. Maundrell actually took out of that business and put into his own pocket, or used for his own benefit, $15,000, which was assigned to him as his share of profits of 1945 and 1946. Now on the cash method——

The Court (Interceding): We are getting back to discussions we had earlier in the trial on proper scope of hypothetical question. I think a hypothetical question should be based on facts in evidence.

Mr. Avakian: That is right, your Honor.

The Court: And it might vary to some extent. There might be qualifications to that. The theory of the part as to the effect of the evidence might be

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incorporated as a part of a hypothetical question, but there is no evidence in this record that these books were kept on an accrual basis.

Mr. Avakian: No, your Honor, the evidence in the record with regard to inventories and other entries in the books are the basis for Mr. Weaver's conclusion that the proper accounting method to apply to these facts in the record is the accrual method. That is based on the inventories here and the records that are here. He is simply applying the proper accounting procedure to the evidence in support that the accrual method is the method that should be used. Now if this is Mr. Remmer's own business and not a partnership, he was certainly entitled at some time deduction for the $15,000 paid to Maundrell. On the cash method he would be entitled to that deduction when he actually paid it in 1947 and 1948, but on the accrual method he would be entitled to deduction in 1946 when the obligation arose. That is the whole thing in a nutshell, your Honor.

If Mr. Weaver is correct in his two assumptions —and I call your Honor's attention to the fact that they are his assumptions, his hypotheses—on the basis of assumptions which he has made as an expert accountant, then these additional adjustments should be made to the extent which would result, your Honor, in allowing, as a 1946 deduction, the amount credited to his account as his share of the profits which is Mr. Maundrell's account and subsequently paid to him. It is simply when I made my deductions. In other words, if I

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were to pay my employees in January for services performed in December, if I were on the accrual basis, I would deduct it in December; if I were on the cash basis, I would deduct it in January. It is a question of when you deduct it. The fact of the deduction is there either way. At some time that deduction has to be allowed. Now, if Mr. Weaver is correct in his assumption—and I repeat, it is his assumption, his accounting hypotheses of how it should be done with this evidence—then I want the opportunity, your Honor, to show that under his hypotheses, correct accounting would call for accruing at the end of 1946 a deduction or liability, which would have the effect then of reducing the net worth and, your Honor, would have exactly the same effect as if a partnership were recognized, so we come out exactly the same way. You can see the significance of that, your Honor, and the importance to us of having an expression from a government witness as to whether on his own hypotheses certain things should be done. It is simply to cross-examine on his own hypotheses to get the full story, not just half of it, your Honor, but the full story of how this should be set up if he is correct in saying (1) this is not a partnership, (2) that the facts in this case call for application of the accrual method of accounting.

Mr. Campbell: If the Court please, I think counsel is incorrect in his statement of the evidence as to whether or not the testimony, particularly the testimony of Mr. Weaver, shows that the books

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were kept on the cash basis and not on the accrual basis.

In response to counsel's questions, it is true Mr. Weaver said that in a business of this kind and under the regulations, they should have been kept on the accrual basis but they were kept on the cash basis and it is on the basis of these records that he has constructed Exhibit 165. Now he has stated that the only items which appear on here, on 165, and upon which he exercised any judgment or made any classification, were with respect to certain expenditures which went into acquisition of capital assets and against which he set up a reserve for depreciation. That is, that all of his items are as set forth on the books, including at the bottom the capital accounts as shown in the books for the partners. Now it is true in response to counsel's question, when Mr. Weaver was asked about it, he gave his opinion that this was not a true partnership, but counsel now it appears, by this question, he wants Mr. Weaver to reconstruct a set of figures for him and to construct it on an accrual basis which was not used by the taxpayer or by his accountants, according to the testimony, and without there being before us any record or available in the record accrued accounts receivable and accrued other matters, which would have to be used to offset any liability which counsel is not seeking to accrue. I submit if the evidence is admissible, it must be produced on behalf of the defendant. This witness cannot be asked on a hypothesis of this kind and in the state of the

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record and with the evidence which is before him, to completely reconstruct on the stand—which would be necessary to do—he may have had simply one liability, as he says, in accruing a liability, such as liability to pay taxes, withholding taxes, you have an offsetting asset of the amount of money which has been accrued out of employees' paychecks. As shown by his testimony, he has taken the records which are here, he has taken the basis upon which those records were kept, for the purpose of producing this exhibit, and I submit it is not proper cross-examination, nor within the scope of cross-examination, to have this witness reconstruct a set of books for the defendant, which this question would require. I submit that the question assumes facts which are not in evidence here, would require the assumption of records, if the answer was to be complete, which are not now before the Court, if in fact such records are available, and therefore that the question is incompetent in its present form.

Mr. Avakian: Your Honor, I wish to make two observations. In the first place, Mr. Weaver did use the accrual method in preparing Exhibit 165, to some extent at least, because he included inventory. Now you will recall his own statement, that where inventories are a factor, the regulations call for the use of the accrual method, and we can reverse that, that the use of an inventory is itself the use of accrual method, so by including inventory in Exhibit 165 Mr. Weaver has, at least to that extent, in his own exhibit made use of the accrual method.

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Secondly, your Honor, it was not upon my invitation that Mr. Weaver made the statement that he did not consider the Menlo Club a partnership, rather it was an explanation of Exhibit 165 and in justification of it that he said that he did not consider it a partnership, and specifically, your Honor, he said, as a justification for omitting from Exhibit 165 the liability to Schriber, that it did not make any difference because he did not consider the Menlo Club a partnership, so that it is a part of his direct testimony. Your Honor, if you will look at his Exhibit 165, which is direct testimony, inherent in Exhibit 165 is his assumption that this is not a partnership and expressed by him on the witness stand as one of the bases for the exhibit was his direct statement that he did not consider it a partnership, so I am simply seeking, your Honor, to complete the picture on the things which he, himself, has brought into this case, certain assumptions which he himself has made.

Now, the uncontradicted testimony in the case—and it is all from government witnesses—is that these were partnerships, but the prosecution is apparently taking the theory that, notwithstanding that testimony, the jury should, by inferences, conclude that these were not real partnerships and Mr. Weaver has indulged in that inference in presenting Exhibit 165. Now, your Honor, if the prosecution has gone beyond the scope of the evidence in making that assumption, then obviously their own hypothesis was improper and should be stricken from the record. If, on the other hand,

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their hypothesis that this was not a partnership is a permissible inference which may be drawn from the evidence, then we are entitled to cross-examine him on that hypothesis, particularly, your Honor, since it is their hypothesis and not ours. We just want to complete his picture, your Honor, we don't want this in the exhibit half way. We want to show that if we take their entire theory of the evidence, we still wind up with the result that was the same as the tax returns that were filed.

We hope your Honor won't cut us off from that because this is a crucial question here. We should have, for the benefit of the jury in their determination of these accounting problems, what the correct accounting result would be, according to the government accountant if his hypotheses were carried out to its proper accounting conclusion.

Now if there is any doubt in your Honor's mind about the propriety about this, may we respectfully suggest to your Honor that particularly in a criminal case the defendant should be permitted reasonable leeway in exploring these things and examining government accountants. I do not think the question is unfair to the prosecution. I think it is within the scope of assumptions the prosecution has made in presenting this witness, it is within the bulwark of the manner in which Exhibit 165 was constructed, it is within the bulwark of Mr. Weaver's statement as to what method of accounting is the proper one to use. Now the Court necessarily has to exercise some discretion in mat-

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ters of this kind because until you finish your case and can look back over it and fit every little thing into the complete picture, nobody can be absolutely sure as to whether a particular item of evidence was material and proper or not. Your Honor must exercise some discretion as we go along in that respect, and we are simply asking your Honor to be generous with us in that respect and to permit us to inquire into these matters, because of the importance to the defense of showing just what the result would be if the government accountant did continue further with the hypothesis which he has applied in his examination.

The Court: Let me have the question, please.

(Question read.)

The Court: Was on the accrual basis—if you assume that, I will allow that to be asked.

Mr. Avakian: In other words, if we modify to say if we apply the accrual method of accounting?

The Court: No. So the ruling that was made will be reinstated.

Mr. Avakian: I think I can modify the question.

The Court: If you will not accept it, the ruling will stand and the objection is sustained.

Mr. Avakian: I want to modify the question to eliminate——

The Court (Interceding): We will take a five minute recess. We will do that later on.

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3:30 P.M.

Defendant present with counsel.

Jury absent.

(Last question read.)

Q. Isn't it true, Mr. Weaver, that you, and the other members of your staff, refused to return those records to the defense when the defense requested the opportunity to examine them in October of 1951 for the purpose of preparing for this trial?

The Court: What former ruling of the court was made on that?

Mr. Campbell: I am referring, may it please the Court, to the motions which were produced and made before this Court for the inspection of certain records and requesting a continuance of the trial. At that time there were placed before the Court the affidavits of both counsel for the defense and counsel for the government.

The Court: And motions were not made until a week or so before the trial.

Mr. Campbell: And that is referring at that time in October of 1951, if the Court please.

Mr. Avakian: It was after the prosecution refused to let us examine the records that we thereafter filed a motion with the Court.

Mr. Campbell: And counsel is referring to the correspondence which is a part of the records of those motions which passed between counsel and

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myself and the statements that were made before the Court.

The Court: My recollection is the reason I denied those motions in Las Vegas, they came in a few weeks before the trial, so it would, if granted, have resulted in postponement of the trial and I could not understand why the defense had been so dilatory in waiting for several years before they made the motion to get possession of those records. That was the idea I had.

Mr. Golden: I would say, your Honor, there is some correspondence to disabuse your Honor's mind of dilatoriness. Considerable correspondence passed back and forth and we have been held on a limb, so to speak. There have been promises it would be done.

Mr. Campbell: Your Honor will recall the evidence here. The case was delayed for the period of a year, during which the defense counsel were going to make, and agreed to make, and were apparently to make some kind of net worth statement. At that time the records that were in the office of the Intelligence Unit were made available to their accountant, one Nat Friedman, who spent some period of time, as the record shows, in examining what records were there available. Previous to that time records had been turned over to Mr. Semenza and the evidence shows he was turned loose to take whatever he wanted and selected what records he wanted. Now it seems to me, that those matters having been gone into, it is improper to inject them in this manner with this witness.

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Mr. Golden: There is a great deal more to the story than that. Mr. Campbell knows that we were lulled into a sense of security for a long period of time that the year 1944 was not under consideration, that that was sprung on us the last minute and that changed the whole picture. The brief little sketchy statement counsel made just now is very misleading to your Honor. It can't be crossed off that way. I don't want to interrupt Mr. Avakian——

Mr. Avakian: In addition, your Honor, the first time we were refused permission to examine the records was in October, 1951, so there was no occasion prior to that to come to the court. Now what happened was this, and I think your Honor will recall it—we were unable to hire an accountant——

The Court (Interceding): Let us not argue the merits. Read the question.

(Question read.)

The Court: What is the purpose of asking that question at this time from this witness?

Mr. Avakian: For this reason—the witness has testified repeatedly that these records were made available on every request that was made, and it is for the purpose of impeaching that testimony, to show it is not correct and that the fact is that they were not made available upon a certain occasion.

The Court: Objection will be sustained. Call in the jury.

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ARGUMENT RE: EXHIBIT "Z" AND EXHIBITS 109A AND 109B

Friday, February 1, 1952, 1:50 P.M.

(In the absence of the jury.)

Defendant present with counsel.

Mr. Gillen: May it please the Court, in regard to Defendant's Exhibit "Z" for identification, your Honor took occasion to look at this exhibit at the time it was first offered today and I believe from reading over and I believe on the occasion of its original offer some days ago, during the testimony of Mr. Maundrell, around Christmas time, it was also exhibited to your Honor.

Now counsel has offered objection that it is a summary of testimony. I can't follow counsel's objection and counsel's observation in that regard, because this is a document which was prepared and executed between these two principals of the transaction on March 7, 1949, which it becomes obvious at once to your Honor was at a time before anybody testified, before this case even started or this testimony. How could it be a summary? It is not a summary of anybody else's testimony at all. It is the best evidence because it is an agreement stating the facts of the transaction. It is a commitment by both of the parties, both of the principals, to the transaction as to the transaction itself, and it is the then existing status as of the time it was executed.

Now it also serves as admission against interest, despite the fact that gave rise to some mirth on the

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part of Mr. Shelton and amusement at the prosecution table. It is in fact an admission against his own interest by Mr. Remmer, in that Mr. Remmer acknowledged by this document that he owes a certain amount of money which, in the false picture that has been attempted to be created here, namely, that there were two payments in 1945 at practically the same time, one for 25 thousand cash, the other 25 thousand by check, would have meant that Mr. Remmer, so far as this transaction was concerned, would have been 25 thousand dollars to the good, but for the fact he admits he is 25 thousand dollars to the bad, that he owes the man 25 thousand dollars more.

Now this document, may it please the Court, is a statement of an account between two principals and it is the best available evidence. It is a recitation of the facts concerning a transaction, it is crystallizing of the status of the transaction and of the obligations involved at the time of the making of the document. It is commitment of both of the principals to those facts as set forth in the document and signed by them. It is better than parol evidence, it is better than oral testimony. It is a prepared agreement and statement of account between two principal participants to a transaction and it is substantiation, of course, of testimony given here, not only by Mr. Schriber, but testimony given here by Mr. Maundrell, whom your Honor will remember, when he moved into the Menlo Club business and was trying to set up a proper and efficient set of books, determined he would rather

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have a check out of the checking account represent the initial down payment on the transaction.

Now we feel, may it please the Court, that we have given your Honor a proper and firm foundation on a document that it is elementary would be admissible as the account stated between two principals, substantiating testimony that has already been introduced, not by this defendant, but by the prosecution in this case. Their own witnesses have related this transaction and throughout the case there has been a consistent effort attempted to detract from the very testimony that they have offered before this jury.

The conversations that were had between Mr. Schriber, as he has indicated on the witness stand here, and the man in charge of the investigation, Mr. Weaver, was conversation relating to Mr. Schriber on the income tax status in regard to it, in which he related—and we make this by way of offer of proof—he related the same facts and circumstances concerning the transaction as are revealed in this document and has been testified to both by Mr. Maundrell and Mr. Schriber. We offer the exhibit, your Honor.

Mr. Campbell: I might state, your Honor, that the offer of this type of document in evidence is entirely novel within my experience in the introduction of evidence, and particularly the introduction of evidence in federal court. This document purports to set out certain events which transpired at a time in April, 1945, between April 30th and September 8th, 1945, on its face and is signed,

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apparently, by the witness Gene Schriber, who has appeared, and by the defendant, Elmer Remmer, whose signature has been identified. Now, of course, the best evidence of any transaction are the documents which are entered into and oral statements of witnesses who were present at the time of the events. This is a document which was entered into a period in excess of two years after the investigation commenced in this case, purporting to set forth these facts.

Now counsel states that it is an admission against interest on the part of the defendant and therefore admissible in his behalf, which is also a novel situation, so far as my experience is concerned. An opposing party can offer documents which are admissions against interest of a witness or a defendant who is not available to be placed on the stand, and can place into evidence letters or documents written long after the event, as being admissions against interest, but through this method, or after an investigation is started, of a witness and the defendant sitting down and writing up what the facts are and then attempting to introduce that into evidence as being part, at least, the statement of the defendant, without the opportunity of cross-examination, it seems to me is defeating the very purpose of a court proceeding, when the witnesses are put on the stand and the story is elicited from their oral testimony. This is unsworn, it is a document addressed "To Whom It May Concern," written at a time that the investigation was fully under way. Mr. Gillen says it is in substantiation

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of the testimony that is already in the record. If that is true, it would add nothing to the record, except it would in this written form and in the manner in which the defendant or his counsel desires, be the evidence which is in evidence. It adds nothing to the record. It is not the best evidence of the events which took place. It purports merely to be a recitation after the events and it does not permit the government to cross-examine one of the parties who purports to state this is what took place.

Under all of the circumstances, the government submits that this document is not admissible under any theory of evidence in behalf of the defendant in this case, and we, therefore, renew our objection to its introduction.

Mr. Gillen: I would like to respond to counsel for a moment.

May it please the Court, here is a thought—I listened carefully to see whether or not Mr. Campbell would make any mention of it. He spoke of admissions against and that admissions against interest can be offered by opposing party in the way of writing or any other admission. Of course, I challenge counsel to say that the defendant cannot offer admissions against his own interests. He certainly can. A defendant can put his head in a noose if he wishes. I also challenge counsel to say that this document which I have offered here would not be an admissible and legitimate bit of evidence against either Mr. Remmer, or against Mr. Schriber, for that matter, if Mr. Schriber was

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involved in a trial, if the government sought to offer it, because it would be a statement of transaction between two principals, at least one of which principals are available, and have been available and have been used as a witness by the government. Now there is no question about it, the government at least was furnished a copy of this document more than a year before the commencement of this trial, there is no question about that, the government has had a copy of this for more than a year before this trial started. You said you couldn't find it, but I say that the government has it, whether you have it or not, the government has it, and I will remind you that that was all discussed during the testimony of Mr. Maundrell and you said you would look for it.

I say, may it please the Court, that if Mr. Campbell chose in this case to prove any aspect of the transaction here, to crystallize the evidence on any aspect of the transaction of the purchase of the Menlo Club by Mr. Remmer from Mr. Schriber to produce this document in evidence would be legitimate and admissible, and if the prosecution could put it in, the defendant could. I think counsel's argument went more to the weight than the admissibility. I think it is an admissible bit of evidence, admissible from either side of this case, and we renew our offer.

The Court: In view of the situation we have here, the ruling will stand.

I will hear you on this other matter.

Mr. Gillen: I thought it might be practical to

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give your Honor our views before the jury is called in.

The Court: Yes.

Mr. Gillen: With regard to the prosecution's proffered Exhibit 109B, that exhibit, may it please the Court, comprises an execution on judgment executed out of the County Clerk's office in San Francisco, California, and I will remind your Honor that this pertains to that $1800 judgment against the defendant Remmer on behalf of Ogden F. Monahan, a man who had a judgment for $1800 back in 1948. That is, he obtained judgment on October 5, 1938, and there was some testimony that shows Mr. Monahan——

Mr. Campbell: I think the evidence shows it was finally satisfied in 1945.

Mr. Gillen: Now there are a number of photostatic sheets which we will pass up to your Honor to examine. The first sheet is writ of execution. We have no objection to the form of the exhibit. We will stipulate it is a true and correct photostatic copy, it has been certified to, of the writ of execution, and we think that is properly admissible as a public record.

Now the other documents which are attached are returns on the garnishment. We have no objection to the form, as being true and correct photostatic copies, certified to, but we do have a serious objection to the documents themselves and to their contents, upon the ground we think they are hearsay. In other words, may it please the Court, when a sheriff takes out a garnishment or writ of execution,

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he goes to a bank or he goes to any business establishment, and he makes an inquiry, with which your Honor is well familiar, as to whether or not that particular party holds anything that belongs to, or is indebted to the person named as the defendant. He obtains from the person he inquires an answer yes or no and he simply makes a return, which is hearsay. It is not an official act in and of itself. In other words, the deputy sheriff who serves the document or makes inquiry does not make his own investigation. Under the law he must be satisfied and content with whatever response he gets, whether true or false response, and therefore the contents of the return on the writ is merely hearsay notation by the deputy sheriff that he made inquiry of some one who told him a no or yes answer. He can not vouch for the truth or falsity and therefore the returns are hearsay.

The Court: Your objection goes to the offer of that portion of the exhibit that has to do with these garnishments?

Mr. Gillen: Yes, your Honor.

The Court: As far as the writ is concerned——

Mr. Gillen: The writ itself we believe is admissible.

The Court: Maybe counsel will go along with you on that.

Mr. Thompson: Well, if the Court please, the important part of the exhibit, from our point of view, is the returns on the writ. It is the sheriff's duty, under writ of execution issued by the court to seize any personal property, goods, etc., belong-

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ing to the defendant in his hands. That is his statutory duty and his public duty. That is the duty that he presumably carries out and the returns that are part of these writs not only show returns on specific inquiries at certain places, but there is a general return of writ of execution unsatisfied, in which the sheriff certifies that after due search and diligent inquiry he has been unable to locate any property not exempt from execution belonging to the defendant.

Mr. Gillen: That is the part of the writ we are not objecting to.

The Court: Maybe you can get together with counsel. I would like to find out just what part of it you did not object to.

Mr. Gillen: The first two pages we do not object to. The returns we do object to. In other words, here is an example of it in plaintiff's Exhibit 109A. It says a deputy sheriff——

Mr. Campbell: I think we can get together on this. Now is it agreed that with the proffered Exhibits 109A and 109B that, there having been detached therefrom certain documents, that the documents remaining in those exhibits may be admitted in evidence?

Mr. Gillen: The writs and unsatisfied return of part of the writ.

Mr. Campbell: Yes. We will have these stapled together.

The Court: After they are stapled, show them to counsel again so there will be no question about it.

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Mr. Campbell: May it be stipulated that 109A and 109B may be admitted in evidence?

Mr. Gillen: So stipulated.

The Court: So we will make the order when the jury returns.

[Title of District Court and Cause.]

ARGUMENT RE: EXHIBIT 183

Monday, February 4, 1952, 1:15 P.M.

(In the Absence of the Jury.)

Defendant present with counsel.

Mr. Avakian: Perhaps it would be well if your Honor had the exhibit before him to follow my grounds of the objection.

The Court: I have it.

Mr. Avakian: We object to the offer of Exhibit 183 for identification, your Honor, on the ground it is incompetent, irrelevant and immaterial. It is based on erroneous conclusions of law and it assumes facts not in evidence and in many instances it assumes facts directly contrary to the evidence presented by the government, and in line with that, your Honor, I would like to, if I may, take up the particular items in the exhibit and point out to your Honor the respects in which they are assumptions of fact not covered by the evidence, or even contrary to the evidence.

First of all, Item No. 2, which is the B. & R. Smoke Shoppe, and your Honor will recall that the figures that are entered thereas to the amount of

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the assets of Mr. and Mrs. Remmer in the B. & R. Smoke Shoppe are the figures shown as the total net worth of the B. & R. Smoke Shoppe in one of the other exhibits in evidence here. Now first of all then, the erroneous assumption made here is that the B. & R. Smoke Shoppe is the sole enterprise of Elmer Remmer, whereas the uncontradicted evidence of both of the other two partners, who have been called here by the government, is that the B. & R. Smoke Shoppe was a partnership. Each witness testified to that effect. In other words, with respect to that particular item, the figures that are used as the net worth figures of the B. & R. Smoke Shoppe at the end of each year, are assumptions which are not based on any evidence, because there is no evidence whatsoever of the amount of the assets of the B. & R. Smoke Shoppe on December 31, for any of these years. Mr. Weaver admitted that he had assumed in one case for a period of a year and another case for a period of two years, that there was no change in the bank roll and furthermore, as to one year in which there is evidence, he says the evidence is only five thousand in cash and 15 thousand in markers, rather than the total 20 thousand dollar figure cash used by Mr. Weaver.

The next item, Item 4, which is the Day-Night Cigar Store, again this exhibit assumes that the entire net worth of that enterprise was the net worth of Elmer Remmer, whereas the uncontradicted evidence presented by the government's testi-

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mony of the other two partners in that enterprise is that it was a partnership.

The next, your Honor, is Item 5, the 110 Eddy Street, and again this exhibit assumes that the entire net worth of 110 Eddy Street is the net worth of Elmer Remmer, whereas the uncontradicted testimony of the only two witnesses who testified on that point, namely the two partners, Kyne and Cavani, is that that was a partnership.

Then, your Honor, is Item 6, the Menlo Club, where again it is assumed that the entire net worth is entirely the net worth of Elmer Remmer, whereas the uncontradicted testimony of every witness called with respect to the Menlo Club is that it was a partnership.

The next item is No. 7, Transit Smoke Shop, which again assumes that the entire net worth of the Transit Smoke Shop belongs to Elmer Remmer, whereas the uncontradicted testimony of Mr. Kyne is that Mr. Kyne paid up half the investment and there is a check here in evidence, your Honor, issued by the Menlo Club to William Kyne and marked "Loan for Transit," which is in exactly one-half of the amount of the cost of the Transit Smoke Shop and which Mr. Kyne said was used by him to defray his one-half share of the cost of the Transit Smoke Shop.

The next item is No. 8, your Honor, cash on hand, which is shown as December 31, 1946, as $65,000. There is absolutely no evidence whatsoever in the record that on December 31, 1946, Mr. Remmer had $65,000 cash on hand. There is in evidence a check

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of the Menlo Club issued early in November, 1946, for $65,000 to William Kyne and marked as a loan to Elmer Remmer and which Mr. Kyne testified that he cashed, put the proceeds in Box 48, which he and Mr. Remmer had access to, and used the money when it became necessary, but there is no evidence whatever of $65,000, or even any other specific amount, being on hand on December 31, 1946.

Next, your Honor, is Item 11, the Gallagher & Burton whiskey, and as to that there is included in the amount of the net worth shown for that whiskey the sum of approximately $7400 paid in 1944 as federal excise tax, and in that respect the exhibits makes the erroneous conclusion of law that that $7400 tax should be treated as an additional cost of the whiskey rather than being treated as a currently deductible item.

Item 12 is designated loan to Brice and Silverman. There is absolutely no evidence in the record that Mr. Remmer ever made any loan to Mr. Brice and Mr. Silverman. There is evidence in the record that Mr. Remmer made an investment in a night club in New York, in which Brice and Silverman were concerned and that that night club went broke within a short time, and within four or five months Mr. Remmer received back $8,000 of the $12,000 investment. In connection with that, the significance of the distinction between a loan and an investment is this, that if it was an investment, which was the uncontradicted testimony, and the investment went sour, then if that is a deductible loss because the investment went bad, there is no continuing liability

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on the part of anybody to repay him for that, so $4,000 at the end of 1946 should not be shown as an asset. In other words, if I invest in a business and the business goes broke, the other partners have no obligation to pay me. There is no evidence this was a loan. The uncontradicted evidence is that it was an investment.

Next, your Honor, is Item 23, which lists 29 thousand dollars as due from the Bank Club for Gallagher & Burton whiskey, and the uncontradicted evidence is, your Honor, that this 29 thousand dollars was not paid to Mr. Remmer until July, 1947, and the effect of showing 29 thousand dollars as an asset of December 31, 1946, is to put Mr. Remmer on the accrual basis of accounting, because that is account receivable for merchandise sold and should not be taken into income until paid on the cash basis, and should be included as an asset only on the accrual basis, and there is no evidence here to the effect that Mr. Remmer was on the accrual basis, nor is there any evidence which would justify, as a matter of legal conclusion, that he should be on the accrual basis, and furthermore, I might point out to your Honor, if he were put on the accrual basis, then to be consistent, the entire net worth statement would have to be on the accrual basis and as to every figure here would be subject to revision.

Next, your Honor, with respect to the liabilities. There is no liability shown with respect to the sum of 50 thousand dollars borrowed from Robert Jeffress on September 27, 1946. The omission of that

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50 thousand dollars liability would inflate the net worth as shown in this exhibit by the same amount. Now the uncontradicted evidence is that 50 thousand dollars was borrowed from Mr. Jeffress on September 27, 1946. The uncontradicted evidence is that immediately thereafter, I believe on the next day, Mr. Remmer put 50 thousand dollars into Cal-Neva account, as the books of Cal-Neva show, and that that payment to Cal-Neva is taken into account here in computing his obligations to Cal-Neva, so the omission of the loan from which the payment to Cal-Neva was made would inflate his net worth by 50 thousand dollars, and I point out to your Honor that the uncontradicted evidence also is that in July of 1947, out of this 29 thousand dollar check from the Bank Club, Mr. Remmer paid 23 thousand to the Bank Club at that time on account of Mr. Jeffress' obligation to the Bank Club, so that it appears quite evident from the evidence so far that at least as to 23 thousand dollars of the 50 thousand dollars borrowed from Mr. Jeffress, the obligation was still in existence at the end of 1946.

The sum and substance of what I just said, your Honor, is that Exhibit 183 for identification, instead of correctly showing the difference between Mr. Remmer's total assets and total liabilities, in arriving at the proper net worth, rather miss at least one liability and on the asset side makes assumptions detrimental to him which not only are not covered by the evidence, but in some instances are contrary to the uncontradicted evidence submitted by the government.

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Now, in that connection I would like to call your Honor's attention to the case of Kirsch vs. United States, decided in 1949 by the 8th Circuit Court of Appeals and reported at 174 Fed. (2d), beginning at page 595. In that case, your Honor, the defendant was charged with income tax evasion and the government's case was based on what is commonly referred to as the bank deposit theory, which treats deposits in a bank as gross income to the extent that they are not identified as being something else, and the senior revenue agent testifying in that case was asked to compute the tax due by the defendant on the basis of a hypothetical question, which assumed that the unidentified deposits in his bank accounts were income. On an objection to that question in the trial court that it assumed facts not in evidence, the trial court suggested that the question be amended so as to state specifically that it was being assumed that the unidentified bank deposits were income, and on the basis of that amendment the court overruled the objection, saying: "I think the jury understands that what counsel is asking here, he is putting in these unidentified deposits as being income. Now he is assuming this is income, and he is giving his answer on that assumption, so that if you find it is not income and the amount is not the same on those unidentified deposits then, of course, this computation wouldn't be correct and you should not consider it," and the question was answered and after conviction, the Circuit Court of Appeals reversed the conviction, holding that it was improper to put a hypothetical question

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to the revenue agent based on assumptions of fact which were not covered by the evidence and which were, in fact, contrary to the evidence, and in that respect the evidence in the case showed, your Honor, from the testimony of the revenue agents, as follows: (Reads from 174 Fed. (2d) "At the trial * * * of the fact assumed." (Page 599-601.)

Now, your Honor, the assumptions that have been made here in preparing Exhibit 183 for identification, which run afoul of that rule——

The Court: I would like to have that before me.

Mr. Avakian: Yes, I am going to hand it to you. The assumptions that are going to violate that rule I will not enumerate in detail, and call attention to just two categories—one is the assumption in the face of uncontradicted evidence of the government's witness that none of these enterprises was a partnership; secondly, in another category is the presumption of the 50 thousand dollars that Mr. Remmer put into Cal-Neva in September, 1946, as in effect an asset, that is reducing the amount that he owed Cal-Neva, treating that in effect as increase in net worth and excluding, your Honor, the question of liability to Jeffress for 50 thousand dollars, which was incurred at or about the same time. I might call again your Honor's attention to this language here in the Kirsch case, in which they say it is wrong for the agent to do this, it is wrong for the agent to say: "From the evidence it shows all these deposits were not income, but I did not know how much was and I have made no effort to find out."

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Certainly then it is improper to ignore the borrowing from Mr. Jeffress.

The Court: There was complete absence of any evidence that certain items of the bank account were income in that case.

Mr. Avakian: The evidence showed certain items were income, as to others, they didn't know.

The Court: There was a complete lack of evidence as to those.

Mr. Avakian: That is right, your Honor. Now the significance here of ignoring the partnership is that all of the assets of these partnerships, even though on the books of the companies that are in evidence here, even though capital accounts of different partners have been built up, even though that represents the portion of the assets there in which the partners have an equity, that is all ignored, your Honor, although that is the uncontradicted evidence and the sum total of the assets of those businesses is treated as Mr. Remmer's net worth. Now if there were testimony here, your Honor, to the effect that these were not partnerships, if partners came in, for example, and said, "I was described as a partner, but I wasn't a partner," or if the evidence were that the partner said, "Although a certain amount was credited on the books to my capital account, it was never intended that I should have that equity," then it would be a different matter, but the uncontradicted evidence of every witness, your Honor, shows that these were partners, every witness called here said, "Yes, I was taken in as a partner, my share of profits was

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credited to me on the books to build up my capital investment in the place." Now we can't ignore that.

Now, I would like to hand this decision up to your Honor. The portions from which I read commence at page 599. The decision itself commences at page 595; page 599 to 601, inclusive, I believe are the pertinent portions, your Honor.

The Court: I can't think of any questions at this time.

Mr. Campbell: I would first like to point out that the Kirsch case has no application to our present problem in this case. As I recall, the Kirsch case was one on which the government predicated the unreported income on what is known as the bank deposit method, as contrasted to the net worth method, which is the government's contention in this case. Under the bank deposit method, so-called, the government attempts to prove, through large bank deposits which continue over the period in question and which are in such amounts as to appear to be income, being received in the course of business, that a proper inference can be raised that those bank deposits are taxable income; and in the Kirsch case, as I recall, that was not supported, for example, by increases in the defendant's net worth, and I do not believe any attempt was made to show other than in general terms, the source of the money nor for what it was spent after it had come into the hands of the defendant, and in that case the government agent ignored the Blackman case—and the court does distinguish it from the

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Blackman case, which was also a bank deposit case —the agent stated that the amount of bank deposits might very well include items which were re-deposits and therefore not income, but that in the absence of anything to the contrary, we are assuming, and have assumed, that they were income. In the Blackman case, which is the leading case on bank deposit slips, the agent testified he had, to the best of his ability, eliminated all duplications from re-deposits of funds. In other words, the bank deposit method, of course, is essentially a somewhat unsatisfactory method because a man's bank account does not necessarily reflect income producing activities. In other words, a man in business, such as a merchant, may cash checks for his customers, or may accept checks which are in part payment for goods and deliver the balance in cash to his customer, so that his deposits do not necessarily indicate his receipts for a given date, and that is the same type of thing which the agent in the Kirsch case admitted he had not eliminated.

Here, however, we are dealing, not with attempt to prove income through daily or weekly deposits to a bank account, but we are relying upon the increase of assets belonging to the defendant and which method, of course, has on various occasions and at various times in various cases been approved by this circuit. A recent case in this circuit is that of Barcott vs. United States, reported at 169 Fed. (2d), 929, in which the decision written by Judge Orr, the other two members of the bench concurring in the decision being Judge Stevens and Judge

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McCormick, who recently retired as senior district judge at Las Vegas. Reading from page 930: (Reads) "Agent Swan made a computation——"

The Court: I think part of this argument is adressed to this contention that there is no evidence showing that certain of these enterprises are not partnerships. It would appear to me at this state that would probably be the most serious of the questions raised.

Mr. Avakian: Also the 65 thousand dollar amount on hand and the excluding of the Jeffress liability of 50 thousand dollars.

Mr. Campbell: I will refer to the two individual items first and then to the partnership allegation.

As to the liability of 50 thousand dollars to Jeffress, the defense in cross-examination of Mr. Maundrell, introduced a note bearing date, I believe, September, 1946, or some such date, in amount of 50 thousand dollars which, as I say, was produced by the defense. Mr. Maundrell testified that he was present when Jeffress, who is now deceased, came into the office with a large number of bills wrapped up in a newspaper, that Remmer called him in and told him to write up some kind of note and receipt for the 50 thousand dollars, and he wrote up that note. He testified he had no knowledge of the transaction other than that on direct examination, that so far as he knew, the note could have been paid back the next day. He had no knowledge when it was paid back or how long it was outstanding, so there is no evidence in the

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record that there was an outstanding liability of 50 thousand dollars at the end of 1946.

Now counsel refers to certain evidence given here by Mr. Perkins, the accountant for the Bank Club, that when they got to the point of paying some 29 thousand dollars they owed Mr. Remmer on account of whiskey in 1946, that at Mr. Remmer's direction when they repaid this in 1947 that they applied some 23 thousand dollars, or very similar sum, to an obligation which Jeffress owed to the Bank Club. That was all there was of that testimony. Now how Mr. Avakian can draw from that —of course, he is entitled to any inference he desires to draw—but how he can properly draw from that the fact that was a repayment of this 50 thousand dollar loan, wasn't another loan or wasn't a repayment on some loan that was made subsequently, I don't know. All Mr. Perkins knew, and all he testified to, was in June or July of 1947 Mr. Remmer permitted the application of some funds owed to him to be applied to the obligation of Jeffress, and I submit that this is not sufficient proof that there was an outstanding obligation or liability as between Mr. Remmer and Mr. Jeffress as of December 31, 1946. It may be there is evidence available to the defense to prove that as the evidence now shows, the government is certainly entitled to draw the inference it has. I might say in that regard there was testimony from Mr. Weaver—he was asked if during the course of his investigation he had gone into this loan between Jeffress and Remmer, for the purpose of ascertain-

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ing whether or not it was outstanding as of December 31, 1946, and he was asked specifically and called for certain exhibits as to when, during the course of his examination he had gone into that matter, and referred, I believe, to some letter which he had received from Semenza regarding credits to Mr. Remmer's account, that is, to Mr. Remmer's account in the books of Cal-Neva, Inc. As I recall Mr. Semenza's testimony, he stated he was unable to ascertain there was any such outstanding liability.

Mr. Avakian: That is not true.

Mr. Campbell: The record will speak in that regard. As to the 65 thousand dollar item, there is in evidence check for 65 thousand dollars which Mr. Kyne stated he cashed, that he wrote at Mr. Remmer's request, cashed the check and received 65 thousand dollars cash and turned that cash over to Mr. Remmer, as I recall, in November, 1946. At any rate, the check is here and bears a date; that that money had never, to his knowledge, been returned. Under the circumstances, we have charged that 65 thousand dollars as being on hand as of December 31, 1946.

Now with relation to these partnerships to which reference has been made. Counsel states the record is entirely lacking in any evidence which would substantiate the government's placing of these assets, or of the net worths of these businesses, in the asset side of Mr. Remmer's statement. Now the evidence here shows that the entire investment in each of these enterprises, with the exception of

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the 186 Club, where some 16 thousand dollars was put up by Kopstake and Nealis and subsequently returned to them from earnings of the corporation, and with the exception of certain money in 110 Eddy Street, which was put up by Mr. Pratt, but which was returned to him, that all of the monies and funds were put up by Mr. Remmer.

The evidence further shows that the agreements as between Mr. Remmer and these other people, if they be considered as bona fide agreements, provided that Mr. Remmer was to receive the return of his investments before these other people were to receive anything. Mr. Kyne repeatedly was returned to the witness stand, he stated these were working agreements, he stated that the agreements of the Menlo Club were the same in connection with all the organizations. It is true the Menlo Club agreements were entered into after the origination of this investigation, but I think of considerable significance is the fact that you have these various groups, with supposedly different partners, yet the money was transferred back and forth without reference. Partners on the books were eliminated and new ones brought in apparently and showing on the books of the percentages to which the partners were allegedly interested, without consultation of the partners. The one man who was produced here who made an investment in the 110 Eddy Street, Mr. Pratt, did not know who his partners were, if any, and couldn't find out what the profits of the concern were, if any.

So far as the B. & R. Smoke Shoppe, the Day-

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Night Cigar Store, the Menlo Club, Transit Smoke Shop, these were all enterprises in which all of the cash involved was put up by this defendant. They were his capital. So far as the record is concerned, he was entitled to get back everything he had put in—and I think this is for the jury to determine—the government has produced here everybody who purported to have any interest in these matters.

As to the loan to Brice and Silverman, examination of the documents themselves will show that it was a loan. It was the testimony of Mr. Maundrell that it was a loan. It was the testimony of Mr. Maundrell on cross-examination that Brice had informed him that that portion which the government is now allowing as a repayment, had been repaid to Mr. Remmer.

Now as to the Gallagher and Burton whiskey, counsel raised the question of including the obligation from the Bank Club to Mr. Remmer for the purchase of that whiskey. Well, I presume it could be put either way, either he has the whiskey on hand or he has an obligation for the whiskey. The amount of money would be the same, whether you put it as whiskey on hand or whiskey for which he is to received money, which has been acknowledged by the Bank Club as outstanding and owing to Mr. Remmer as of December 31, 1946. When a man sells an asset, which this whiskey was, to a concern who are to pay him subsequently for it, he does not take a loss, to carry out Mr. Avakian's argument, to the amount of his investment in the asset; in other words, he had 29 or 30 thousand

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dollars' worth of whiskey—he cannot take a 30 thousand dollar loss of income for that period except he sold it, as Mr. Avakian's theory would result. In computing income on a net worth basis, however, accounts receivable are properly included as a part of the net worth, and that is so particularly where the assets giving rise to the account receivable have been removed as an asset from the net worth statement, as is the situation here.

Now as I understand the decisions with relation to the net worth method and with relation to the computations and with relation to the preparation of charts, either side is entitled, if the evidence will support it, or the inference from the evidence which can be reasonably drawn on the theory of the party presenting the particular chart, is entitled to place such theory before the jury, and I refer specifically to the case of U. S. vs. Skink, 126 Fed. (2d), 702, where a similar method as that which is here adopted by the government is used. Now this chart which is offered here is based entirely upon evidence which has been produced in this case. Now I agree that counsel does now, and has throughout the case, and will continue undoubtedly to quarrel with much of that evidence and to quarrel with the inferences which the government would draw from that evidence, which, of course, is perfectly proper for them to do so. That is one of their functions in the case, but I submit that this particular exhibit seeks to draw, if it draws any inference, draws inferences which can be legitimately drawn from the evidence and which the jury can have the right

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to draw from the evidence. Counsel's statement here is argument which might properly be presented to the jury in his argument of the case, of the strength and value which should be given to this proposed Exhibit 183. However, I do not believe that that affects the question of the admissibility of the document, for such weight as the jury might finally determine to give it under the legal instructions of the Court.

There is one other case also on the matter of recomputation by treasury agents of assets and liabilities and resulting net worth of a taxpayer. I refer to a case decided May 28, 1951, by the 6th Circuit, Garivy vs. U. S., 189 Fed. (2d), 459.

Mr. Avakian: If I may first comment briefly on these authorities which Mr. Campbell has cited and then on certain factual statements he made.

The Garivy case which he just cited deals only with the proposition it is proper for expert witnesses to present for use of net income and tax resulting therefrom the net worth method and we have no quarrel, your Honor, with the propriety of using expert witnesses to make these computations. That is not the point of our objection at all. The point of our objection is that this must be based on evidence in the record. Now the Garivy case did not involve that question. The Barcott case is simply a case concerning net worth method, was properly applied in that case and does not deal with the question of the meaning or scope of a hypothetical question to an expert witness, so it likewise has no bearing on the point here. It has

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been some time since I have read the Skink case, but my recollection is it likewise does not involve the rule the hypothetical question to an expert must be based on evidence supported by the record.

Mr. Campbell: Pardon me—I did not understand the hypothetical question is presently before the Court.

Mr. Avakian: Oh, yes, it is, your Honor, because incumbent in the exhibit if the computation of net worth on the basis of the evidence that is summarized in the exhibit. Instead of the witness saying verbally what the evidence is, he has it set forth in writing.

The Court: Let me ask you this question: Couldn't a computation be based upon the evidence and also upon a reasonable inference which might be drawn from the evidence?

Mr. Avakian: That is right, your Honor. The hypothetical question may include any inference which the jury could properly draw from the evidence that is in the record. That is where we come exactly to the Kirsch case. In the Kirsch case, your Honor will recall, there was a fixed——

The Court (Interceding): Yes, and I take it in that Kirsch case there was no evidence at all—(reads from the Kirsch case). Because it is found some of the deposits unaccounted for by any evidence on that point.

Mr. Avakian: That brings us specifically to the 65 thousand dollar cash on hand and I point to the inconsistency in Mr. Campbell's argument between that point and the Jeffress loan. He says the

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Jeffress loan was negotiated September 27, 1946. There is no evidence, other than Mr. Perkins' statement of 23 thousand dollar payment by Remmer to Jeffres' account the following year, that that liability still existed at the end of 1946, but on the 65 thousand dollars that Mr. Kyne says he turned over to Mr. Remmer on November 7, 1946, there is no evidence whatsoever that that money was on hand on December 31st. Mr. Campbell did not point to any evidence. On the contrary, he said, "Under the circumstances, we are entitled to assume that that money was still on hand." On the contrary, your Honor, Mr. Kyne's testimony is that Box 48 was continuously being used to put money in, take money out, and there is no record what was there at any particular time. He put the 65 thousand dollars there on November 7, 1946, but there is no evidence, your Honor, as to whether that, or any portion of it, or even a penny of it, was there on December 31st. The record is silent. We meet exactly the point of the Kirsch case. An assumption is being made without evidence to support it.

Mr. Campbell says, with respect to the Gallagher and Burton whiskey, it doesn't matter whether we ignore the whiskey or the amount payable on it. It does matter, your Honor, because the whiskey was entered at cost of 29 thousand dollars, as shown here by the proposed Exhibit 183 at the end of 1945. If you eliminate the whiskey from the assets and put it in account receivable, you are in effect charging him with having receivable, you are in

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effect charging him with having received 29 thousand taxable income in 1946, when actually he did not get the money until 1947. That is why I say the assumption he makes here puts it on the accrual basis.

Then, your Honor, with respect to these partnerships. Mr. Campbell overlooks the fact that, using Mr. Maundrell and the Menlo Club as an example, there was a credit on the Menlo Club books to Mr. Maundrell's account at the end of 1946 in amount of $17,000. Mr. Maundrell, during the next thirteen months, withdrew $15,000 of that $17,000. In the exhibit here, your Honor, that portion of the assets, namely, that $17,000 credited to Maundrell on the books of the Menlo Club, is treated as Mr. Remmer's asset. The evidence shows within thirteen months Mr. Maundrell put $15,000 in his own pocket or used for his own purposes and yet this exhibit, in the face of that, your Honor, in the face of that treats that $17,000 as part of Mr. Remmer's net worth. Now it is credited on the books to Maundrell's account, it is his portion, his equity in the assets of the Menlo Club. He actually draws it out within thirteen months; over a period of thirteen months in periodical withdrawals, he withdraws it, your Honor. Now does the evidence here support the inference that that $17,000 credited on Mr. Maundrell's account is entirely Mr. Remmer's assets? It does not, your Honor. There is no reasonable inference can be drawn. These are all facts brought into this case by the prosecution's witness. It would be different if Mr. Maundrell said "none

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of that $17,000 was credited on the books to my account, it did not belong to me and I never exercised a claim over it and I walked out and ignored it and left it there." That would be different, but Mr. Maundrell took $15,000 of it within the next thirteen months and you can't draw inferences contrary to that, your Honor. That is the prosecution's witness testifying. That is the uncontradicted testimony; that is what every witness says, and you can't draw an inference contrary to the prosecution's uncontradicted testimony. If the evidence were questionable, yes, but where the evidence is direct and positive and it is uncontradicted, you can't draw inferences contrary to it. That is the point of the Kirsch case. Undoubtedly in the Kirsch case the government argued to the jury that they should infer that all of these bank deposits represent income and undoubtedly the jury did infer or they wouldn't have convicted him, but the Circuit Court says no, that was improper, there was no basis for inferring from the evidence in that case that all the deposits were income, and similarly, as to each of these various items, we submit that the uncontradicted evidence is in such a state that on many of these items it is not permissible to draw any inference contrary to the direct testimony of the witnesses.

Now, your Honor, if we are right in any major respect, you can see the prejudice of submitting to the jury and allowing the jury to see his net worth statement, which on the basis of various assumptions made, which we feel are contrary to the evi-

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dence, builds up a net worth at the end of 1946 of 482 thousand dollars. Now that is not correct, your Honor. There are some items there that are correct, but there are many on which no proper inference from the evidence could support the inclusion.

Mr. Campbell: We will submit it, your Honor.

The Court: Mr. Campbell, on this $17,000 received by Mr. Maundrell, what is your position in regard to that?

Mr. Campbell: Well, simply this, your Honor; I do not think the evidence in the case shows he received $17,000.

Mr. Avakian: Fifteen thousand.

Mr. Campbell: Certain taxes were paid for that and he received a certain amount of cash. Now as I see the situation, we have to take that which existed as of December, 1946. Now there was in existence an agreement about that time between Mr. Maundrell and Mr. Remmer, by which Mr. Remmer was to receive a return of his 175 thousand dollar investment before these other people were to receive anything. Now we do know that the books of the Menlo Club were entirely inadequate for the period which we have under consideration here. For example, the bank account was left entirely off the records, funds were transferred back and forth from Mr. Maundrell and whatever funds were needed for another enterprise, they would come out of the safety deposit box or out of the Menlo funds. It may very well have been, we don't know—but in a period subsequent to this

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Mr. Remmer did get his entire 175 thousand dollars back, which would entitle Mr. Maundrell to what funds he received some 13 months later. However, for the purpose of this case and for the purpose of determining the relationship of assets as of December 31, 1946, I think we have to look to the situation as it existed at that time—what the circumstances were, what the impelling factors were of Mr. Maundrell receiving this money, were there legitimate partners who had dropped out of the thing long before—Mr. Fricker and Mr. Ditto received nothing as far as the evidence shows. Whether their account was still being carried on the books, I don't know, but I do believe that we have to look at the situation as it existed at the end of 1946. The evidence would show that Mr. Maundrell apparently was the only one—I believe that there are some small payment shown in the records to Nelson.

Mr. Avakian: Not so small.

Mr. Campbell: Well, the record shows that. I think the government is entitled to draw its inference from the records and from the exhibits which are here. So far as this witness drawing any inference, he has, according to his testimony and examination of the records here will disclose, placed on here the figures which are disclosed in the exhibits to which reference has been made and which are here in evidence. That is the government's position.

The Court: Well, the exhibit will be admitted in evidence.

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3:50 P.M.

(Defendant present with counsel.)

Mr. Avakian: Your Honor, the testimony of Mr. Maundrell which I have in mind is at pages 1401 to 1404 from the transcript, and I read particularly these questions and answers on cross-examination:

"Q. Now, Mr. Maundrell, you were questioned concerning two checks that were issued by you in November of 1945—November 16th, I believe was the date—for six thousand dollars to Lou Brice and Mattie Silverman. Those two checks, totalling 12 thousand dollars, represented a 12 thousand dollar investment that Mr. Remmer made in a night club in New York with Mr. Brice and Mr. Silverman, is that correct? A. Yes, sir.

"Q. And that night club failed, did it not?

"A. Yes, sir.

"Q. In how short a time?

"A. About 8 days.

"Q. It operated about 8 days and failed?

"A. Yes, sir."

And then there is subsequent testimony, as to which, I think there is no dispute, that four or five months later Mr. Remmer told Mr. Maundrell that at some time prior to that conversation he had gotten back eight thousand dollars out of that twelve thousand.

Now, your Honor, we feel this question is proper. There is also testimony of Mr. Kyne, which your Honor can recall, where he talked to Mr. Remmer on the long distance telephone, Mr. Kyne being in

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New York, and Mr. Remmer told him he had a piece of a New York night club. In any event, your Honor, the purpose of the question is this. One possible interpretation of the evidence, according to this testimony of Mr. Maundrell I have just read——

The Court: Pardon me—does Mr. Campbell dispute that?

Mr. Campbell: Yes, to this extent, your Honor. I have before me, for example, check 1538, which is Exhibit 133, in regard to this check to Lou Brice for six thousand dollars. I also have before me government's Exhibit 133, which is the check stub book and which is marked "Loan." I have in mind the fact that on direct examination Mr. Maundrell testified as both the six thousand paid to Brice and the six thousand paid to Silverman, both were loans in connection with that and the question on cross-examination——

The Court: Let us find out what he said on direct examination.

Mr. Campbell: Yes. Might I borrow your transcript?

Mr. Avakian: Surely. Your Honor, as long as there is evidence which supports the facts in my question——

The Court (Interceding): If there is evidence on this direct examination that this was a loan, then in response to a question on cross-examination about an investment, I don't know that an inference should be drawn what he calls a loan should be changed to investment.

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Mr. Avakian: It can be interpreted either way in this case. If it is subject to two interpretations, we are entitled to question on both of them.

The Court: Did Mr. Maundrell use the word "investment"? Let us see what he said on direct.

Mr. Avakian: Your Honor will also recall Mr. Kyne said he had a piece of a night club, that also has a bearing on it. That was on direct, your Honor.

Mr. Campbell: Here is his testimony on direct examination, page 1219:

"I show you plaintiff's Exhibit 133G, Check No. 1538, dated November 16, 1945, payable to Lou Brice, in amount of $6,000, and ask you for what purpose that check was drawn?

"A. Well, that was given to Mr. Brice as payment on night club Mr. Remmer had an interest in in New York.

"Q. What was the source of the funds on which you drew this check?

"A. The money was given to me in cash by either Mr. Remmer or the manager of the Menlo Club. If Mr. Remmer wasn't around, I always got the money from the manager."

I think from the record either inference could be drawn.

The Court: The objection will be overruled.

Mr. Campbell: I will withdraw my objection.

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State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the trial commencing November 28, 1952, and that the foregoing pages, comprising 101 in number, are a true and correct transcript of my said shorthand notes of the arguments held in the absence of the jury during the trial on January 28, 29, 30, 31 and February 1 and 4, 1952, to the best of my knowledge and ability.

Dated at Carson City, Nevada, February 19, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed February 19, 1952.

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[Title of District Court and Cause.]

JURY TRIAL

Be It Remembered, That the above-entitled matter came on regularly for trial before the Court sitting with a jury at Carson City, Nevada, on Wednesday, the 28th of November, 1951, the defendant being present in court with his counsel.

Appearances:

MILES N. PIKE, ESQ.,
BRUCE R. THOMPSON, ESQ.,
JAMES H. SHELTON, ESQ.,
Attorneys for Plaintiff.

JOHN R. GOLDEN, ESQ.,
LESLIE C. GILLEN, ESQ.,
SPURGEON AVAKIAN, ESQ.,
LOHSE & FRY, By
GEORGE LOHSE, ESQ.,
Attorneys for Defendant.

Opening Statement

By Mr. Pike:

May it please the Court, ladies and gentlemen of the jury: This morning I made a brief statement of what the case was about to this extent, that I endeavored to outline the elements contained in the six different counts or charges of the indictment. Now, as you have been told by the Court, the in-

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dictment itself is no evidence whatsoever of guilt. It is the mere formal charge against the defendant in this case. It is, however, as the Court has indicated, the mechanism through which and upon which the evidence brought before the jury for its consideration must be predicated. What I had to say this morning was, of course, not evidence in the case, and what I have to say now in connection with this opening statement, or what I say or any other attorney in this case may say throughout this trial is not in any sense evidence. If I make errors in referring to the figures contained in these charges, I have no doubt that I will be promptly corrected. However, I assure you that, to the best of my ability, the correct figures will be presented for your consideration at all times.

The jury has listened to the reading of the indictment and each of the six counts contained in it and each juror is, of course, aware at this time that the six charges, and each of them, charge the defendant, Elmer F. Remmer, with the violation of a certain federal statute, which makes it an offense for a person to wilfully attempt to avoid and defeat the payment of a tax due the United States. In this case, of course, the particular tax that is referred to is the federal income tax and the particular years that are referred to in the indictment are the calendar years 1944, 1945, and 1946. There are two counts in the indictment as to each of those three years, '44, '45, and '46, and, for example, with reference to the first year in which the violation is charged, the calendar year 1944, we find the charge

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there to be that the defendant, Elmer Remmer, with intent to violate the law in attempting to defeat and evade a large part of the tax due the United States for income, did file a false and fraudulent income tax return for himself, in which he falsely stated the amount of taxable income that he had received for that taxable year and the amount of tax due, and the indictment then goes on, in that count, to state the government's contention and what it will be obliged to prove as to the actual taxable income that he received for the calendar year 1944 and the correct amount of tax that was due and payable on the actual taxable income received by the defendant for that year.

Now in the second count of the indictment we see the name of Helen L. Remmer appearing for the first time. Now, as the jury knows, Helen L. Remmer is not a defendant in this case and there is no other defendant in this case besides Elmer F. Remmer, but in the second count of the indictment the charge is that for the calendar year, 1944, Elmer Remmer, the defendant, wilfully and knowingly, and for the purpose of evading the payment of this tax due, or a large part of the tax due, filed, or caused to be filed for Helen L. Remmer a false and fraudulent income tax return, in which the amount of taxable income received by Helen L. Remmer for the calendar year 1944 was falsely stated and the amount of tax due on the taxable income received by Mrs. Remmer for that year was falsely stated. The indictment then goes on to charge the government's contention as to the correct

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taxable income for Mrs. Remmer for the calendar year 1944, and also to state in the indictment the amount of tax that was due for that year. Thus we have for the calendar year 1944, Elmer Remmer filing his own false income tax return, according to the charge, and in the second count of the indictment that Elmer F. Remmer filed, or caused to be filed a false and fraudulent income tax return for his wife, Helen L. Remmer for that same year.

I say that by way of illustration because if we move on then to the calendar year 1945, we find a similar situation. We find in the third count of the indictment that Elmer Remmer is charged again, for the purpose already stated, the charge that he unlawfully, in the indictment, filed a false return for himself in that calendar year, and we find in the next succeeding count of the indictment, Count 4, that he is charged with having filed, or caused to have been filed, a false and fraudulent return for the taxable income received by his wife, Helen L. Remmer for 1945; and just so, when we come to the fifth and sixth counts of the indictment, we note that they relate to the calendar year 1946 and we find in the fifth count of the indictment the charge that Elmer Remmer, for the purpose stated in each of the counts, did wilfully attempt to evade the payment of the correct income tax due from him for his taxable income for the calendar year 1946, filed a false and fraudulent return. The indictment in that particular Count 5, charges the amount of income that he reported and the amount of tax upon that income and then it charges what, under the

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government's contention, he should have reported in order to comply with the law and the amount of tax that was payable on that correct and larger amount of income.

Count six and last count of the indictment follows the same pattern. It is for the calendar year 1946, just the same as the fifth count. The charge is, without elaborating again, that the defendant, Elmer Remmer, filed, or caused to be filed, a false and fraudulent return of income for the calendar year on behalf of Helen L. Remmer. The indictment then sets out the amount that was reported, which it charges was a false amount, it was known to be false to Elmer Remmer at the time he reported it. He did it wilfully, in an attempt to evade payment of income tax due on that and sets out the amount of tax computed on the amount of income reported by the defendant in the false and fraudulent return filed for Helen L. Remmer for the calendar year of 1946 and also the government charges, in the concluding language of that count, the correct amount of tax that should have been paid.

The jury has been impressed by the language "wilfully and knowingly," as it appears in the federal statute, that makes it an offense for a person to attempt to evade the payment of a tax due, and the indictment contains the same language. The defendant is charged with having wilfully and knowingly attempted to defeat and evade a large part of the tax due in each one of these counts. That is true in every count, and "wilfully and knowingly,"

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of course, means just what is says. It means that the government must establish——

Mr. Gillen: Your Honor, I must offer an objection that counsel is now departing from the prerogative of——

The Court (Interceding): I think counsel is just about to tell the jury that the government must prove the intent.

Mr. Pike: That is right.

Mr. Gillen: He is interpreting words, which is your Honor's province and must come from your Honor as a matter of law.

Mr. Pike: It is an element of the offense and that is what I am trying to say within my ability—that the government is obliged to prove knowledge on the part of the defendant that the amount of taxable income reported in the particular income tax return filed for each of these years, 1944, 1945, and 1946, was not the correct income for that particular calendar year. The government is obliged to prove that, which is the intent element in this case, beyond a reasonable doubt.

Now there will be rather voluminous records offered in evidence by the government and many records may be received in evidence. Those records will be produced before the jury by people who will bring them into court and standing alone, the jury may wish to know the significance of any particular documents or records that are brought before the Court and the jury for consideration. It is in connection with this evidence, when received and admitted in evidence, and the other accepted evidence

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in the case on the part of the government, that I address these brief remarks, as possible assistance to the jury in following the evidence which will be submitted.

In connection with the government's case evidence will be brought forward to show taxable income in the amount charged by the government in each of these calendar years, both as to the counts referring to the income of Elmer F. Remmer and the counts referring to Mrs. Remmer, or as she is named, Helen L. Remmer, for the purposes of this trial, for the particular calendar years, and there will be brought before the jury evidence as to the method of the determination of that amount of income for each of those years, as referred to in each of the six counts of the indictment.

The evidence will follow what may be referred to as a net worth computation of income. Now there it is the position of the government that net worth of a taxpayer may be considered generally as the difference between his assets and his liabilities, or perhaps, in more of our usual way of talking, the difference between what he owns and what his obligations and debts are, constitute a person's net worth. So here the government, in presenting its evidence as to the income that is charged by the government to be taxable under each of these counts of the indictment for each calendar, will present evidence showing what the net worth of the taxpayer was at the begining of the calendar year and will further offer evidence to show what the net

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worth of the taxpayer was at the end of the particular calendar year.

Now by way of pointing out this evidence, let us say that this evidence will show that the sources of property are confined within general classes through necessity, and those classes are gifts, inheritance, borrowed money, net income, whether that income be profits or whether it be earned income, and the evidence will consider and be presented to you on the proposition of the elimination or the consideration of the elements of gifts or inheritance having been received by the taxpayer during any given calendar year, after the net worth of that taxpayer has been established as of the beginning of that particular calendar year.

Now by way of pointing out as a further simple illustration on that, let us assume that if there were ten thousand dollars net worth of the taxpayer at the beginning of the particular calendar year, and eliminating gifts, inheritance and borrowed money, and the net worth of the taxpayer at the end of that particular calendar year is twenty thousand dollars, then there would appear to be a gain through income of ten thousand dollars at least, and why did I say at least? Because if the taxpayer has a gain of ten thousand dollars at the end of the calendar year in his net worth, the taxpayer has had his living expenses in addition to that, and it is generally on this net worth method of computation that the government's evidence in this case will proceed. The evidence will come forward before you on the proposition too that when

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it comes to the value of assets and liabilities, that the cost and not the marketable value will be relied upon by the government to establish the correct taxable income as charged by the government.

Now you have heard other language here in each count of the indictment as follows, and I read from Count 1, about the middle of the count, where it says:

> "Elmer F. Remmer in the year 1944, * * * filed and caused to be filed with the Collector of Internal Revenue for the Internal Revenue Department for the District of Nevada; Reno, Nevada, a false and fraudulent income tax return, wherein he stated that his net income for the said calendar year, computed * * *"

This is the language particularly:

> "* * * computed on community property basis was * * *"

according to the government's charge, a false and fraudulent return and smaller figure than he actually had in the way of income. But referring again: "Computed on community property basis"—I do not wish to discuss law, but under appropriate instructions of the Court you will be advised as to that aspect of the language of the indictment, which appears in every count, and you will note in that connection, of course, that each time there has been in the first count a reported income of Elmer F. Remmer, in the second count the reported income of Helen L. Remmer, the third count the reported income of Elmer F. Remmer, the fourth count the

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reported income of Helen Remmer, the fifth count the reported income of Elmer Remmer, the sixth count the reported income of Helen Remmer, and relating to the right of a taxpayer in a community property State, which Nevada is, to divide their community property income for the purposes of the income tax law, so as to properly take advantage of the particular tax advantages that might be available to them through so dividing their income in their income tax returns.

So I would say this, that as to the charge here, we find that Elmer Remmer is charged in each count with the intent, or in the language here, "wilfully and knowingly" having filed these false and fraudulent returns, in an attempt to evade payment of a large part of the income tax due for the particular calendar year, and I have stated that the evidence to be brought forward by the government will follow the net worth computation basis and there will be certain evidence as to the assets of Mr. Remmer as at the beginning of each of these three particular calendar years, '44, '45, and '46. What he owned at that time was what we will say his assets were at that time, and what he owed at that time was what his liabilities were at that time and the amount by which his assets exceeded his liabilities both at the beginning and at the end of each of those three calendar years, was what his net worth was at the beginning of 1944, and the end of 1944, and the end of 1944, and the beginning of 1945, at the end of 1945, at the beginning of 1946, and at the end of the calendar year 1946.

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Now again to possibly assist the jury in following this evidence that will be produced by the government, certain businesses, in which the government contends Mr. Remmer had an interest, either sole or partial, will be produced and they will relate, besides the interest in Cal-Neva, to nine other businesses or clubs, six of which were situated in San Francisco, California, and three of which were situated in the community of El Cerrito in Contra Costa County, State of California, and further pointing to the testimony in that regard, I might state the names of those clubs or businesses are as follows: That the six businesses in San Francisco, in reference to which the government will offer evidence as showing the interest of Elmer Remmer in the same, are: B-R Smoke Shoppe, 186 Club, Day-Night Cigar Store, 110 Eddy, Menlo Club, and Transit Smoke Shop; and that the three businesses in El Cerrito, Contra Costa County, California, were known as the San Diego Social Club, 21 Club, and the 311 Club.

Now here I have already stated that the net worth computation method would be applied and evidence will be brought before you for your consideration as to the application of that method of computation of taxable income for each calendar year as to these businesses and the method of computation for all, as the evidence will be developed, will be the same. The net worth, which is the difference between the assets and the liabilities, of each of these clubs and businesses, ten in number, including Cal-Neva, as to the beginning of each

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calendar year and as to the end of each calendar year of 1944, 1945, and 1946, will be shown and then, depending upon the evidence as to the particular interest of the taxpayer in the particular club or business which has shown an increase in net worth, there will be, under the government's contention, a proportionate chargeable interest in the way of taxable income to the defendant, Elmer F. Remmer, for that particular calendar year, by reason of his interest in that club or business which has produced the income resulting in increased net worth between the beginning of any particular calendar year and the end of any particular calendar year.

I have outlined again the charges in the indictment and I have tried to outline for your consideration the character and type of evidence that will be brought before you. I have referred to the net worth method of tax computation that the evidence will refer to here. After the proper allowance has been made for the elements of gifts received, inheritance, borrowed money, that there remains in all income, whether that income be earned income or income by profits from a business or from a club. Now essentially that evidence will be developed from the testimony of witnesses, the introduction of documents, and through the tendered testimony of further witnesses correlating and connecting these many references which, standing perhaps alone and isolated, may not have their full connection apparent to you in connection with the

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government's charge at the time that they are offered individually for your consideration.

I will say once more it is recognized that the government has the burden of establishing the elements of the charge contained in each of the six counts beyond a reasonable doubt.

Supplement to Plaintiff's Opening Statement

Thursday, November 29, 1951

Mr. Pike: Your Honor, just prior to the recess of court yesterday afternoon, I made an opening statement to the jury. At this time, with permission of the Court, I wish to add to and amplify that statement in certain particulars.

The Court: You may do so.

Mr. Pike: I wish to state that the government will introduce evidence to establish each of the elements of the offense charged in each of the six counts of the indictment in this case. In other words, the government expects to prove each of those charges and each of the elements contained in each of those six charges by competent legal evidence brought before this jury for its consideration, and as to the elements of the offense charged in each of the six counts, I might say that the evidence brought before you by the government for your consideration, and for the purpose of establishing in the mind of each of you beyond a reasonable doubt to establish the guilt of the defendant in this case, that evidence will be produced by the government to show that, as to the particular calendar year charged in the respective counts of the

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indictment, the defendant, Elmer F. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States in the particular calendar year referred to in the count of the indictment, by filing and causing to be filed with the Collector of Internal Revenue of the Internal Revenue office of Reno, District of Nevada, a false and fraudulent income tax return, wherein he stated that his net income—or, as the case may be as to certain counts, as I explained yesterday, the net income of his wife, Helen L. Remmer—during each of these three calendar years, 1944, 1945, and 1946, was a certain stated amount and that the amount of tax due and owing thereon was a certain stated amount as given in these particular counts of the indictment; and the evidence will further show that the defendant, Elmer F. Remmer then and there well knew that his net income for that said calendar year, computed on the community property basis, or the income of his wife, Helen L. Remmer, for that particular calendar year, according to the particular count of the indictment, similarly computed, was a larger sum than that filed in his income tax return and that the tax payable on the larger and greater sum of income, which the government will offer evidence to prove and with the intent of proving, was larger than the tax which the defendant paid, or caused to be paid. The government expects to produce evidence before you to prove that the amount of income reported in these false and fraudulent income tax returns, either filed or caused to

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be filed by the defendant, as charged in each of the counts of the indictment, was larger in fact than the amount reported in the returns, and that there was an additional tax due the government as charged in each of the counts. Further, such evidence will be brought before you to establish, on behalf of the government's charge in this case, that at the time the defendant filed, or caused to be filed, each of these income tax returns, that he knew that they were false and fraudulent and that he filed them, or caused them to be filed, in each instance as charged with the Collector of Internal Revenue in this district in a wilful and knowing attempt to defeat and evade a large part of the income tax due and owing by him or from his wife in those instances where the particular count of the indictment refers to returns of Helen L. Remmer, a large part of the income tax due and owing the United States for that particular calendar year.

And further the evidence brought forward by the government will show that there was not only additional income received that was not reported in these false returns, but there was a tax due the government for each of the calendar years on such additional income besides that reported in the return, and that besides the intent to actually file a false and fraudulent return, the defendant did actually file, or cause to be filed the false and fraudulent return, in an attempt to evade the payment of a large part of the tax, as stated, all as alleged in each of the six separate counts of the indictment in this case.

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The Court: Does the defendant desire to make an opening statement now or reserve it?

Mr. Golden: We reserve it, your Honor please.

Thursday, November 29, 1951

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

Motion by Mr. Golden for acquittal.

Statement by Mr. Pike supplementing opening statement.

HOMER H. FORRESTER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name, please.

A. Homer H. Forrester.

Q. Where do you live?

A. 1395 Nixon Avenue, Reno, Nevada.

Q. What is your employment?

A. I am employed with the Bureau of Internal Revenue as assistant collector for the District of Nevada.

Q. How long have you been employed as assistant collector of Internal Revenue for the District of Nevada? A. Since November of 1944.

Q. What are the duties of the office of collector of Internal Revenue for the District of Nevada, with regard to the receipt and filing of income tax

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(Testimony of Homer H. Forrester.)

returns of residents of the District of Nevada and the maintenance of returns so filed as a permanent record?

A. It is the duty of the collector to collect and assess income tax returns due the federal government and to maintain a [14*] record of the returns filed and the amounts of tax paid.

Q. Are returns on persons who are residents, or who claim to be residents, of the District of Nevada filed with the office of the collector at Reno, Nevada? A. Yes.

Q. And that applies to the income tax returns of those people? A. Yes.

Q. Are those returns so filed maintained in your office as official records of the Collector of Internal Revenue for this district? A. Yes.

Q. Have you brought with you, from the records of the office of the Collector of Internal Revenue for the District of Nevada, an income tax return for Elmer F. Remmer, sometimes known as Elmer Remmer, for the calendar year 1944?

A. I have.

Q. Will you produce it please? Mr. Forrester, I show you Plaintiff's Exhibit 1 for identification.

Mr. Gillen: May we see that?

Mr. Thompson: You may see it in a minute. I haven't offered it yet.

Mr. Gillen: Well, it is marked.

The Court: Let him proceed for a moment. You will have an opportnuity to see it, Mr. Gillen.

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

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(Testimony of Homer H. Forrester.)

Q. Mr. Forrester, is Plaintiff's Exhibit 1 for identification [15] an income tax return filed for Elmer F. Remmer for the calendar year 1944 taken from the official records of the Collector of Internal Revenue for the District of Nevada?

A. Yes.

Mr. Thompson: I offer it in evidence, your Honor.

(Exhibits 1 to 12, inclusive, marked for identification.)

(10 minute recess taken at 10:55.)

MR. FORRESTER

resumes witness stand.

The Court: They will be admitted without any qualification.

(Discussion between Court and counsel.)

Q. Mr. Forrester, I show you Plaintiff's Exhibit 9 for identification and ask whether that is official record which you have taken from the office of the Collector of Internal Revenue for the District of Nevada? A. It is.

(Discussion.)

Mr. Thompson: I offer in evidence Plaintiff's Exhibits 9, 10, 11, 12, 7 and 8 for identification.

(Objection and discussion.)

(Jury excused at 11:20.)

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(Argument by Mr. Avakian in absence of the jury.)

(Reply by Mr. Shelton.)

(Jury returned into court and excused for noon recess.) [16]

Afternoon Session—November 29, 1951, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. FORRESTER

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Forrester, have you caused a search of the records of the office of the Collector of Internal Revenue for the District of Nevada to be made for the purpose of determining whether or not Elmer F. Remmer filed with the Collector of Internal Revenue for the District of Nevada any federal income tax returns in addition to those which now are in evidence as Plaintiff's Exhibits 1 to 12, inclusive?

Mr. Gillen: Objected to first of all as incompetent, irrelevant and immaterial; income tax returns for any other years other than those mentioned in the indictment are not involved, and second, on the ground it is calling for hearsay evidence unless the witness made personal search himself.

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(Testimony of Homer H. Forrester.)

The Court: Answer that question yes or no.

A. Yes.

Q. And what period of time did that search cover? A. The years you mean?

Q. Yes. A. From 1934 through 1941.

Q. Are there any returns on file in the office of the Collector of Internal Revenue for the District of Nevada for Elmer F. [17] Remmer for the years after 1934 to and including 1941?

Mr. Gillen: Just a moment. My objection——

The Court: To that I would sustain an objection.

Mr. Thompson: What is the objection?

The Court: It is hearsay obviously. He caused a search to be made but he didn't testify he made it.

Mr. Gillen: On the additional ground, may it please your Honor, it is incompetent, irrelevant and immaterial.

Q. Mr. Forrester, did you personally make the search? A. No.

Q. Was the search made by employees of the office of the Collector of Internal Revenue for the District of Nevada under your supervision and direction?

Mr. Gillen: I think that would be hearsay, too. If it is competent material evidence at all, the party who made the search should be brought in.

The Court: You may answer this question.

A. Yes.

Q. And was the report made to you by the em-

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(Testimony of Homer H. Forrester.)

ployee of that office after the search was concluded?

Mr. Gillen: Objected to as calling for hearsay.

The Court: Answer yes or no.

A. Yes.

Q. Are there any income tax returns for Elmer F. Remmer on file in the office of the Collector of Internal Revenue for the District [18] of Nevada for the years after 1934 and including 1941?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial first, and, second, calling for hearsay, and third we assign asking of the question, in view of your Honor's indicated ruling, as misconduct on the part of the attorney.

The Court: I think it may be hearsay. Objection sustained.

Q. Mr. Forrester, after income tax returns are received and filed in the office of the Collector of Internal Revenue for the District of Nevada, what, if any, official record was made in your office of assessments, based upon returns filed?

(Objection as hearsay—discussion.)

The Court: The witness may answer this question.

A. After the returns are received in the Collector's office, an assessment list is prepared, listing the name and address of each taxpayer filing the return, showing the amount of tax as per the return and the amount of payments made with the return.

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(Testimony of Homer H. Forrester.)

Q. Mr. Forrester, you have testified, I believe, that you have been employed as assistant collector of Internal Revenue for the District of Nevada since 1944 to and including the present date, is that correct? A. That's right.

Q. Were you employed in the office of the Collector of Internal [19] Revenue for the District of Nevada prior to 1944? A. I was.

Q. During what years?

A. I was employed from January 2, 1941, as deputy collector until the early part of 1943 and from the early part of 1943 to November, 1944, as assistant chief of the field men.

Q. You have been continuously employed by the Collector since what date?

A. Since January 2, 1941.

Q. In the course of your employment have you had occasion to examine the records which were kept by the Collector in the years prior to 1941, as far back as the year 1934?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial, has no bearing on the issues in this case.

The Court: Objection will be overruled. Witness may answer.

A. I have.

Q. And do you know what records were kept and maintained by the Collector since 1934 in the regular and usual course of the operation of the business of that office? A. I do.

Q. Was an assessment list regularly kept and

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(Testimony of Homer H. Forrester.)

maintained from the kind you describe in the office of the Collector of Internal Revenue at all times subsequent to the year 1934? [20]

Mr. Gillen: Again I offer the objection, it is incompetent, irrelevant and immaterial what he knew about the assessment list or anything between 1934 and 1941 because such things are not shown, we have not been advised they are in the contention in the indictment.

The Court: I don't see how he can testify.

Mr. Gillen: It is hearsay also.

The Court: I think he can testify as to having seen such records. I will sustain the objection.

Mr. Gillen: I would like to add to my objection it would be hearsay as to prior to 1941.

Q. Mr. Forrester, since the year 1934, in the regular course of the business of the office of the Collector of Internal Revenue have records been kept and maintained which include an assessment roll of the kind you describe?

Mr. Gillen: Just a moment—I am going to offer an objection, may it please the Court, counsel is attempting to adopt regular course of business doctrine and it is calling for hearsay and that doctrine only applies——

The Court (Interceding): I think so.

Q. Mr. Forrester, are you familiar with the law and regulations governing the management of the office of Collector of Internal Revenue prior to the year 1941?

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(Testimony of Homer H. Forrester.)

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial, whether he was familiar. [21]

The Court: Objection overruled. You may answer the question.

A. I am, as far as the particular item that was mentioned.

Q. Do you know whether or not under the regulations in effect subsequent to the year 1934, the Collector has been required to keep and maintain an assessment roll of the type you have described?

Mr. Gillen: To which I offer an objection.

The Court: Objection overruled. You may answer the question.

A. Yes.

Q. And in your examination of the records of the office of the Collector of Internal Revenue for the District of Nevada have you found any instances of such assessment rolls for this succeeding the year 1934?

Mr. Gillen: Same question, your Honor, has already ruled upon; hearsay, not material also.

The Court: Objection overruled. That is not the same question I ruled on.

A. I have.

Q. Have you personally examined those assessment rolls?

Mr. Gillen: I offer the objection it is incompetent, irrelevant and immaterial and respectfully invite the Court's attention to the fact that we are now concerning ourselves with matters ten years

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(Testimony of Homer H. Forrester.)

prior to the year that is called the initial [22] year in this indictment.

The Court: Objection overruled. Answer the question.

A. I have.

Q. Is there any record on the assessment rolls of the office of the Collector of Internal Revenue for the District of Nevada for the years succeeding the year 1934 of any income tax assessments made against Elmer F. Remmer or Elmer Remmer, with the exception of the years 1942, 1943, 1944, 1945, and 1946 and a delinquent return filed in 1937 for the year 1934?

Mr. Gillen: May it please your Honor, we offer an objection, first it is incompetent, irrelevant and immaterial; objection secondly that the assessment rolls would be the best evidence and not this man's interpretation or recollection of what he may have seen at some time or other. We also assign asking such question as misconduct, on the ground it is calling for evidence of matters or things and referring to matters or things which we are not charged with. I admonish the jury we are only concerned here with the truth of the charges concerning this defendant's returns for the years 1944, 1945 and 1946 and I charge that these questions are only being asked for the purpose of casting some sort of aura of suspicion or cloud upon this defendant.

(Discussion.)

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(Testimony of Homer H. Forrester.)

Mr. Gillen: I am going to offer further objection, may it please the Court, on the contention that counsel made with [23] regard to the certificate. The certificate would undoubtedly have to be from the collector himself.

The Court: Objection will be overruled. You may answer the question.

Mr. Thompson: Before the answer is made, your Honor, I would like to modify the question by excluding the years after 1946.

The Court: Do you understand that now?

A. Yes. There were no entries made on our assessment list other than the ones mentioned.

Q. What is the source of the information from which the assessment list is made up?

A. The information contained on the income tax returns filed by taxpayers with our office.

Q. And if a tax return had been filed in any year showing a tax due from the taxpayer, in the ordinary and regular course of the business of the operation of the office of the Collector of Internal Revenue, would that have appeared as an entry on the assessment list?

Mr. Gillen: I offer the objection it is leading and suggestive and also asking for hearsay. It is asking him to speculate as to whether somebody before he was in the office in 1941 would have kept a record in a certain way.

The Court: Objection overruled. You may answer the question. [24]

Q. Mr. Forrester, I show you Plaintiff's Exhibit

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(Testimony of Homer H. Forrester.)

1, an income tax return for the calendar year 1944 for Elmer F. Remmer, and call your attention to the entry, "Balance of tax due $1070, interest $5.35," with a total of $1075.35. Have you brought with you any record from the office of the Collector of Internal Revenue for the District of Nevada showing whether or not that tax was paid by the taxpayer, and if so, when it was paid?

A. I have.

Q. Will you produce it please? This is a duplicate?

A. It is prepared in duplicate, yes.

Q. I show you Plaintiff's Exhibit 13 for identification, Mr. Forrester, will you state what that is?

A. It is a certificate of assessments and payments.

Q. And what does it cover, generally?

(Not answered.)

Q. Mr. Forrester, is Plaintiff's Exhibit 13 for identification a record which the Collector of Internal Revenue for the District of Nevada is required to make under the regulations?

A. It is.

Q. At whose request?

Mr. Gillen: That will be calling for hearsay.

The Court: Objection will be overruled. Answer the question.

Mr. Gillen: Under the regulations at whose request, is calling for hearsay.

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(Testimony of Homer H. Forrester.)

The Court: Maybe it is. I will sustain the objection. [25]

Mr. Thompson: I offer Exhibit 13 in evidence, your Honor.

Mr. Gillen: We offer the objection, may it please the Court, that the exhibit contains matter which is incompetent, irrelevant and immaterial, in no wise binding upon this defendant. Contains matter which is not involved in the time boundaries cited in the indictment, to wit, the years 1944, 1945 and 1946 and I would like your Honor to have an opportunity to look at the exhibit and your Honor will observe what I mean.

The Court (Examines exhibit): Objection will be overruled. It will be admitted in evidence, Exhibit 13.

Mr. Gillen: May I then have an opportunity to offer objection to certain portion of that exhibit, the portion which relates to the year 1934 and any other year up to the year 1944, as being entirely incompetent, irrelevant and immaterial.

The Court: Same ruling, objection overruled.

(Discussion.)

Q. I show you Plaintiff's Exhibit 13, Mr. Forrester, will you state what it is?

Mr. Gillen: Objected to as being asked and answered.

The Court: Objection overruled.

Mr. Gillen: The further objection is offered, may it please the Court, that the paper itself is the best evidence and it is in evidence.

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(Testimony of Homer H. Forrester.)

The Court: Objection overruled. Answer the question. [26]

A. It is certificate of over-assessments and payments to the income tax and estimated tax assessed and paid by Elmer F. Remmer. Assessment rather than overpayments.

The Court: Do you want to make a correction?

A. Certificate of assessment and payments. Of the income tax and payments made by Elmer F. Remmer for the year 1934 and year 1946.

Q. And in column 1 of Plaintiff's Exhibit 13 what information is given?

Mr. Gillen: Just a moment. That refers to a year not involved, may it please the Court, as your Honor will see from the indictment. I think it is incompetent, irrelevant and immaterial.

The Court: What is your answer?

A. The taxable period.

The Court: There is nothing before the Court. You may proceed.

Q. Is that given on that exhibit in terms of calendar years; that is, taxable period calendar year 1943 or 1946, as the case may be? A. It is.

Q. In column 2 what information is given?

A. The list and year.

Q. By list, what do you mean?

A. It is merely an identification, whereby we can locate previous [27] returns and assessments.

Q. In column 3 what information is given?

A. The account number and the page or line on which it is assessed on our assessment roll.

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(Testimony of Homer H. Forrester.)

Q. In column 4 what information is given?

A. The amount of tax assessed.

Q. In column 5 what information is given?

A. Well, 5 and 6 contain the dates the payments were made and the amounts paid.

Q. I show you Plaintiff's Exhibit 14 for identification, Mr. Forrester, relating to the tax paid by Helen L. Remmer, is that a record which the Collector of Internal Revenue for the District of Nevada is required to make under the regulations?

(Discussion by counsel and Court regarding showing of exhibits before identified.)

(Jury admonished and excused at 2:12.)

(Argument in absence of the jury.)

2:15 P.M.

(Jury and alternate jurors returned into court.)

(Last question read.)

The Court: Answer the question.

A. It is.

(Exhibit 14 admitted in evidence over objection.)

(Discussion.)

Q. Mr. Forrester, you have already testified regarding the information set forth in the different columns on Exhibit 13 [28] which is a certificate of assessment and payments for Elmer F. Remmer.

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(Testimony of Homer H. Forrester.)

Is Exhibit 14 a certificate of assessments and payments for Helen L. Remmer the same type of document, with the same character of information set forth under each column as to that taxpayer?

A. It is.

Q. I show you Plaintiff's Exhibit 15 for identification, Mr. Forrester, is that an official record taken from the records of the office of the Collector of Internal Revenue for the District of Nevada?

Mr. Gillen: We offer the objection, may it please the Court, it is incompetent, irrelevant and immaterial. If your Honor will observe the exhibit, your Honor will find it is a so-called floor tax of a corporation and not any individual return or report or evidence of payment or the evidence of any money by the individual defendant in this case. It is floor tax of a corporation.

The Court: Objection overruled. Answer the question.

A. It is.

Q. Without referring to any of the information given on Exhibit 15 for identification, will you state what type of record that is?

A. It is a return of floor stock tax on distilled spirits, malt liquor and wines under the Revenue Act of 1943.

Q. Referring again, Mr. Forrester, to your examination of the [29] assessment lists in the office of the Collector of Internal Revenue for the District of Nevada, did you examine those lists for the years subsequent to 1934 for the purpose of

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(Testimony of Homer H. Forrester.)

determining whether there were any entries thereon relating to the assessment of income taxes against Helen L. Remmer?

Mr. Gillen: We offer the objection, may it please the Court, it is incompetent, irrelevant, and immaterial, not binding upon this defendant.

The Court: Objection will be overruled. You may answer the question.

A. It was done by employees under my supervision.

Q. Did you find a record of any entry in the assessment lists of the office of the Collector of Internal Revenue for the District of Nevada for the years from 1934 to 1946, inclusive, showing the assessment of any federal income tax against Helen L. Remmer?

Mr. Gillen: Just a moment. We offer the objection it is assuming something not in evidence. He said he didn't make the search himself—calling for hearsay; third, it refers to another person, not binding on the defendant, and fourth, includes years other than those involved here, and for that reason is incompetent, irrelevant and immaterial.

The Court: The hearsay feature of this objection is good.

Q. Mr. Forrester, do I understand that you did not personally [30] examine the assessment lists as to Helen L. Remmer? I am not talking about search.

A. I examined the lists. I was under the im-

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(Testimony of Homer H. Forrester.)

pression it was the search, the same as made in the case of Elmer Remmer.

Q. I did not refer to search for income tax returns. I referred to an examination of assessment lists, similar to the one that you made for Elmer F. Remmer.

A. I have examined that, yes.

Mr. Thompson: May I have the question?

(Question read.)

Mr. Gillen: Same objection, with the exception of the portion assuming something not in evidence.

The Court: Objection overruled. Answer the question.

A. There were entries in connection with 1934 return.

Q. And were there entries in connection with the years 1942, 1943, 1944, 1945, and 1946 returns?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial, referring to another person other than the defendant in this case and also referring to years other than the years that are involved in the indictment in this case.

(Further argument.)

The Court: Objection will be overruled. You may answer the question.

A. There were. [31]

Q. Were there entries of federal income tax assessment in the assessment lists relating to Helen L. Remmer for any year other than those you have

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(Testimony of Homer H. Forrester.)

mentioned, that is, the year 1934 and the years 1942 to 1946, inclusive? A. There were not.

Mr. Gillen: May I move to strike the testimony again on the ground that the assessment roll itself would be the best evidence what the assessment roll contained?

The Court: Motion denied.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Forrester, in direct examination this morning you answered Mr. Thompson with regard to the duties of the Collector of Internal Revenue, and I take it that you included in those the duties of the deputy of the Collector of Internal Revenue, is that correct? A. Yes, sir.

Q. And among the duties of the Collector and also the deputies are the duties of assisting taxpayers in preparing their income tax returns, is that true? A. That is right.

Q. And as a matter of fact, there are times when practically everybody in your office is assigned to those duties, is that true?

A. That is right. [32]

Q. And it is a regulation, and encouraged in fact, that deputy collectors of internal revenue, and the collector himself, will assist any taxpayer or make out any taxpayer's return?

Mr. Thompson: That is already answered; incompetent, irrelevant and immaterial.

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(Testimony of Homer H. Forrester.)

The Court: Objection overruled.

Q. Is that true?

A. Well, assist any taxpayer.

Q. Make out income tax returns?

A. In certain cases.

Q. In any case where a taxpayer brings data, you will show him how to make it out and make it out and have him sign it?

A. If the records are not so voluminous that we wouldn't have the required time; in other words, we can't do a man's bookkeeping.

Q. If it is going to take you four or five days, if he had that much data to go into, you would——

Mr. Pike: Objected to as argumentative.

Mr. Gillen: This is cross-examination, your Honor.

Mr. Pike: It is not within the scope of direct.

The Court: Let us not have any exchange between counsel. Let us go right along.

Q. Mr. Forrester, I am going to show you the prosecution's Exhibit 1 in evidence, which I will identify for you as the 1944 tax return of Elmer Remmer, as stipulated to by the defendant, [33] and ask you to look at the handwriting in the body of that document and tell us if you recognize that handwriting.

A. I couldn't positively say that I recognize it. It is familiar.

Q. Would you say that was the handwriting of Mr. Pat Mooney of the Internal Revenue office in this District? A. It appears to be so.

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(Testimony of Homer H. Forrester.)

Q. By the way, are you familiar with the signature of Elmer F. Remmer?

A. Only as it is shown on the returns.

Q. And I notice at the bottom of the first page of that exhibit there is a reference made to what collector's office was any prior payment made, is that true, bottom of left-hand side? A. Yes.

Q. And that means that a taxpayer might make a return and a payment to any one of the internal revenue collector's offices of the United States, is that true?

A. It means he could file a declaration of estimated tax in any other collection district, yes.

Q. And it also means that he could make a payment at any other collector's office, does it not?

A. Not to what payment office did he pay the amount—that refers only to the estimated tax for the current year.

Q. Doesn't it say, "If you filed a return for a prior year, what was the last year," and immediately after that, "To what [34] collector's office was it sent"?

A. That is correct, for a prior year.

Q. It doesn't say "the" prior year; it says "a" prior year, doesn't it? A. Yes.

Q. The fact of the matter is that a taxpayer could make a return to any district in the United States for any prior year, isn't that so?

A. That's right.

Q. I will ask you whether or not in your search for other returns that were made by the defendant

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(Testimony of Homer H. Forrester.)

Elmer F. Remmer, if you examined records of every Internal Revenue district in every office of the United States or the District of Nevada?

A. Just the records for the District of Nevada.

Q. I am going to ask you to look at Plaintiff's Exhibit 5 for the year 1946 and there is attached to it a sheet of paper giving detailed explanation and I note under "Deductions" there is a deduction for a charitable contribution by Elmer F. Remmer to St. Thomas Aquinas Church at Reno in the amount of $2500, and alongside that is a very small pencil notation, I can make out "OK" but can't make out the other words. I ask you to use that magnifying glass and tell us, if you know, what that indicates?

A. I can't make out the middle word.

Q. Would the middle word be the name of some member of the staff of the Collector of Internal Revenue? [35]

A. It is possible that it could be.

Q. Let me ask you this—do you make out "OK" before the middle word and "OK" after the middle word?

A. No, the last word appears to be "CK," the last letters.

Q. Are the first letters "OK"?

A. That is correct.

Q. And it is possible the last could have been "OK" too, but so written that it appears to be a "CK"? A. That is possible.

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(Testimony of Homer H. Forrester.)

Q. Let me ask you this—isn't it a fact that when a rather large charitable contribution is reported as deduction that it is the practice of your office to check and confirm or verify whether such a contribution was actually made, by going to the recipient of the contribution, is that correct?

A. In certain cases. I might state at this time that income tax returns filed with our office are segregated into collector's returns and Bureau or revenue agent's returns. We are not allowed to examine or audit or verify the collector's returns; I mean, the returns classified as Bureau or agent's.

Q. Let me ask you, from your knowledge of the workings of your office, is it possible that those notations on the side indicate that your office desired to verify whether or not such a contribution had actually been made by Mr. Remmer to the St. Thomas Aquinas Catholic Church at Reno and that it was confirmed and "OK" means that some agent OK'd it by verifying it at [36] the place of the recipient of the contribution?

Mr. Thompson: We object to the question upon the ground it calls for conclusion of this witness as to what was possible. It is purely speculation or inference as to what those notations mean. It is not based upon any knowledge that he may have in his capacity as deputy collector.

The Court: I will overrule the objection. You may answer the question.

(Question read.)

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(Testimony of Homer H. Forrester.)

Q. Do you understand the question?

A. It is possible it was made with the idea of having the matter checked. As to whether it was checked and verified, I couldn't answer that question.

Q. "OK" and a name would indicate it was checked; the man who checked it said "OK"; in other words, verified it, isn't that so?

Mr. Pike: We object, it assumes something not in evidence, in that he says "and a name," because there is no evidence there is a name there.

The Court: Objection overruled. Answer the question.

A. It is possible.

Q. Of course, you wouldn't expect an agent, if he found it wasn't OK, to put OK on it?

A. It isn't the ordinary practice for our office or other agents to mark the returns. [37]

Q. Even in the Internal Revenue Department, OK means OK, doesn't it? A. Right.

Mr. Gillen: I think that is all.

Mr. Thompson: No further questions.

(Witness excused.)

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JOHN A. HILL

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. John A. Hill; 559 Buena Vista Avenue, San Francisco.

Q. What is your employment or occupation?

A. Sales manager, Stanley Furniture Company, 739 Mission Street, San Francisco.

Q. Have you brought with you, pursuant to subpoena, certain records of the Stanley Furniture Company? A. I have.

(Jury and alternate jurors admonished and 15 minute recess taken at 2:45 p.m.)

3:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. HILL

resumes the stand on further

Direct Examination

By Mr. Thompson:

Q. State the name of the company by whom you are employed again. [38]

A. Stanley Furniture Company.

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(Testimony of John A. Hill.)

Q. How long have you been employed by that company? A. Approximately 20 years.

Q. Are you acquainted with Mr. Elmer F. Remmer? A. I am.

Q. And do you see him in the courtroom?

A. Yes, sir.

Q. Would you designate him, please?

A. Sitting over there.

Mr. Gillen: We will stipulate he knows Mr. Remmer and Mr. Remmer is in the courtroom.

Q. In your capacity as sales manager for the Stanley Furniture Company during the years 1945 and 1946, did you have occasion to make sales for the Stanley Furniture Company to Mr. Remmer of articles of merchandise? A. I did.

Q. You have produced, Mr. Hill——

(Exhibit 16 admitted in evidence by stipulation of counsel.)

Q. Referring to the exhibit, Mr. Hill, will you testify what sales of merchandise you made to Mr. Remmer during the years 1945 and 1946?

A. According to these records here the first sale to Mr. Remmer was for some furniture for his office, 52 Mason Street, San Francisco. [39]

Q. On what date?

A. I believe it was sold 1945, October of 1945, and October, same month, there were about four purchases in the month of October, 1945, and January of 1946 three purchases, and there were about seven purchases in the years 1945 and 1946.

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(Testimony of John A. Hill.)

Q. Did you personally make those sales to Mr. Remmer? A. I did.

Q. Will you state what the sales were and the amounts involved in each sale?

A. The original sale sold to Mr. Remmer was some office furniture for his office, 52 Mason Street. I think it consisted of some carpet for the floor, office desk and swivel chair and there was a purchase——

Mr. Gillen: I wonder if the witness could give the amounts?

A. That amount was $517.63. That was for carpet and desk.

Mr. Gillen: I think it would facilitate the testimony to give the date and the amount of the item.

The Court: Can you do that?

A. Yes, October 17 purchase furniture——

The Court: That is what year?

A. 1945; some carpet and some office desk and chair and a refrigerator, small radio, and that was purchased in 1945.

Q. And the amounts?

A. The amounts of $517.63, $352.50, $76.88, $128.13, $33.83; [40] and for the year 1946 he purchased some furniture for a home in El Cerrito, which consisted of what we call furniture home complete, for living room, dining room combination, and bedroom. The particular sale at that time was for $3660.69.

Q. Referring to that purchase, Mr. Hill, did you

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(Testimony of John A. Hill.)

participate in the delivery of that furniture to Mr. Remmer's home? A. I did.

Q. And what is the location of his home where that furniture was delivered?

A. Well, it was located at El Cerrito. I think it was next door to what was known over there at that time as the 21 Club.

Mr. Gillen: We stipulate that that address is 306 Panhandle, El Cerrito, Contra Costa County, California.

Q. Will you continue?

A. This particular furniture was selected by Mrs. Remmer, who came into our store and selected this furniture for her home, which we delivered the following week. After it was all set up in her home, we called Mrs. Remmer and asked her to go and inspect it and let us know what she thought of the furnishings, which she did. I believe the following day, or following week, she came in and made a few exchanges and that is about all there was to that. We made the exchanges.

Q. That one purchase of furniture for the home with the later exchanges constitutes the whole transaction for 1946, is that correct? [41]

A. No, I think there were a few—I don't have an itemized statement, but in 1946 there were three other sales they made, one $25.63, one $204.95, and one $197.31.

Q. Do ou recall now what those purchases consisted of? A. Offhand, no.

Q. Do you have any record with you to which

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(Testimony of John A. Hill.)

you could refer to determine what those purchases consisted of?

A. October 11, 1945, the amount of $352.50 was for his office furniture.

Mr. Gillen: That was item you mentioned before.

A. There was refrigerator and some carpet.

Mr. Gillen: I think those items were mentioned.

A. Well, I am trying to refer to the things he asked me if I had a record of the exact things.

Q. You can't designate the balance of those other three items the latter part of 1946 that you referred to? A. I do not have the record.

Q. Mr. Hill, by again referring to Exhibit 16, will you testify when and on what dates and in what amounts Mr. Remmer made payment for the merchandise purchased?

A. Well, this first purchase in October, 1945, all of his purchase on November 15, 1945, amount was paid in full, the check, $1075.14; and the purchase of 1946, some of the purchase of April 30th was check paid $208.13, on April we received a check for $197.31, and on May 10th we received check for $22.45. On [42] his sale of June 18, 1946, we received—well, on June 2nd we received check for $230.63, June 28 received a check for $513.63, and on July 9th we received a check for $204.95. Then we didn't receive any money until 1947 which, in February, I believe, we received a payment of a thousand dollars by check.

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(Testimony of John A. Hill.)

Mr. Gillen: Might I inquire, are we referring to the 1946 bill?

A. Yes, 1946 bill wasn't all paid at one time. It was paid at different times and in different amounts.

(Discussion.)

The Court: It is understood that payments shown on Exhibit 16 after 1946 are not material, so that is the reason why the testimony regarding the last payment in 1947 was stricken. Anything stricken during the course of the trial is not to be considered as evidence by the jury.

Q. Mr. Hill, I would like to call your attention to Plaintiff's Exhibit 16 and credit item of one thousand dollars, and ask you whether or not that exhibit does not show that that payment was made on December 27, 1946?

A. That's right, December 27, 1946, one thousand dollars.

Mr. Gillen: The witness was in error when he said February, '47?

A. Yes.

Mr. Thompson: You may cross-examine. [43]

Cross-Examination

By Mr. Gillen:

Q. Mr. Hill, you say that you are the sales manager of the Stanley Furniture Company on Mission Street in San Francisco and been with that concern for more than 20 years? A. Right

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(Testimony of John A. Hill.)

Q. It is true, is it not, that your company also owns the Sierra Furniture Company in Reno, Nevada, is that correct? A. That is right.

Q. And your acquaintance with Mr. Remmer extends back to the time when Mr. Remmer was operating Cal-Neva, he did considerable business with the Sierra Furniture Company in the matter of furnishing Cal-Neva, is that correct?

A. That is correct.

Q. And then subsequently in California he still did business with your firm under the name of Stanley Furniture Company?

A. That is correct.

Q. Now there are three items here, Mr. Hill, that I want to ask you to enlighten us on. I don't know whether they are items that refer to furniture purchases for Mr. Remmer's home or furniture purchases for his office. There was an item—I will hand you this ledger sheet, Exhibit 16, and I will tell you the items I have in mind and perhaps you can tell us—there is a transaction reflected on March 25, 1946, for $25.63, another item of March 25, 1946, for $204.95, and another item for April 5, 1946, of $197.31. Can you tell us from any records you have [44] there what those purchases were and were they for the home or for the office?

A. I believe those purchases was for radio and refrigerator—I don't know what the other was for. I know one was for radio and the other refrigerator, but the other purchase I do not recall. I don't have the record with me.

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(Testimony of John A. Hill.)

Q. You have identified radio and refrigerator?

A. That is correct.

Q. Is there any way for you to determine whether they were delivered to the Mason Street office or the home in El Cerrito?

A. They were delivered to Mason Street.

Q. Do you recall whether purchases made for the office were paid by business check or were paid by personal check by Mr. Remmer?

A. Paid by business check.

Q. On that ledger sheet that you hold in your hand, prosecution's Exhibit 16, were any of those items that are reflected there as credits, would that be return of merchandise as well as payments?

A. They could be, yes.

Q. In other words, giving credit for, well, let us take an arbitrary figure, there is an item of $500, it might be for return of $500 item of merchandise rather than payment of cash?

A. That is right.

Q. I believe you said Mrs. Remmer, after inspecting the furniture [45] in her home, did make some exchanges? A. She did.

Re-Direct Examination

By Mr. Thompson:

Q. Mr. Hill, referring to Exhibit 16, which items on that exhibit reflect exchange of merchandise rather than payment? I notice you testified certain of them represented payments by check.

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(Testimony of John A. Hill.)

A. Our bookkeeper writes up credit first as a sale, so unless I have each individual sale here, I would not be able to tell. For instance, if she sent back a chair for $200 plus sales tax, she automatically enters credit against our store, which goes in the same as cash sale, that they don't owe us any more, so I would have to have each one individually before I could truthfully say which was which.

Q. What, by that record, Exhibit 16, enabled you to testify that certain payments for refrigerator and radio were made by a business check of Mr. Remmer rather than a personal check?

A. Well, because most of these collections were collected by me personally. I used to go up there personally to collect them.

Q. Most of them were?

A. That is right.

Q. Which ones on this represent personal collections by you in payment of the amounts owed by Mr. Remmer?

A. Truthfully I couldn't say. There are quite a few of them [46] here. Mr. Remmer would be out of town a considerable amount of time and if something was due us, I would generally go up to his office and collect it. I wouldn't have any way of telling you which were the credits and which ones he gave a check.

Q. Referring to the payments made by Mr. Remmer for furniture purchases for the home in

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(Testimony of John A. Hill.)

El Cerrito, which ones of the credits on Exhibit 16 represent payments?

A. Well, I believe this one here of—I think, the $204.95 was a credit and I believe the $86.36 was a credit and I believe the other ones were payments that were made.

Q. You say the other ones were payments?

Mr. Gillen: He says he believes they were payments.

A. I believe the other ones were payments made.

Q. And you believe the two you mention were credits for the return of merchandise, is that correct? A. That is my knowledge of it, yes.

Q. Again examining the record that you have, Exhibit 16, Mr. Hill, isn't it true that credits for returned merchandise is designated by the symbol "cr" and payments for merchandise by the symbol "cs"? A. That is right.

Q. Again referring to that exhibit, will you testify which of the credit items represent payments by Mr. Remmer and which of them represent credits on account for returned merchandise?

A. On June 28th he has a credit of $230.63. On June 28th there [47] is a credit of $513.63, and I believe the other one is February 24th, which would be a credit of $86.36.

Q. Which ones, according to that record, represent cash payments?

A. Do you want them all the way down?

Q. I think you had better, in view of the fact we now have a method of identifying them.

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(Testimony of John A. Hill.)

A. Well, November 15th cash payment——

Q. What year please?

A. 1945. A cash payment of $1075.14. January, 1946, we have cash payment $33.83. Then on April 3 of 1946 we have a payment of $208.13. On April 15th we have a payment of $197.31.

Q. That is 1946 also?

A. That is 1946 also. And on May 10th we have a payment of $22.45. Then on June, 1946 we have a payment of $204.95 and on December 27th a payment of a thousand dollars.

Mr. Thompson: That is all.

Recross-Examination

By Mr. Gillen:

Q. When you mention cash payments you don't necessarily mean actual cash; you might mean also a check, but you are using that term to distinguish from a credit for returned merchandise, is that correct? A. That is correct.

Q. What does the symbol "sj" mean? The little symbol "sj," what does that mean?

A. I don't know. [48]

Q. It is a symbol of your bookkeeper, is that correct? A. Yes.

Q. What does the symbol "sc" mean?

A. I believe that means payments of cash.

Q. You believe it means, are you sure?

A. I believe "cs" cash payments, "cr" means credit.

Q. Are you positive?

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(Testimony of John A. Hill.)

A. I am not postive.

Q. In other words, that is some symbol your auditing department uses? A. Yes.

Q. You don't know then which would be credit for returned merchandise and which would be credit for actual payments?

A. No, I do not.

Mr. Gillen: I think that is all.

(Witness excused.)

CHARLES J. SCOLLIN,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Charles J. Scollin.

Q. Where do you live?

A. 52 Sotello Avenue, San Francisco.

Q. What is your business or occupation?

A. Insurance brokers. [49]

Q. Are you a member of a firm or are you employed by some one? A. Member of the firm.

Q. What is the firm's name?

A. Tinneman, Bridgeford & Rainey.

Q. Where is the office of that company located?

A. 333 Montgomery Street, San Francisco.

Q. Are you personally acquainted with Mr. Elmer F. Remmer? A. I am.

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(Testimony of Charles J. Scollin.)

Q. You recognize him in the courtroom?

A. Yes.

Q. During the years 1945 and 1946 did your firm have occasion to sell insurance to Mr. Remmer? A. We did.

Q. Have you brought with you a record kept and maintained by your firm relating to those transactions?

Mr. Gillen: Is this document the original kept in the ordinary course of business or is it a document especially made up?

A. That is a document that our bookkeeping system had changed since that time.

Q. What I want to know, is this document that is part of the record that was kept the original document?

A. That is the original of what was taken from our bookkeeping system since changed. That is our new bookkeeping system.

Q. That is a copy of the original entries, is that so? [50]

(Discussion.)

The Court: You may proceed.

Q. (By Mr. Thompson): Mr. Scollin, showing you Plaintiff's Exhibit 17 for identification, will you state whether or not that is a record kept and maintained by your firm in the usual and regular and customary course of its business?

A. It is.

Q. And is it a part of the business of your firm

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(Testimony of Charles J. Scollin.)

to keep and maintain a record of that character?

A. It is.

Q. Does this record, Exhibit 17 for identification, relate to transactions had by your firm with Elmer Remmer or Helen Remmer during the years 1945 and 1946? A. It does.

Mr. Thompson: I offer it in evidence, your Honor.

Mr. Gillen: Just a moment. I am going to object to that, no proper foundation laid to determine whether or not it is an original entry.

The Court: Do you want to examine him a little on that question?

Mr. Gillen: Yes, I would like to, your Honor.

Q. (By Mr. Gillen) Mr. Scollin, when was this document that is now designated prosecution's Exhibit 17, when was it made up?

A. When was that particular document made?

Q. Yes. [51]

A. That was made up no doubt by the bookkeeper when we received that subpoena.

Q. Then it is not an original record?

A. Of our new bookkeeping system.

Q. Sir, it is not an original record, is it?

A. Of our new bookkeeping system, it is.

Mr. Gillen: I ask that the answer be stricken as not responsive and that the Court request the witness to answer.

The Court: Motion denied.

Q. This record was made up for the purpose of bringing it to court, was it not?

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(Testimony of Charles J. Scollin.)

A. That is right.

Q. The original transactions are reflected somewhere else, is that not so? A. That is right.

Q. So this is not an original record, is it?

A. That is right.

Q. That is what I tried to get at. Where are the original records?

A. If we have them, they most likely are in the warehouse, though I couldn't verify whether they were destroyed. They most likely are in the warehouse.

Q. Then when did you get your subpoena?

A. It is dated here November 16th.

Q. You got your subpoena November 16th. [52]

A. It is dated that, yes.

Q. Of 1951? A. 1951, yes.

Q. And right after you got your subpoena this was made up from an original record?

A. Undoubtedly it was. I had nothing to do with it.

Q. You don't know?

A. That I don't know.

Q. So then when you answered that this reflected business that your firm did with Mr. Remmer and Mrs. Remmer, you were not acquainted with those facts of your own knowledge?

A. Will you repeat that?

Q. You were not acquainted whether these represented actual business transactions with Mr. Remmer and Mrs. Remmer, of your own knowledge? You simply received the subpoena to come up here

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(Testimony of Charles J. Scollin.)

and your bookkeeping department made up something and you brought it up here, is that correct?

A. That is taken from our records first.

Q. Did you see it taken from your original records? A. No.

Q. So you don't know of your own knowledge?

A. No.

Q. And you say you don't know whether or not those original records have been destroyed between November 16th of this year, this current month, destroyed or not? [53]

A. I say undoubtedly they would not be destroyed.

Q. You don't know where the original records are now but you know these are not original records? A. That is right.

Mr. Gillen: May it please the Court, we offer the objection the original records are the best evidence; also this witness is completely uninformed as to whether or not these truly reflect matters of original entry in connection with any transactions between his firm and Mr. Remmer or Mrs. Remmer.

The Court: He stated he had nothing to do with these, Mr. Thompson.

Mr. Thompson: May I inquire?

Q. (By Mr. Thompson): When did you say your bookkeeping system changed?

A. I believe it was at least three years ago.

Q. And at the time the bookkeeping system was changed, was a new set of books set up?

A. Yes.

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(Testimony of Charles J. Scollin.)

Q. Based upon the present records?

A. That is right.

Q. And at that time were inactive accounts transferred to the new records?

A. I don't believe inactive accounts would be transferred.

Q. Is the record which we now have before us of the account for Elmer Remmer and Helen Remmer the same type of record which [54] your firm kept and maintains of other clients with whom they did business in 1945 and 1946?

Mr. Gillen: Just a moment. He has already testified, been asked and answered, that there was a different type of bookkeeping system maintained at that time.

(Discussion between counsel.)

Mr. Gillen: If your Honor will permit me, I would like to ask a question or two more of the witness.

The Court: Yes.

Q. (By Mr. Gillen) Mr. Scollin, did I understand you to say that you were a member of the firm of Tinneman, Bridgeford and Rainey?

A. Yes, sir.

Q. And have been such for how long?

A. January of this year.

Q. How long have you been with that firm?

A. Since November 1, 1945.

Q. I note that the subpoena is in typewriting and is directed to the firm, is that correct?

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(Testimony of Charles J. Scollin.)

A. Yes.

Q. And I take it that the reason you are here is that you have been designated by your firm as the member of the firm to appear in obedience to this subpoena, is that correct? A. Yes.

Q. I notice on the second page, where it sets forth the records there are certain pencilled notations which appear to compare [55] with the typewritten transcript which you have presented here, is that true? A. That is true.

Q. Now that means that somebody in your firm, some stenographer or clerk, dug up that information out of the old bookkeeping system, is that not true?

A. This is Mrs. Bridgeford, a member of the firm.

Q. She went into the books of original entry and dug out that information, is that correct?

A. Correct.

Q. And then the document, which is now designated prosecution's Exhibit 17, was made up from those pencilled notations that she jotted down on the subpoena, is that correct?

A. I presume so.

Q. And that was done by some stenographer?

A. No, that was done by Mrs. Bridgeford.

Q. You saw her do it?

A. I didn't see her do it.

Q. She just told you she did it?

A. She usually does that work.

Q. And, of course, Mrs. Bridgeford, as a mem-

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(Testimony of Charles J. Scollin.)

ber of the firm, does not spend her time digging into records and making up transcripts from old records? A. Not unless it is necessary.

Q. To save you the trouble of bringing the book into court, [56] you made up this transcript, is that correct?

A. That I couldn't say that either way.

Q. Well, you haven't reconverted all of your books into this type of transcript?

A. Active accounts, yes.

Q. But not closed accounts? A. No.

Q. You only do that if somebody wants a copy of such business they want?

A. That is right.

Mr. Gillen: I submit, if the Court please, this does not reflect the original entry or comply with the rule that your Honor has read. This is something prepared by some one else, not within the knowledge of this witness. It is hearsay as to this witness and of course definitely not kept in the regular course of business.

The Court: Objection overruled. Exhibit may be admitted in evidence as Exhibit 17.

Q. (By Mr. Thompson): Referring to Exhibit 17, will you please testify to the items of purchase made, the dates on which purchases were made, what type of insurance was purchased, and the dates on which payments were made.

Mr. Gillen: I offer the objection it is incompetent, irrelevant and immaterial and also that acceptance of this exhibit in evidence and reference

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(Testimony of Charles J. Scollin.)

to it by this witness deprives [57] the defendant in this case of the right of examination of the original documents reflecting the original transactions made at the time they were consummated.

The Court: Objection will be overruled.

A. Our record indicates that May 1, 1945 personal property floater, our office No. 106.37 was issued, $218.25. Second item is——

Q. What is a personal property floater?

A. Covers all personal property of any particular nature, including jewelry, household furniture, carpets, personal clothing, anything of a personal nature.

Q. Have you brought any other records which reflect what types of property were covered under personal property floater policy which is listed as the first item? A. I have some here.

(Discussion.)

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial what types of property are insured.

The Court: Objection will be overruled. You may answer the question. Do you understand the question?

A. In other words, I am to continue on reading from this and taking out these records.

(Question read.)

A. Yes.

Q. What does that record consist of? [58]

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(Testimony of Charles J. Scollin.)

A. Consists of daily reports of our office.

Q. Will you produce it please? I show you Plaintiff's Exhibit 18 for identification. Does this constitute original records kept and maintained by your firm in the ordinary and customary course of the operation of its business? A. They do.

Q. Does Plaintiff's Exhibit 18 for identification refer to the first item on Plaintiff's Exhibit 17, designated May 1, 1945, personal property floater office No. 106.37? A. It does.

Q. Does it also constitute original record of your office relating to any other of the items on Plaintiff's Exhibit 17? A. It does.

Q. Which ones? A. 116.64.

Mr. Thompson: I offer Plaintiff's Exhibit 18 in evidence, your Honor.

Mr. Gillen: To which we offer an objection and I believe, may it please the Court, that your Honor should see the exhibit and I believe it will take some few moments to argue our objection on this with reference to the particular items.

(Jury and alternate jurors admonished and excused at 4:10 p.m.) [59]

(In the absence of the jury.)

Mr. Gillen: May Mr. Avakian present the argument?

Mr. Avakian: Your Honor, as Mr. Gillen stated, we have no objection to evidence as to the amount of insurance premiums paid. As a matter of fact,

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I believe Exhibit 17 already contains that information.

Our objection to the receipt in evidence of the offered Exhibit 18 for identification is based on two grounds, and both of them involve a consideration of the legal basis for proving income on the net worth method. You will recall that in his opening statement Mr. Pike stated that in proving income on the net worth method, the government will establish the net worth at the beginning of each year and the net worth at the end of each year and that that increase in net worth would represent a figure which would be at least that amount of income received, unless it came from gifts, inheritance, or loans, and then he said in addition if they could show that certain expenditures were made during the course of the year, then the income would be even in excess of the amount of the increase in net worth.

Now the very heart of proving income on the so-called net worth expenditures method is this, that increase in net worth must be shown and then the prosecution may add to that expenditures of a personal or non-deductible nature, because any expenditures that are made which are deductible for tax [60] purposes would automatically wash out, because if you show the expenditures as income, then by the very nature where expenditure is deductible, the deduction offsets it, so that expenditure, if it is of a non-deductible nature, would not affect any income of the taxpayer and in net worth expenditure method the result of the computation

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is not income on gross income but net income, so it becomes important then, in connection with any particular expenditure, for the government to show that that expenditure is not deductible under the income tax law before the amount of that expenditure can be added to the figures in net worth.

Now if your Honor follows me that far—and I hope that I am making myself clear, because this is a rather unusual point to come up in a court litigation—if your Honor follows me that far, then may I refer to the contents of this proposed Exhibit 18 for identification to explain our two-fold objection.

First of all, if the premium payment on this insurance represents a deductible payment, if the insurance is incurred in connection with the operation of a business, for example, so that the taxpayer would be entitled to deduce the insurance payment, then it would not fall in the category of expenditures that the prosecution may add to the net worth increase in computing net income for that year. Accordingly to have the amount of this insurance premium payment can be added to the taxpayer's [61] increase of net worth for the year 1945, the government must show that that payment was made for payment for insurance of a non-deductible or personal nature.

Now I understand from our off-the-record discussions here a moment ago with Mr. Thompson that he proposes to show, through introduction of this policy, which describes the property insured, that the property insured was not property used

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in a business, but rather was personal property, that is, not business type of property. Now I think your Honor will recognize that the statement of an insurance policy as to the property insured does not establish the use that the taxpayer, or the insured, is making of that property. I do not care what the property may be—it may be an automobile, it may be a refrigerator, it may be a chair or a desk, it may be a fur coat—and bearing in mind the type of business of this taxpayer, it is conceivable even that type of property could be used in business—the important point is on the crucial question of whether the property covered by this policy was used in business or not. The listing in the policy of items of property insured throws no light on what use was being made of it. Now the prosecution, I take it, is trying to prove by this policy that the property insured was of a non-business nature. That is a matter of determination, not from the nature of the property, but from the use that is being made of it, and so I submit that we have nothing before us in this policy which would [62] establish this.

The Court: You look at some of those items and after looking at them, do you have any trouble in determining whether or not they are used in business or for personal adornment?

Mr. Avakian: Your Honor will remember in his opening statement Mr. Pike listed ten businesses——

The Court: I am just trying to follow your argument.

Mr. Avakian: I am trying to explain.

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The Court: You said the statement of an insurance policy would not necessarily show whether the property insured was of a deductible nature or not.

Mr. Avakian: That is right.

The Court: Take a look at some items in that list and then do you have any trouble determining whether or not those items are deductible items?

Mr. Avakian: Let me explain my position. Here is a taxpayer who, according to Mr. Pike's opening statement, is engaged in ten different businesses, and I think we are not going too far from the record if we recognize for the moment that this was the type of business which involved entertaining in business and night clubs, etc.

The Court: We haven't any evidence as to the type of business. The Court is without any official knowledge as to the type of business of those businesses. [63]

Mr. Avakian: You have exactly hit the nail on the head, your Honor, and that illustrates why this is objectionable, because until they can show, for example, the fur coat or jewelry mentioned in this insurance policy, until they can show that this was not used in business, they have no right to bring into this case to build up as net income——

The Court (Interceding): Isn't that a matter of argument before the jury?

Mr. Avakian: No, your Honor, it is a matter of whether reasonable inference can be drawn from the fact a man insures a fur coat that he wasn't using that in his business.

The Court: Isn't it for the jury to determine

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from the evidence in the case, including that, and they can determine whether or not that property should be used in the estimate of income of the defendant. Isn't it for the jury to determine those things from all the evidence?

Mr. Avakian: It is for the jury, of course, to interpret and apply admissible evidence, but it is for the Court to determine whether evidence is admissible, and I think your Honor is well aware of the ruling in connection with admissibility of circumstantial evidence. There must be a reasonable inference which can be drawn from circumstantial evidence to a material issue to the case.

The Court: That is the rule that will have to be applied [64] to warrant a jury in returning a verdict of guilty. Every link would have to be connected. That is for the jury.

Mr. Avakian: I do not make myself clear, your Honor. Before we leave the submission of the case to the jury, the Court has to rule whether the evidence being offered has sufficient materiality. Now if it is remote, it has no business in the evidence. If there is a reasonable inference which can be drawn from that evidence, then it is proper to submit it to the jury to determine whether they want to draw that inference. We are at the point of determining whether it could be reasonable to infer the mere fact that a man insures a fur coat means he is not using that fur coat in a business. Now that is the heart of my objection on the first objection, that is, that submission of this policy, showing the articles insured, does not reasonably support a conclusion

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as to what use was being made of those articles. If it does not reasonably support the conclusion, then the Court has no business submitting that evidence to the jury. It is only if the jury could reasonably draw that conclusion it would be proper to submit it.

The second point of my objection is this—in this policy there are listed not only articles insured, but there is placed a value on each of those articles for the purpose of the insurance policy. You will recall that Mr. Pike made it clear in his opening statement that in making net worth computations [65] the government must use cost values and not market values of items that go into net worth. Now it would be highly improper then to submit to the jury evidence showing that a particular coat was insured for x dollars, because the jury might infer from that therefore x dollars figure should be used in this net worth computation, whereas the important factor Mr. Pike himself recognized, is not the value of it but the cost of it, what the taxpayer paid for it. Now it would be improper then to submit any value figure to the jury in connection with net worth computation, unless that is a cost figure, and furthermore, it is improper to submit to the jury any values of assets unless the time of acquisition of the asset is shown. Now here we have a policy taken out in May of 1945, insuring certain articles, say, for example, a fur coat. Now this policy does not show when that fur coat was acquired. If that fur coat was acquired before 1944, it has no place at all in this net worth net

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worth computation. But the jury might infer from the fact that the prosecution has introduced evidence that this fur coat was insured on May 1, 1945 that that was purchased in 1945 and that would be a highly erroneous conclusion for the jury to draw and we should not expect a jury to be able to appreciate all these facts once they enter into net worth computation. We are having a trial that is going on apparently for many days and many witnesses are going to be presented and it would be prejudicial to the defense to put into this record [66] things which are not proper evidence under net worth computation and trust that the jury would properly understand the law of net worth computations and would know what to eliminate from the evidence in the record as immaterial. If it does not have probative value, then it should not be in this record.

Mr. Thompson: Your Honor, I think Mr. Avakian has made a very clear explanation of the materiality of the evidence we are now offering. He infers, however, or speculates, as can be no more than remote possibilities, that these insurance policies relate to business. In the first place, is there one insured here named as the Menlo Club, the B & R Smoke Shoppe, the 116 Club? Are any businesses named as insured in these policies? No, Helen Remmer and Elmer Remmer are named as the insured and when they insure property under a personal policy floater, they insured property which they claimed to own. I do not think there can be, as far as materiality of evidence is con-

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cerned, any weight given to Mr. Avakian's suggestion that this evidence does not show, and I say most conclusively, that these are personal items of expenditure by Mr. Remmer during the year in question, which are entitled to be taken into consideration in making a net worth computation under the method which Mr. Avakian himself has explained.

We concede that the values given on the policy are not binding for the purposes of this case. Mr. Avakian is perfectly correct that it is the cost of the item and the time when [67] purchased which must be proved in a net worth case of this character, and it should be shown that the expenditure was made in one of the three years we have testified in this case. However, I might point out to your Honor that they are the ones that called for the original records. We tried to proceed in a way which would produce before the Court the material parts of this testimony and eliminate the immaterial parts. We now are in the position where we have to offer the original record in evidence. We think your Honor can properly instruct the jury at the time as to what portions of this record are material to be considered by the jury and what portions are not and we must, and it is very material to the government in this case, be permitted to introduce competent evidence which shows whether this expenditure by Mr. Remmer at the time in question was personal expenditure or business expenditure by a policy of this character, issued to Mr. Remmer and his wife personally, not

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to one of his businesses, and things of that character should be admitted.

Mr. Avakian: May I say this, your Honor—Mr. Thompson first of all says the policy is in the name of Helen Remmer and Elmer Remmer and not the Menlo Club. There is nothing in this record so far, your Honor, which distinguishes any of those clubs from Helen and Elmer Remmer. We do have the opening statement from Mr. Pike that Mr. Remmer had either full or partial interest——

The Court (Interceding): I do not attach much weight to that remark because business property could be insured in the names of the defendant and his wife.

Mr. Avakian: Sure, and Mr. Thompson's statement is admission that the values shown in this policy are not proper evidence in this case, calls for conclusion because that is a very prejudicial matter if it does go to the jury and he has admitted it would be erroneous to put that in.

The Court: Well, I think that counsel will have an opportunity during the course of the trial or it probably will be shown just what these costs are. If it is not, the Court can take care of that question in the matter of instructions to the jury, instruct the jury not to regard those values placed as controlling, if that is the law, and at the conclusion of the trial counsel, I suppose, will submit instruction covering such points.

Mr. Avakian: I recognize all that, your Honor.

The Court: How else is the government going to be able to present its case?

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Mr. Avakian: By showing through whatever evidence there may be what the use was of these particular articles.

The Court: If it is a fact that the defendant's wife purchased these items, valuable articles of personal wear, during any of these particular years, if [69] it is a fact, the government certainly is entitled to show it.

Mr. Avakian: Yes, if there is showing by this evidence when it was purchased or what was paid for it. I don't want to seem to belabor this point, but I want to make it as clear as I can that this is a highly important question and if the government is going to be able to get before the jury in this fashion evidence which it itself admits is immaterial and incorrect——

The Court (Interceding): Are those articles identified there? Could they be identified by reference to that exhibit?

Mr. Avakian: They just name one full length mink coat, for example. I submit that the government is entitled to show if they can by any competent evidence, what expenditures were made of a non-deductible nature.

The Court: Don't you think the government is entitled to show whether it is a fact that the defendant and his wife were possessed of such articles?

Mr. Avakian: That they owned these articles?

The Court: Yes.

Mr. Avakian: That would be immaterial unless

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connected with evidence showing it is used in a non-deductible way.

The Court: We cannot have the whole case put in at one time. [70]

Mr. Avakian: I appreciate that.

The Court: The objection will be overruled. The exhibit will be admitted in evidence. [71]

Friday, November 30, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

The Court: Now at the conclusion of yesterday's session, the Court determined to admit in evidence Exhibit 18, but for the present the valuation figures contained in such exhibit are not to be considered by the jury. I say for the present. They may or may not later be considered. We haven't decided that question at this time.

Mr. Thompson: Your Honor, for the purposes of the record, I take it your present statement is a ruling on the objection which was made yesterday afternoon which was decided in the absence of the jury?

The Court: That's right. Are you ready to proceed?

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MR. SCOLLIN

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Scollin, at the recess yesterday we were to consider Exhibit 17, statement of Mr. Remmer's account with your firm, in connection with Plaintiff's Exhibit 18, which you testified, I believe, was the original record of your office relating to certain items on Exhibit 17. Will you state again what items on Exhibit 17 are covered by Exhibit 18?

A. Personal property floater, our office 106.37, effective May 1, 1945, covering personal property in that contract. [72]

Q. And the first item at the top of Exhibit 17, May 1, 1945, personal property floater, office 106.37, debit $218.25, that is one of the items covered by that policy? A. That is right.

Q. Also the second item on Exhibit 17, June 21, 1945, personal property floater additional, debit $24.56, is that also covered by Exhibit 18?

A. That is right.

Q. And also item dated May 1, 1946, personal property floater, debit $248.25, is that covered by Exhibit 18?

A. That is the renewal premium, $248.25. That is right.

Q. I refer also to the item dated November 1, 1946, personal property floater additional, $336.00?

A. That would be additional premium, yes.

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(Testimony of Charles J. Scollin.)

Q. $336.00?

A. It doesn't seem to be on this contract.

Q. That is not part of policy Exhibit 18? Was that renewal of that policy?

A. That figure does not appear to be on the contract.

Q. I would like to read a portion of Exhibit 18, your Honor. As testified, this is a personal property floater insurance policy insured by the Home Insurance Company, New York, to Helen Remmer, with additional endorsements as testified. The items insured are as follows: one full length mink coat; one four Russian sable neckpiece; one coat full lynx collar; one [73] full length silver fox coat; one pair of diamond and platinum ear screws, 2½ cts. each; two fur foxes; one full length mink collar; one star sapphire and diamond ring; one diamond and platinum wrist watch, 100 diamonds; one fancy diamond ring; one diamond ¾ ct. two diamonds 1/5 ct., small diamonds; one diamond and platinum pendant watch open; one platinum bracelet, 96 diamonds, 64 emeralds; one diamond ring; one diamond approximately 4½ cts., 20 diamonds, six fancy diamonds; one fancy diamond ring; one diamond 1½ ct. ring 10 baguettes, 12 diamonds.

Mr. Scollin, referring again to Exhibit 17 and the item under date September 3, 1945, public liability, office 108.02, debit $14.00, do you know what that insurance coverage was for?

A. That covers Mr. Remmer's personal liability, including his home. It is a liability contract.

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(Testimony of Charles J. Scollin.)

Q. The item September 2, 1945, plate glass, office No. 108.01, debit $7.50, do you know what that insurance covers?

A. That covers residence plate glass. All of the plate glass in his personal residence.

Q. The next item, August 17, 1945, fire on dwelling, $6500, three years, office No. 107.65, debit $54.25, do you know what that item covers?

A. That covers fire insurance in the amount of $6500 for three years.

Q. Do you know where that residence was located?

A. Not from that record I couldn't say. I believe it is [74] Orinda.

Q. Where is Orinda?

A. I believe in Contra Costa County.

Q. California? A. California.

Q. Under date of October 26, 1945, comprehensive liability, office 1.75, debit $25, do you know what that insurance coverage was?

A. That would be also his comprehensive personal liability policy.

Q. Date May 1, 1946, personal property floater, office 116.64, debit $248.25. Do you know what that insurance coverage was?

A. That would be personal property floater covering his personal effects, such as you read there, jewelry, furs, etc.

Q. That is renewal of the same policy, Exhibit 18, is that correct?

Mr. Gillen: What is the date of that?

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(Testimony of Charles J. Scollin.)

Mr. Thompson: This item is May 1, 1946.

A. That is a renewal premium.

Q. Of Exhibit 18?

A. Yes. It would be renewal contract of that.

Q. Is it a renewal of Exhibit 18?

A. That's right, it would be.

Q. And the item November 1, 1946, personal property floater additional, $336.00? [75]

A. That would be a renewal premium under this contract.

Q. By this contract do you mean Exhibit 18?

A. No, sir, this contract here.

Q. Mr. Scollin, I show you Plaintiff's Exhibit 19 for identification, and state whether or not that is a record of your firm which is kept and maintained in the usual customary course of the business of that firm? A. It is.

Q. And is it a part of the business of your firm to keep records of that character relative to the issuance of insurance policies?

A. It is.

Mr. Thompson: I offer in evidence Exhibit 19 for identification.

Mr. Gillen: May it please the Court, the defendant makes the same objections to this Exhibit 19 as was advanced yesterday in connection with the introduction of Exhibit 18, and we make the additional objection that this Exhibit 19 shows an insurance policy issued exclusively to Helen L. Remmer, and for that reason, of course, we do not think that it could possibly be construed as binding

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(Testimony of Charles J. Scollin.)

upon the defendant in this case, because Helen L. Remmer as the insured is the only one that will be an insurable interest and the only one that will be recognized by the insurance company, and there is no evidence that the premium for this was paid by any one other than the person [76] named as the insured in the policy. I am very happy to pass the exhibit up and let your Honor observe that it is exclusively in the name of Helen Remmer.

Mr. Thompson: If the Court please, exhibits are already in evidence showing that during the year in question when the policy was issued Mr. Remmer and his wife, Helen Remmer, filed federal income tax returns on the community property basis, in which income reported by himself was reported as community property and divided with his wife, Helen Remmer, for the purpose of computing the tax alleged to be due.

Mr. Gillen: Of course, that does not affect this policy. This policy might be on matters that belong exclusively to Mrs. Remmer. It might be separate property.

The Court: Objection overruled. The exhibit will be admitted in evidence.

Q. Mr. Scollin, by referring to Exhibit 19, are you able to testify what type of insurance and the character of the coverage is represented by the item of November 1, 1946, debit $336?

Mr. Gillen: We encountered the same situation in regard to the schedule in that exhibit as the other.

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(Testimony of Charles J. Scollin.)

The Court: We will have the same understanding in regard to the schedule that seems to be in Exhibit 19 as in regard to Exhibit 18.

Mr. Thompson: Yes.

Mr. Pike: Your Honor, we understand, of course, if [77] the tender is made, it will be for the entire document, subject only to that reservation for the present.

The Court: That is right.

(Question read.)

A. This is a personal property floater unscheduled, effective November 1, 1946, for a period of three years for a premium of $336.

Q. What do you mean by unscheduled, Mr. Scollin?

A. That excludes all jewelry or furs in the policy.

Q. Covers every other character of personal property owned by the insured? A. It does.

Q. Mr. Scollin, by referring to Exhibit 17, will you testify as to the dates on which payments were made on account of Mr. Remmer and the amounts of payments?

A. On September 30, 1945, a payment was made of $298.06, which paid premiums of $218.25, $24.56, and $55.25. On November 27th payment was made in the amount of——

Q. What year was that please?

A. That would still be 1945—of $46.50, which paid $14.00, $7.50, and $25.00. On July 5, 1946, payment was made in the amount of $248.25, which

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(Testimony of Charles J. Scollin.)

paid premium under personal property floater of $248.25. On December 31, 1946, payment was made in the amount of $365.39, which paid a premium of $336.00 and $29.30.

Mr. Thompson: You may cross-examine. [78]

Cross-Examination

By Mr. Gillen:

Q. Mr. Scollin, do you have in your hand or in your possession your subpoena?

A. I believe it is on the exhibit, I believe it is 16.

Mr. Pike: It was produced yesterday and I believe it was here on our counsel table yesterday afternoon.

Q. Now I note in this subpoena that you were directed, or at least your firm was directed, to appear and bring with you data referring to payments made on insurance premiums November 27, 1945, and September 30, 1946, and July 5, 1946, and any other records of insurance payments on residence or other personal property of Elmer F. Remmer or Mrs. Helen L. Remmer during the years 1944 to 1946 inclusive. Do you wish to verify that by looking at it, or is that your recollection?

A. That is my recollection, reading that.

Mr. Gillen: Do you wish to verify that, Mr. Pike?

Q. Now I show you the prosecution's Exhibit 18, which we will call the daily—the insurance people call daily—a copy of the daily. I will hand you this exhibit and ask you if, from looking at that exhibit,

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(Testimony of Charles J. Scollin.)

you can tell us whether that daily indicates the original policy was renewal policy of an earlier policy?

A. This is a daily report of an original policy that was issued May 1, 1945, for a period of one year.

Q. Is there anything indicated that that was the first time [79] the property named therein was insured, either through your firm or elsewhere?

A. Will you repeat that again?

Q. Is there anything in that exhibit that indicates to you that was the first time that that property designated therein or referred to therein was insured?

A. It appears to be a renewal of a former policy.

Q. The date of that policy is what?

A. May 1, 1945, to May 1, 1946.

Q. It appears to be renewal of a policy that had been in existence prior to May 1, 1945, is that correct? A. That is right.

Q. And you don't know how many renewals prior to that on that same property was issued and effective for a 12-month period?

A. Not from this contract we couldn't determine that.

Q. You were not asked or directed in the subpoena to do any more than bring with you records from 1944 to 1946, inclusive?

A. That is my understanding.

Q. And so you don't know what your records reflect as to whether or not that same property may

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(Testimony of Charles J. Scollin.)

have been covered by a 12-month period—and I am talking about jewels and furs referred to in that particular floater policy—you don't know how many years that same property had been insured?

A. No.

Q. It might have been insured since the 30's, is that correct? [80] A. It could possibly.

Q. Now that particular floater policy which covers furs and jewelry, those policies are issued for 12-month periods, are they not? A. Normally.

Q. And then there are other types of policies that are issued for three-year periods?

A. That is right.

Q. And I believe that the prosecution's Exhibit 19 reflects a policy issued for a three-year period, is that correct? Would you care to look at it?

A. That is right, this is a three-year contract, November 1, 1946, to November 1, 1949, personal property floater.

Q. That policy covers personal property of a character other than furs and jewels, is that correct? A. That is correct.

Q. That is why you call it an unscheduled policy? A. That is right.

Q. That covers such things as silverware and linens or furniture, antiques, etc.?

A. That is correct.

Q. Probably ordinary clothing?

A. Clothing also.

Q. And then as I recollect, there are policies in

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(Testimony of Charles J. Scollin.)

existence covering public liability, plate glass and fire on dwelling, [81] is that correct?

A. That is correct.

Q. Now public liability means, does it not, the insured person's obligations to some one who might be injured on their premises?

A. That is correct.

Q. Or who might be injured by their property or by themselves? A. That is right.

Q. And plate glass insurance, of course, covers plate glass broken by storm or other accident, or something of that sort?

A. That's right, correct.

Q. And of course fire on dwelling, I notice here is a $6500 policy for three years, is that correct?

A. That is correct.

Q. That is a rather modest policy for a dwelling house, is it not?

A. Depending on the valuation of the house.

Q. I say it is rather modest. You encounter higher policies on dwelling houses, isn't that right?

A. That is correct.

Q. Now your records reflect—and if the prosecution's Exhibit 17 will assist you, with the clerk's permission I will hand it to you—your records reflect who paid the premiums on those policies and in what manner the premiums were paid?

A. This record here indicates it was by cash and on those [82] dates I mentioned previously.

Q. Well, we have the dates, of course, set forth, and you have testified to them, but you say that

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(Testimony of Charles J. Scollin.)

the transcript that was made up for you by your office indicates that the payments were made by cash? A. It could be check.

Q. Check or cash?

A. Or cash, that's right.

Q. In other words, just reflects you received money in whatever form for those premiums?

A. That is right.

Q. And then the other part of my question was, does it indicate who made the payments?

A. No, it does not.

Q. The payments may have been made by some one other than Mr. Remmer?

A. That is right. Our records just indicate that it was check or cash.

Q. Now as to the prosecution's Exhibit 19 that reflects the policy issued, a floater policy and personal property, issued exclusively to Helen L. Remmer, does it not? A. It does.

Q. She is the sole insured in that policy?

A. Correct.

Q. And she is the only person whose claim would be recognized [83] by the company under those circumstances, is that true? A. That is true.

Mr. Gillen: I think that is all, thank you.

Redirect Examination

By Mr. Thompson:

Q. Mr. Gillen, calling your attention to the item August 17, 1945, fire on dwelling, $6500, three years.

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(Testimony of Charles J. Scollin.)

Do you have any knowledge, or any way of telling from your record, whether that is the only fire insurance policy coverage issued for that particular dwelling?

A. According to our records, that is the only policy issued on that dwelling.

Q. By our company? A. By our office.

Q. Do your records show whether fire insurance coverage had been obtained for that dwelling from any other company? A. I would say no.

Q. They don't show?

A. They don't show. We wouldn't know whether any other policy was issued through another source.

Mr. Thompson: That's all.

Recross-Examination

By Mr. Gillen:

Q. Isn't it a fact that when fire insurance is applied for, the applicant is asked what other insurance covers that particular property, isn't that a fact?

A. In some cases it is so, to establish a value, so that the [84] agent handling, or the broker handling, the insurance will not be criticized for underinsuring a piece of property.

Q. Is there anything that reflects what was done in this case in the records?

A. I would say no.

Q. Isn't it a fact that you usually make it your concern whether or not the same piece of property is insured several times by other company?

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(Testimony of Charles J. Scollin.)

A. If it is a piece of merchandise business we would.

Q. Well, it is a fact, is it not, that within your practice and the custom of the insurance business, that as to dwelling houses, as a rule, there is only one policy on dwelling houses?

A. That is normal.

Q. And on business property there may be re-insurers, that is, company may take portions of the risk?

A. That is correct, they take a percentage.

Q. There may be four of five company?

A. Yes, are participating.

Q. Participating in one large building, like an office building, merchandise company or factory?

A. That is correct.

Mr. Gillen: I think that is all.

Mr. Thompson: That is all, Mr. Scollin.

(Witness excused.) [85]

(Discussion between counsel.)

MRS. AGNES BADOBINATZ

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you please state your name?

A. Mrs. Agnes Badobinatz.

Q. Where do you live?

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(Testimony of Mrs. Agnes Badobinatz.)

A. 1506 Vageden Avenue, Fresno.

Q. Are you married? A. I am a widow.

Q. What was your husband's name?

A. Peter Raymond Badobinatz.

Q. Sometimes known in business as P. R. Badobinatz? A. P. R. Badobinatz.

Q. When did he die?

A. January, 1950, January 11th.

Q. January 11, 1950? A. Yes.

Q. Prior to his death where did you and your husband reside?

A. 1505 Vageden Avenue, Fresno.

Q. For how many years did you reside there?

A. At the same address or in Fresno?

Q. No, in Fresno. A. Since 1937.

Q. Do you know with what bank your husband conducted his business [86] usually during his lifetime? A. In Fresno?

Q. Yes.

A. The Bank of America, the main branch.

Q. You know he did do business with the Bank of America in Fresno, is that correct?

A. Yes.

Q. In the month of February, 1947, did you have a conversation with your husband relating to an obligation of his? A. Yes.

Mr. Gillen: Just a moment. It slipped by me. This calls for a conversation between husband and wife at a date later than the time boundary in the indictment.

The Court: We have not reached that point. All

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(Testimony of Mrs. Agnes Badobinatz.)

we have there was a conversation; we don't know what it is.

Mr. Gillen: Of course, it is incompetent, immaterial and irrelevant what these people talked about in 1947.

Q. Mrs. Badobinatz, where did that conversation take place?

Mr. Gillen: I think that would be incompetent, irrelevant and immaterial, and I will offer that objection.

The Court: Objection will be overruled.

Q. Did you answer the question?

A. I did.

Q. I didn't hear it. A. At our home. [87]

Q. At your home in Fresno? A. Yes.

Q. Who, if any one, other than yourself and your husband, was present at that time?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Nobody was present.

Q. What was the conversation that you had at that time?

Mr. Gillen: Now, of course, first this is asking for hearsay testimony that couldn't possibly be binding on the defendant in this case.

The Court: Objection sustained.

Mr. Thompson: Your Honor, I would like to be heard before you rule, if I may, and I respectfully request that you withdraw the ruling.

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(Testimony of Mrs. Agnes Badobinatz.)

The Court: Very well, we will excuse the jury.

(Jury and alternate jurors admonished and excused from the courtroom at 11:05 a.m.)

(In the absence of the jury.)

The Court: Now.

Mr. Thompson: If the Court please, I will state in the absence of the jury that we anticipate that this witness will testify that on the occasion in question she had a conversation with her husband——

Mr. Gillen: I wonder if I might interrupt counsel, for this reason—if counsel is going to state—of course, the press is present—this is a public trial, the subject of that conversation would undoubtedly be talked about by the press and be published. I would like to make this observation before counsel goes farther—I can't see for the life of me, as stated before, how counsel expects to get conversation occurring between husband and wife. The husband is now deceased. How does he expect to get into this case a conversation which, first of all, is a confidential and privileged conversation? Secondly, is sealed forever by reason of the fact that the person who could waive the privilege and confidential relationship of that conversation is deceased, and I am not familiar with your so-called dead man's statute—we have the statute in California and I know your Nevada law is based largely upon the original code in California. I assume that the same statute is in existence here. And finally, of course, Mr. Remmer was not present at this conversation,

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(Testimony of Mrs. Agnes Badobinatz.)

that has been established. No one was present but this husband and wife and it would be calling for the grossest and rankest kind of hearsay.

The Court: I would like to hear from you on the hearsay question.

Mr. Thompson: Your Honor, I would like to suggest to counsel there is a well-recognized exception to the hearsay rule known as declaration against interest which goes into [89] effect when the person who made the statement is deceased or otherwise unavailable as a witness. When a statement is made by a person deceased or otherwise unavailable, and in this case we have proved he is deceased, which is against his pecuniary interest, such as admission of indebtedness, it is admissible in any trial if it is relevant and material. Now in this instance we are dealing with the payment of an obligation which we expect to take into consideration in the net worth computation of Mr. Remmer's income. We expect to corroborate the circumstances of that obligation by other evidence. I am saying that generally, your Honor——

The Court: Have you any authority here on this question of declaration against interest? I know, of course, that is an exception against the hearsay rule. I would like to hear if you have anything that would apply to that situation. Let us hear the authority.

Mr. Gillen: It wouldn't be binding upon Mr. Remmer, who was not present.

Mr. Thompson: Mr. Gillen confuses—I would

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(Testimony of Mrs. Agnes Badobinatz.)

like to read from 31 Corpus Juris Secundum, 954: (Reads) That is the heading in black print. The balance of the text is as follows: (Reads page 954) Then there is a lengthy discussion of the requirement, which I will be glad to read if the Court wishes. [90]

The Court: I can't see how the dead man's rule would have any bearing on this question. Just discuss that part of it for a moment. It isn't to be used in any way, shape or form against a deceased person. Now that, I think, is the purpose of the dead man's rule. That part I am not so much concerned with. Have you anything further to say on the question?

Mr. Thompson: Your Honor, with regard to the dead man's rule, I think it is well settled, if your Honor is referring to the Nevada statute——

The Court: Yes.

Mr. Thompson: ——that the dead man's rule only applies to transactions between parties to the litigation and that was decided——

The Court: Well, where one of the parties is deceased.

Mr. Thompson: That is right. Now the gentleman here has no part in this instant litigation and one of the requirements of the declaration against interest rule is that the person who made the statement, be dead or otherwise unavailable, so that he, himself, can not be presented as a witness to the fact. If under those circumstances we can prove a statement made by him which is against his declara-

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(Testimony of Mrs. Agnes Badobinatz.)

tory interest and therefore would presumably be an accurate, honest, truthful statement of the facts, we are entitled to do that, and as the quotation points out that may be, as it clearly is, a weaker form of [91] evidence than would be the presence of Mr. Badobinatz if he hadn't so unfortunately died, but nevertheless it is competent and admissible evidence under these circumstances.

Mr. Avakian: Your Honor, the provision to which we refer is a peculiar provision in all of our States and also the rule in federal courts and in Nevada the law reads as follows: Section 8971—I am going to read the entire section, which is short, and then emphasize the portion which I believe applies here:

> "A husband can not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage."

The remaining sentence is not material, but that part I emphasized in reading is the important thing, your Honor. There are two aspects of communications between husband and wife. One aspect which does not apply here is——

The Court (Interceding): Read the complete sentence. (Mr. Avakian reads.) Now the purpose

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(Testimony of Mrs. Agnes Badobinatz.)

of that provision, beginning with, "nor can either," is to insure to a husband and wife that during their marriage they can speak with complete confidence to each other and rest assured that at no time, [92] whether during marriage or afterwards, can the other party to the marriage be examined as to any of those communications. The purpose of it is the social policy of encouraging free communications between husband and wife. We did not expect this to come up or we could have prepared case authorities, but I think the statute is clear:

> "* * * nor can either, during the marriage or afterwards, be, without the consent of the other, be examined as to any communication made by one to the other during marriage."

The Court: Have you any federal cases?

Mr. Avakian: There are, but I don't have them at hand.

The Court: Would that provision govern a federal court?

Mr. Thompson: I think the rule of evidence in criminal cases in federal court is generally conceded to be the best common law rule of evidence as determined by the courts at the present time. I do not think there is any definite statutory rule of evidence, but I would like to suggest to your Honor that if Mr. Remmer who, as far as I know, is a stranger to the marriage between Mr. and Mrs. Badobinatz, can claim the privilege of Mr. Badobinatz with relation to confidential communication

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(Testimony of Mrs. Agnes Badobinatz.)

between husband and wife, this will be the first instance in which that claim was ever successfully made. A stranger to the marriage can not claim such a privilege, otherwise whenever you had a married witness and produced them, you would have [93] to produce the husband or wife to get their consent to testify. It is a personal privilege which only the husband or wife can assert.

The Court: I can see this picture coming up in the trial of any case. The husband is on the witness stand. He is speaking about some business matter but he happened to mention the matter to his wife day before yesterday and if counsel on the other side could bring that out by cross-examination, then it would be stricken.

Mr. Avakian: No, your Honor, the section says the witness can not be questioned as to communication between husband and wife. They can't question the husband as to what he told his wife, but they can question him as to the transaction.

The Court: Objection overruled.

Mr. Avakian: May we ask your Honor to defer ruling until we can provide federal authorities?

The Court: I overruled the objection now and I think your argument to be in the nature of an admission as to the soundness of the text which was just read on the question of declaration against interest.

Mr. Avakian: We won't concede that, your Honor.

The Court: Your only offer is on that point.

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(Testimony of Mrs. Agnes Badobinatz.)

Mr. Avakian: We made the argument on one point and are making it now on another. [94]

The Court: Objection is overruled. Now the question is we don't want any conversation to go before the jury which wouldn't come within the provisions of this text, so I think we had better hear the conversation now in the absence of the jury, so we may know whether it is a declaration of interest.

Mr. Avakian: May we approach the bench and have the conversation given to your Honor?

The Court: I don't see any reason for that.

Mr. Avakian: Well, the papers——

The Court: I don't believe the gentlemen of the press here would publish matter which was not admitted in evidence.

Mr. Gillen: There was something published in our papers this morning that wasn't admitted in evidence.

The Court: Well, we are going to try this case without regard to the presence of the press. This is a public trial, so we will proceed.

Q. Mrs. Badobinatz, will you state at this time what the conversation was that you had with your husband in February, 1947?

Mr. Gillen: I am going to object to any testimony being taken by the Court outside the hearing of the jury. It is my understanding that your Honor wanted some statement by counsel.

The Court: I want to hear the conversation so

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(Testimony of Mrs. Agnes Badobinatz.)

I can [95] determine for myself whether it is a declaration against interest.

Mr. Gillen: Is this witness going to testify?

The Court: She is going to give me the conversation. You may proceed.

(Question read.)

A. He said he was going to the bank to get a cashier's check to send to Mr. Remmer of five thousand dollars for money that he had borrowed.

Mr. Thompson: That's it.

The Court: So call the jury in.

Mr. Gillen: May we have a moment's recess before the jury is called in?

(5 minute recess taken at 11:20 a.m.)

11:30 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MRS. BADOBINATZ

resumes the witness stand.

(Last question read.)

Mr. Gillen: We renew the objection on all the grounds previously stated and believe we have some further authorities found during the recess.

The Court: Objection overruled. Proceed.

Mr. Gillen: Does your Honor care to hear the authority [96] that we have?

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(Testimony of Mrs. Agnes Badobinatz.)

The Court: Proceed. Objection overruled.

Mr. Gillen: Your Honor asked us for some federal authority.

The Court: Objection overruled.

Mr. Gillen: Let the record show that we have federal authority.

The Court: Proceed.

Q. (Read): What was the conversation you had at that time?

A Mr. Badobinatz said that he had to go to the bank to get a cashier's check for five thousand dollars to pay Mr. Remmer the money that he had borrowed.

Mr. Thompson: You may cross-examine.

Mr. Gillen: At this time, may it please the Court, we move to strike the question and answer and assign asking of the question as misconduct and press our motion—I amuse counsel, but I am very earnest——

The Court: The motion is denied. Let us proceed.

Mr. Gillen: The motion is denied before I state my grounds? I am about to state my grounds.

The Court: I thought you moved to set aside on all grounds contained in your objection.

Mr. Gillen: There is some additional.

The Court: I wouldn't entertain any other grounds except the ones raised in your [97] objection.

Mr. Gillen: You won't entertain any other grounds? I would like to cite your Honor a case.

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(Testimony of Mrs. Agnes Badobinatz.)

The Court: What are your grounds? Go ahead and state them.

Mr. Gillen: Well, in the first place, it is hearsay as to the defendant Remmer, No. 1. In the second place, it is priviledged communication between husband and wife, No. 2.

The Court: I am asking you to state grounds other than those raised in the objection.

Mr. Gillen: All right. My new grounds are, first of all, there is no foundation laid to establish here when the indebtedness to Mr. Remmer was incurred. If it was incurred in 1920, 1925, 1930, it would be incompetent, irrelevant and immaterial, and moreover, we would like your Honor to consider, in connection with your ruling, the case of Frazier vs. U. S., decided October 3, 1944, found in 145 Federal Reporter (2), at page 139, where privileged communication between husband and wife is recognized. I would like to add the further ground that the answer given here is not a so-called declaration against interest, as recognized in law.

The Court: Motion is denied.

Mr. Gillen: Would your Honor consider the fact that it would be incompetent, irrelevant and immaterial?

The Court: The Court has ruled. The motion is denied.

Mr. Gillen: I am calling another matter to your attention. [98]

The Court: I don't want to hear any more argument on a matter I have already ruled.

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Mr. Gillen: No questions.

Mr. Thompson: That is all.

The Court: I hear no reason why you could not be excused. You may be excused.

EUGENE F. MURPHY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Eugene F. Murphy.

Q. Where do you live?

A. 649 Brookwood Road, Oakland.

Q. Are you acquainted with the defendant, Elmer F. Remmer?

A. I am. I knew him since he was a boy. We were boys together in Oakland.

Q. And since the year 1934 where, do you know, has Mr. Remmer lived?

Mr. Gillen: I think that is calling for his opinion?

The Court: Let me have the question.

(Question read.)

Mr. Gillen: I withdraw the objection.

A. I knew he was in Cal-Neva and at San Francisco, back and forth. I wouldn't know where his residence was. [99]

Q. What is your business?

A. I am retired police inspector of the City of

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(Testimony of Eugene F. Murphy.)

Oakland. Now outside representative of Billings Furniture Company, 14th and Clay, Oakland, California.

Q. When did you retire as police inspector for the City of Oakland?

A. My retirement took effect legally March 1, 1946, but I had overtime and the last day I worked was January 30, 1946.

Q. During the year 1946 did you have a conversation with Mr. Remmer relating to a contribution by him? A. I did.

Q. Where did that conversation take place?

A. I phoned him. I got his telephone number. Some way I obtained his telephone number in San Francisco. I phoned his office and I phoned from my home and I talked to Mr. Remmer. That was in April and I told him——

Q. April of 1946?

A. Yes, sir. I told him what the nature of the call was. I told him that the County Board of Supervisors were remodernizing the charter, that they asked me would I help, which Judge Kennedy took an active part, and being a friend of mine, asked me would I help the Board of Supervisors. I told him I would. So Maundrell, the chairman at the time, and Judge Kennedy and Harry Bartel, the present chairman of the Board, had a meeting and talked over the coming election, so they asked again [100] would I work with the finances with Bartel and I said yes, so I talked to Mr. Remmer what they were doing about having the charter

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(Testimony of Eugene F. Murphy.)

modernized, had to modernize the charter so the salaries of supervisors and others could be regulated, etc.—that couldn't be changed unless the charter was changed—so I asked him if he wanted to give a little contribution to it. He said yes, he would send over $200, so shortly after I received a check from Hal Maundrell for $200 and I endorsed that check, which several others were made out in my name, I endorsed it—I don't know whether I gave it to Bartel, but we put all the money we received, I think around three thousand dollars, into the Bank of Commerce at 16th and San Pablo Avenue in Oakland, and the only one who could sign those checks was the chairman of the Board of Supervisors and myself, but some checks maybe come in that we cashed for petty cash, like for stamps, there were 75 thousand postal cards sent out and maybe 30,000 letters and they had volunteer workers they paid expenses of, but most of our checks, and I am pretty sure this check here, was put in that bank account.

Q. The conversation which you have related you had by telephone with Mr. Remmer in April of 1946, is that correct? A. That is true.

Q. Did you ever talk to Mr. Remmer personally, other than by telephone, concerning this contribution? A. No. [101]

Q. Will you state again what you told him the purpose of the contribution was?

A. Here is what I told him—modernization of charter of Alameda County. I told him they were

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(Testimony of Eugene F. Murphy.)

changing it so they could change the salaries of the county employees. That included the supervisors and the supervisors were the ones that brought this amendment up to the people to vote on it.

Q. You also stated, I believe, that there was an election in the offing? A. Yes, there was.

Q. And was any of the money used, so far as you know, in connection with the campaign expenses of any candidates for office?

Mr. Gillen: I think this question has been asked and answered. The gentleman said what he was working on—to modernize the city charter so that the salaries of the city employees could be brought up to date.

The Court: I think you are correct.

Mr. Thompson: You may cross-examine.

Mr. Gillen: I think there is no cross-examination.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 11:45.) [102]

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Afternoon Session, November 30, 1951, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MAX SILVERMAN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Max Silverman.

Q. Where do you live?

A. 717 Kansas Street, San Francisco, California.

Q. How long have you resided in San Francisco? A. Fifteen years.

Q. At one time did you own a business in San Francisco known as the 186 Club and Day-Night Cigar and Liquor Store? A. Yes, sir.

Q. Did you dispose of that business?

A. I did.

Q. On what date?

A. It was on or about March 1, 1943.

Q. Where did the transaction relating to the sale of that business take place?

A. Originally took place in my home.

Q. And that was around the first of March, 1943? A. Around about that time. [103]

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(Testimony of Max Silverman.)

Q. What did the business known as the 186 Club consist of?

A. Consisted as a cigar and liquor store, magazines, and a club room, incorporated club room.

Q. Where were the premises located?

A. Located at 26 Eddy Street.

Q. In San Francisco, California?

A. San Francisco, California.

Q. And what character of business was carried on in the incorporated club room?

A. A card room.

Q. You mean that is a place where people played card games?

A. Played card games, right.

Q. What types of games?

A. Well, draw poker, called panguingue.

Q. Who came to see you at your home around the first of March, 1943, regarding the purchase of those premises? A. Mr. Willie Kyne.

Q. And did you and he have a discussion at that time relating to the purchase of this business by Mr. Kyne? A. Yes, sir, we did.

Q. Subsequent to that, did you and Mr. Kyne meet in any attorney's office to complete the transaction? A. We did.

Q. And what was the name of the attorney?

A. Joe Haughey.

Q. Do you recall where his office was [104] located? A. Phelan Building.

Q. In San Francisco? A. San Francisco.

Q. Who was present at that time?

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(Testimony of Max Silverman.)

A. Mr. Kyne, Mr. Haughey, myself, and my attorney, Mr. Blackfield.

Q. At that time did you receive from any any money on account of the purchase price for this business?

Mr. Gillen: I am going to have to offer an objection to all this line of questioning. It is grossly hearsay as to the defendant in this case, not binding upon him, the actions of some man and Mr. Kyne and an attorney.

The Court: The objection will be overruled but, of course, if it is not connected up, you may move to strike it. You may answer the question.

A. I did.

Q. How much money did you receive from whom?

A. I received one thousand dollars as a deposit.

Q. Who paid you that money?

A. Mr. Kyne.

Q. And in what form was the payment made?

A. In cash.

Q. Were arrangements made at that time for the establishment of an escrow?

Mr. Gillen: Objected to as leading and suggestive, also [105] hearsay.

The Court: Objection overruled. You may answer the question.

A. Yes.

Q. And was an escrow established in connection with the sale by you to William Kyne of the prem-

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(Testimony of Max Silverman.)

ises known as 186 Club and the Day-Night Cigar Store? A. Yes, sir.

Q. And where was the escrow established?

A. Bank of America, Day and Night Branch, San Francisco.

Q. Did you subsequently receive the full purchase price for those two businesses from the escrow department of the Bank of America?

A. Yes, sir, I did.

Q. Do you recall on or about what date you received the balance of the money?

Mr. Gillen: May it be understood, your Honor, that all of this line of testimony which your Honor permits to come up, is subject to the objection that it is hearsay?

The Court: If it is not connected, you may move to strike it.

Mr. Thompson: That is a satisfactory understanding, your Honor.

(Question read.)

A. Well, approximately in the month of March, latter part of [106] March.

Q. Of 1943? A. Yes, sir.

Q. How much did you receive?

A. Fifteen thousand dollars from the escrow department and six thousand and sixty-seven dollars for the inventory. The escrow money was paid to me by check. The inventory money was paid by cash by Mr. William Kyne.

Q. As I understand it, you received the sum of

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(Testimony of Max Silverman.)

15 thousand dollars from the escrow department some time in the month of March, as you recall, 1943?

A. As I recall in 1943, right.

Q. And when did you receive the sum of $6067 in cash from Mr. William Kyne?

A. I don't know the exact date, but it should have been the early part of March, after the inventory—must have been the 1st or 2nd of March.

Q. And what do you mean by inventory?

A. The inventory, I mean by that that you take an inventory of stock, such as liquors, cigars, cigarettes, candies, magazines, etc.

Q. They were the stock-in-trade of those businesses?

A. Yes, sir.

Q. That inventory was taken and then you received $6067 as the purchase price for the inventory? [107]

A. That's right.

Q. The sum of $15,000 received from the escrow department of the bank and the one thousand dollars received by you in cash as a down payment in Mr. Haughey's office, was in payment for what?

A. For the lease, good-will, fixtures, licenses.

Q. Do you recall, Mr. Silverman, whether there was an allocation of the 16 thousand dollars purchase price for the premises, good-will, licenses and the like, between those various items? Do you understand what I mean?

A. I don't understand.

Q. Do you understand whether any particular portion of that total sum was in payment for

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(Testimony of Max Silverman.)

licenses, another portion in payment for the lease, another portion in payment for the good will?

Mr. Gillen: May that be answered yes or no, your Honor?

The Court: Yes, answer it yes or no.

A. Yes.

Q. And how was the total price of 16 thousand dollars allocated between the various items?

Mr. Gillen: To which we offer an objection, first of all, it is hearsay, and secondly, the written agreement is the best evidence of what the terms of the sale was, in the event that your Honor does not act upon the hearsay objection.

Mr. Thompson: If he recalls it, your [108] Honor.

The Court: You may answer the question. The objection is overruled.

Mr. Gillen: If there is an existing contract, that is, of course, always the best evidence.

The Court: I don't know whether there is.

Mr. Gillen: It should be eliminated then.

A. There is a contract.

Mr. Gillen: Then I ask that we see the contract, as the best evidence.

Q. Do you have the contract?

A. Mr. Haughey has the original contract.

Q. Do you have a copy of the contract?

A. I have a copy with me, yes.

Q. Mr. Silverman, I show you Plaintiff's Exhibit 20 for identification, which you have handed

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(Testimony of Max Silverman.)

to me. Is that a copy of the only contract you had relating to this sale? A. I believe it is.

Q. Is this copy of the only contract which you received in connection with the transaction?

A. Yes, sir, I believe it is.

Mr. Thompson: I offer it in evidence, your Honor.

Mr. Gillen: Well, of course, we still offer the objection, may it please the Court, that it is incompetent, irrelevant and immaterial and hearsay as to the defendant in this case, not binding upon him, and purports to be a contract dated [109] February 4, 1943, between Max Silverman, the witness on the stand, and one Willie Kyne, making no reference whatever to the defendant in this case.

The Court: It will be admitted subject to a motion to strike if it is not connected.

Mr. Thompson: (Reads Exhibit 20.)

Q. Mr. Silverman, how was the purchase price of 16 thousand dollars allocated between the price for the lease, the price for the furniture and fixtures and equipment, the price for the licenses and the price for good will, as you recall?

Mr. Gillen: May it please the court, that is objected to as having been asked and answered and there is a contract here which speaks for itself and which this gentleman has testified is the only understanding there was between him and the buyer reduced to writing.

The Court: He said only reduced to writing, but he has heretofore stated there was some kind

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(Testimony of Max Silverman.)

of distribution of this price for the various items and I can't see any reason why he can't so testify now. Objection will be overruled?

A. Well, I appraised the value of my business at the time at that price and I don't know how to say as to the values between licenses and fixtures, that the fixtures were so much money and the lease I had was worth so much and the licenses at a value approximately three thousand dollars, but we come to an understanding [110] of worth——

Mr. Thompson: I might have misunderstood your previous answer.

Mr. Gillen: Just a minute—I move it all be stricken.

The Court: What is the grounds, Mr. Gillen?

Mr. Gillen: Well, the man doesn't remember, for one thing, what comments he made were only his appraisal and not subject to agreement. He said he valued the fixtures at so much and the licenses and lease worth so much, without mentioning the amount of his valuation and not the subject of any agreement. The agreement is there.

The Court: Motion is denied.

Q. Mr. Silverman, do you recall whether or not the total price of 16 thousand dollars was allocated between these various items in different sums?

Mr. Gillen: Objected to as having been asked and answered.

The Court: Objection will be overruled.

A. Well, we didn't discuss it at the time as to the dollars and cents. At the time Mr. Kyne and

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(Testimony of Max Silverman.)

myself were talking, we came to the conclusion that——

Mr. Gillen: So that conclusion, your Honor, would be rankly hearsay.

Mr. Thompson: When the witness says, "we came to a conclusion," that is statement of what the conversation was. [111]

The Court: It might be hearsay. Objection is sustained. That part of the answer he is about to give, he is not to give.

Q. What type of license do you refer to as having been transferred to Mr. Kyne in connection with sale? A. Liquor license.

Q. What did those licenses cost you?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, what the license cost him.

The Court: Objection sustained.

Mr. Shelton: If your Honor please, it is necessary on net worth statement for the government to do the very best it can to allocate between these different items if we establish that this property was a proper part of net worth statement in this case. The first effort would be to establish any agreement between the parties, buyer and seller, as to the values——

The Court (Interceding): We have nothing in this witness' testimony to show when these licenses were acquired.

Mr. Shelton: Well, counsel then would lay the foundation as to when they were acquired and then obtain such evidence as available to break down

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(Testimony of Max Silverman.)

the cost between the various items for the purposes of tax computation.

Mr. Avakian: Your Honor, do I understand the Court is [112] entertaining argument on the objection sustained? If so, I would like to answer.

The Court: No. The reason why this is sustained is because I don't know when these licenses were procured.

Q. When did you acquire the liquor licenses, Mr. Silverman?

A. 1937, to the best of my recollection.

Q. Are those licenses that are renewed?

A. They are.

Q. When did you last renew the license?

A. Well, they are being renewed June 1st of every year. That would have been in 1942 when I renewed them.

Q. What did you pay for the license at that time?

Mr. Avakian: Objected to on the ground that the price he paid for the license in 1937——

The Court: No, that question is not directed to 1937. The last time of renewal, as I understand. Maybe I am wrong.

(Answer read.)

Mr. Avakian: This question then relates to renewal cost in 1942?

Mr. Thompson: Yes.

The Court: Answer the question.

A. $110.00.

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(Testimony of Max Silverman.)

Q. Mr. Silverman, in San Francisco does the actual license [113] fee represent the value of the liquor license? A. No, sir.

Q. What was present on the premises in the way of furniture and fixtures at the time you sold that to Mr. Kyne?

A. The front part of the store had shelving that holds the liquor, counters, cigar case, candy case, coca-cola case, magazine racks, display cases, and in the back room were 13 tables to my best recollection at present, chairs and chips and some cards.

Q. What was the value of the furniture and fixtures and equipment at the time you transferred and sold the property to Mr. Kyne?

Mr. Gillen: Just a moment, objected to as incompetent, irrelevant and immaterial, calling for opinion and conclusion of the witness and no foundation laid to show that he is qualified to place any valuation.

Mr. Thompson: He was the owner of the property, your Honor.

The Court: The objection is overruled.

A. Well, I valued it, as stated before, I valued the fixtures and the license and the whole thing as 16 thousand dollars. The way I arrived at those figures, I broke it down myself as to the value of the license, the value of the amount of business I have done, what the fixtures cost me, and Mr. Kyne tried to buy the place, I just put up one sum, that is the [114] amount I want for it and that is what he paid for it. It would be very difficult for me to

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(Testimony of Max Silverman.)

say now as to what each and every piece of furniture or fixture in the store the actual value was.

Q. What was the reasonable value, in your opinion, of the furniture and fixtures which were included in the sale to Mr. Kyne?

Mr. Gillen: That has been asked and answered several times, apparently to the best of the witness' ability, and also calling for his opinion and conclusion and also an attempt to qualify him as an expert.

The Court: Objection overruled. Answer the question.

A. What is the question again?

(Question read.)

A. Well, I felt the reasonable price for the fixtures alone, in my own mind, was ten thousand dollars, and the balance would be license and leasehold value.

Q. When you refer to fixtures, do you include the furniture and all the equipment which you described in the premises?

A. The entire premises, all the fixtures.

Q. And the furniture too?

A. Furniture, right.

Q. What was the reasonable value of the liquor license at that time which you sold to Mr. Kyne?

Mr. Gillen: Objected to as having been asked and answered. [115]

The Court: Objection overruled. Answer the question.

A. I figured it would run about three thousand dollars, the value of the license.

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(Testimony of Max Silverman.)

Q. What was the reasonable value of the leasehold interest which you transferred and sold to Mr. Kyne at that time?

Mr. Gillen: May it please the Court, I renew my objection to the whole line of questioning as hearsay, and also object that this has been asked and answered not once, but several times, and furthermore what the reasonable value of the leasehold is, it would seem to me, would have to be established through expert testimony.

The Court: Can't an owner give his opinion of the value of his property?

Mr. Gillen: An owner can say what it is worth to him, but I do not think he can give an opinion of the market value unless he establishes he is acquainted with realty in the particular location at the particular time.

The Court: Objection overruled.

(Question read.)

A. I valued it at three thousand.

Mr. Gillen: I move the answer be stricken. He said he valued it at three thousand. It is not responsive to the question.

The Court: Motion denied. [116]

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Speaking of that lease that you had, what length of time did it have to run, do you recall, in

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(Testimony of Max Silverman.)

February or March of 1943? What was the length of time the lease had to run?

A. I don't recall the exact time, but I believe it was until 1946.

Q. And was there a renewal option on that lease, do you recall? A. I don't recall that.

Q. You don't have the lease with you, do you?

A. No, sir.

Q. Now, do you have any recollection of what date in 1946 the lease expired? A. No, sir.

Q. As a matter of fact, you are not sure it was 1946? A. No, I am not sure it was in 1946.

Q. Now, I understood you to describe this enterprise as a cigar stand where cigars and tobaccos and candies and magazines were sold, is that correct? A. That is right.

Q. And then there was a bar in connection with it? A. No bar.

Q. What kind of liquor license was that?

A. Package goods. [117]

Q. Where you buy bottled liquor and take it off the premises? A. That is right.

Q. Not consumed on the premises, like a cafe?

A. No, sir.

Q. And I understood you to say there was also a card room contained in an incorporated club?

A. That is right.

Q. That was known as the 186 Club, is that correct? A. Yes, sir.

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(Testimony of Max Silverman.)

Q. And that club was incorporated under the laws of the State of California, was it not?

A. Yes, sir.

Q. I have handed you photostatic copy of what purports to be an incorporation under the laws of the State of California, counsel. When you finish looking at it, I intend to show it to the witness and offer it.

Q. I will hand you here, Mr. Silverman, two photostatic sheets, photostated on both sides, purporting to be (1) an official document of the State of California, purporting to contain also some supporting documentary data attached thereto. Would you glance at those and tell us, if you recall, whether or not those represent the incorporation and the Articles of Incorporation of the so-called 186 Club at San Francisco that you have described here?

A. To the best of my recollection, I believe it is something [118] like this.

Q. As a matter of fact, one of those sheets bears your signature, does it not?

A. I don't see my signature on here.

Q. May I look at it?

A. I never had those papers myself. They belong to the membership.

Mr. Gillen: I would like to offer this as defendant's exhibit in evidence.

Mr. Thompson: If the Court please, we object on the ground it is irrelevant and immaterial, inasmuch as there is no testimony to the effect that the corporation itself was included in any sale to Mr. Kyne. The sale was of the leasehold premises, fur-

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(Testimony of Max Silverman.)

niture and fixtures and the inventory and stock-in-trade on hand.

The Court: The exhibit may be admitted and it will be Exhibit A.

Q. Now, Mr. Silverman, it is true, is it not, that when you became interested in the 186 Club and in the other enterprise, the cigar stand in conjunction therewith, that incorporated clubs incorporated under the State laws of California were legal organizations, which operated under the State laws of California?

Mr. Thompson: Objected to on the ground it calls for an opinion of the witness as to the law, your Honor. [119]

The Court: Objection overruled. Answer the question.

Q. Do you have the question in mind?

A. Yes. They were legal.

Q. It is true, is it not, that certain card games were prohibited by State law of California and certain other card games were recognized as legal games in California, is that correct?

Mr. Thompson: We make the same objection.

The Court: Same ruling.

A. As far as I know, some are legal and some are not legal.

Q. You know of your own knowledge, having been interested in that club, that, for example, draw poker was legal, unprohibited, while on the other hand stud poker was prohibited under the State law of California, is that correct?

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(Testimony of Max Silverman.)

A. That is correct.

Q. And you know, of your own knowledge, under the State law of California, the games, so-called games of chance, were prohibited, while games, so-called games of skill, were the permitted games?

Mr. Thompson: Same objection.

The Court: Objection overruled. Answer the question.

Q. Isn't that true?

A. Well, as far as I know, the legal games were draw poker and no other games were permitted legally.

Q. Draw poker and panguingue. Do you recall what other games [120] were permissive games?

Mr. Thompson: I would like to know if panguingue——

The Court: He didn't give the answer as to panguingue.

Q. Do you recall, other than draw poker, what other games were legalized games in California?

A. Well, any game was that was draw was legal, so far as I understand. Panguingue also and draw poker, any game that you draw cards to are legal games.

Q. As distinguished from games that are so-called games of chance, where the skill of the player is not involved, is that correct?

A. That's right.

Q. I take it, Mr. Silverman, that you acquired your interest in this property from some predeces-

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(Testimony of Max Silverman.)

sors, did you not? A. That's right.

Q. In other words, according to the exhibit that I have shown you here, the exhibit consists of two pages and one of a so-called Articles of Incorporation of the 186 Club, which appears to have been organized on June 29, 1939, by Eugene H. Stone, San Francisco, Irving D. Freeman and Bernard D. Freeman of San Francisco. Were they your predecessors? A. I couldn't say off-hand.

Q. But you bought your interest from some one else, you were not the original incorporator?

A. I bought the cigar store originally and I held the lease. [121] The club was operated by membership as a non-profit organization.

Q. Now, also this document, this Exhibit, Defendant's A, contains the certificate of incorporation of the Department of State of the State of California, does it not, the charter certificate of incorporation, is that correct, that first page of the document, the exhibit?

A. All I can say what I see in front of me. I guess it is. I am not an expert in that. I guess it is the charter.

Q. Signed by the Secretary of State and official seal of the State of California?

A. That is right.

Q. State Department form, is it not?

A. That is right.

Q. Of course, being a non-profit corporation, there was no stock issued, isn't that true, no stock in existence, so far as you knew?

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(Testimony of Max Silverman.)

A. So far as I know there was none.

Q. And you sold your interest in this corporation together with the fixtures to Mr. Kyne, did you not?

A. Well, not so far as the corporation is concerned. I sold the fixtures.

Q. You sold the good will and everything that was there, as well as the good will in the name of the 186 Club, did you not? [122]

A. Yes. I couldn't sell the charter, because the charter wasn't mine. It belonged to the corporation and I can't sell it.

Q. Have you personally done anything with the 186 Club operation since you sold what you did sell to Mr. Kyne? A. I don't get your question.

Q. Since you made this sale of whatever it was you sold to Mr. Kyne, have you personally done anything or had anything to do with the corporation, 186 Club? A. No, sir.

Q. In other words, when you sold the good will, fixtures, inventory, the leasehold, furniture and everything else to Mr. Kyne, you, so to speak, washed your hands of it and walked away and it was left in Mr. Kyne's hands?

A. That is right.

Q. Including the name of the 186 Club and everything else that was there on the premises, is that true? A. Yes.

Mr. Gillen: That's all.

Mr. Thompson: No further questions.

(Witness excused.)

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LANUS CARDOZA

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name please? [123]

A. Lanus Cardoza.

Q. Where do you live?

A. 60 Halkin Lane, Berkeley.

Q. Where are you employed?

A. San Francisco. American Trust Company.

Q. How long have you been employed by the American Trust Company?

A. Twenty-six years.

Q. And where is the American Trust Company's business located in San Francisco?

A. At 464 California Street.

Q. What character of business does it conduct?

A. Banking business.

Q. What is your present position with the American Trust Company? A. Assistant auditor.

Q. Have you appeared here today pursuant to subpoena issued to the American Trust Company?

A. I am appearing, yes.

Q. And did that subpoena require you to bring with you certain records of the American Trust Company? A. It did.

Q. Will you produce them please? Mr. Cardoza, are you prepared to furnish photostatic copies of

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(Testimony of Lanus Cardoza.)

each of the records of the American Trust Company which you have produced? [124]

Mr. Thompson: I would like to inquire of counsel at this time if they have any objection to having the photostats marked as exhibits rather than the original records?

Mr. Gillen: May we look at the documents first of all please? We have no objection to accommodating the bank or accepting photostats. Of course, we are not conceding they are significant.

Mr. Thompson: We understand that, Mr. Gillen.

Q. Mr. Cardoza, I show you Plaintiff's Exhibit 21 for identification; consists of a signature card for a commercial account and a transcript of a commercial account. Is that a record of the American Trust Company which is kept and maintained in the ordinary and usual and customary course of the operation of the business of that company?

Mr. Gillen: We will do this. We will stipulate those are true photostatic copies of the original bank records of the American Trust Company and that they may be offered for identification. If they are connected up later, if there is any significance, we have no objection from a technical standpoint as to the authenticity.

Mr. Thompson: You reserve only objection of relevancy and materiality?

Mr. Gillen: Yes, if prepared by you, we are satisfied they are true copies of records of the American Trust Company reflecting the activity of that particular commercial account. [125]

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(Testimony of Lanus Cardoza.)

Mr. Thompson: I would like to state for the record this is the account of Hazel Harris, 100 Park Drive, San Francisco, California.

Q. Mr. Cardoza, does the American Trust Company operate more than one branch in its bank?

A. It does.

Q. From what branch of the American Trust Company are the records contained in Exhibit 21 for identification taken?

A. From the San Anselmo branch.

Mr. Thompson: Exhibit 22 for identification is transcript of account of H. & H. Sandwich Shop by Hazel or Violet Harris, together with signature card for the same account.

Mr. Gillen: In the interest of time we offer the same stipulation as to those photostatic documents.

Q. Mr. Cardoza, from what branch of the American Trust Company are the records contained in Exhibit 22 for identification taken?

A. From the San Anselmo branch.

Mr. Thompson: If the Court please, we offer Exhibits 21 and 22 in evidence, subject to their being connected up.

Mr. Gillen: Oh no, we have to object to that, if the Court please. I understand there is another witness here with these checks and let us see what happens. We have offered a stipulation and tried to save time.

Mr. Thompson: We appreciate that. [126]

The Court: What is your objection to the exhibit?

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(Testimony of Lanus Cardoza.)

Mr. Gillen: It is incompetent, irrelevant, and immaterial, no foundation laid for anything, your Honor. It is a bank account of somebody else.

The Court: How about postponing the offer until you do connect it up?

Mr. Gillen: I think that is the proper way, your Honor and that is what we suggest.

Mr. Thompson: You may cross-examine.

Mr. Gillen: No questions.

(Witness excused.)

HAROLD B. TRAUNPOUR

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Harold B. Traunpour.

Q. Where do you live?

A. 2485 23rd Avenue, San Francisco.

Q. What is your business?

A. Banking sir.

Q. With what bank are you associated?

A. Crocker First National Bank in San Francisco.

Q. And where are the premises of the Crocker First National Bank situated in San Francisco?

A. 1 Montgomery Street. [127]

Q. What is your official position with the Crocker First National Bank?

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(Testimony of Harold B. Traunpour.)

A. Assistant auditor.

Q. How long have you been employed at the Crocker First National Bank?

A. Thirty-four years.

Q. Have you brought with you, pursuant to subpoena, certain records of the Crocker First National Bank of San Francisco? A. Yes.

Q. Are you prepared at this time to furnish photostats of the records you are producing?

A. Yes.

Q. Will you produce first the signature cards and ledger accounts of the commercial account of the B & R Smoke Shoppe? Where are the originals of the ledger accounts?

A. They have been destroyed.

Q. What record have you kept of the original ledger accounts? A. We have microfilm.

Q. And the documents which you are producing now are blown-up films taken from your microfilm record? A. That is correct.

Mr. Gillen: Now, our understanding is—correct me if we have a misapprehension—Mr. Traunpour has the original signature cards for this account, but as to ledger sheets, that are reflected, that are in my hands here, these are photostatic [128] copies made up from microfilm which were used to supplant the original larger ledger sheets. The original sheets were destroyed and these smaller microfilms used in their place as permanent records?

A. That is correct.

Mr. Gillen: We have no objection to stipulating

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(Testimony of Harold B. Traunpour.)

that these may go in under the same conditions as stipulated, go in for identification. No technical objection raised as to the authenticity of the bank records. That is the account of William Kyne. But we would object to their going into evidence at this time.

Mr. Thompson: We offer Exhibit 23 for identification in evidence, without any reservation or restriction whatever, and call your Honor's attention to the fact that the income tax return for Elmer Remmer and his wife, Helen Remmer, Plaintiff's Exhibit 1, which is for the years 1944 to 1946 inclusive, report income from the B & R Smoke Shoppe.

The Court: And the period of time covered by those other documents cover the same place of business in the same period of time that is embraced within the admitted tax returns?

Mr. Thompson: Run from the period February 29, 1944, your Honor, to July 17, 1946.

The Court: Do you want to examine them with that point in mind? [129]

Mr. Gillen: May it please the Court, we call attention to the fact that the signature here sets forth: "I am the sole owner of the B & R Smoke Shoppe. Checks to be signed by myself only. William C. Kyne."

The Court: Very well, but the income tax returns, I presume, show that the defendant has some interest in that same institution?

Mr. Gillen: No, the income tax returns, your

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(Testimony of Harold B. Traunpour.)

Honor, show only that Mr. Remmer received some income from that institution. That doesn't mean that that is his bank account.

The Court: Very well. Exhibit will be admitted in evidence, Exhibit 23.

Mr. Gillen: He might only be working there. He might be an errand boy.

The Court: Exhibit 23.

Q. Mr. Traunpour, as part of Exhibit 23, I notice in the photostats of the ledger accounts the typewritten transcript with two items on it, $19.20 under date of February 7, 1944, with balance on that date of $712.27, and an item of $700 on February 17, 1945, with an item of $12.27, will you please explain how that typewritten transcript appears as part of your photostats?

A. It is merely because the photostat just preceding is very illegible and it was done over in this manner, just for clarifying sake. That is the way it came out of the photograph. [130] You can hardly see it at all.

Q. It is duplication of the photostat which precedes it?

A. That is right. It is a clear picture.

Q. Will you produce the signature cards and ledger accounts of the commercial account in the names of Elmer F. Remmer or A. F. Pritchett. Mr. Traunpour, what period of time is covered by the records included in Exhibit 24 for identification?

A. That covers period of time from February 17, 1945, to March 19, 1948.

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(Testimony of Harold B. Traunpour.)

Mr. Gillen: No objection to Exhibit 24 for identification going into evidence.

Mr. Thompson: We offer it, your Honor.

The Court: It will be admitted in evidence, Exhibit 24.

Q. Mr. Traunpour, will you produce the signature card of safe deposit box 130 in the names of Henry Clay and William E. Kyne, receipt for the return of the key to that box, and any other papers and records you have relating to the box?

Mr. Gillen: I take it, Mr. Traunpour, you have the originals of these cards? A. I do.

Mr. Gillen: Now, the defense is prepared to stipulate to the authenticity of these photostats as true photostatic copies of the original bank records and there has been no offer in evidence yet. However, in anticipation of an offer, we would make an objection. [131]

Mr. Thompson: It is my understanding that the defendant reserves only the objection of relevancy and materiality.

Mr. Gillen: That is right. Are you going to offer it at this time?

Mr. Thompson: No. I am just restating what I understood your stipulation to be.

Mr. Gillen: Our stipulation is that we will not raise any technical objection to the authenticity of the photostats as being true photographs of the records in the bank. However, we reserve any right to object to the document for any use whatsoever upon any ground or basis that arises.

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(Testimony of Harold B. Traunpour.)

Mr. Thompson: You stipulate that these are records of the bank kept in the ordinary and regular course of business?

Mr. Gillen: We will so stipulate to that, yes.

The Court: They have been marked?

Mr. Thompson: 25 for identification.

Q. Will you produce the signature cards and ledger account for the commercial account of Harold H. Maundrell for the period May, 1945 to June, 1946. Mr. Traunpour, does Exhibit 26 for identification consist of the signature card and transcript of a ledger account of the commercial account in the Crocker First National Bank entered under the name of Harold H. Maundrell?

A. That is correct.

(Jury and alternate jurors admonished and recess taken at 2:50 p.m.) [132]

3:05 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. TRAUNPOUR

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Gillen: Prosecution's Exhibit No. 26 for identification, the signature card and the photo-

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(Testimony of Harold B. Traunpour.)

stats, microfilms, of the commercial account of Harold H. Maundrell, we are prepared to stipulate that these are true authentic copies of the bank records of this account and we agree that they may go in evidence, subject to a motion to strike if they are not connected.

The Court: Very well.

Mr. Thompson: We offer them in evidence, your Honor, Exhibit 26 for identification.

The Court: I presume you accept the stipulation?

Mr. Thompson: Yes.

The Court: Exhibit 26 is admitted in evidence, subject to the motion to strike if it is not connected.

Q. Mr. Traunpour, will you produce the signature card and ledger account for the commercial account of Elmer F. Remmer and Harold H. Maundrell for the period June, 1945, to January, 1947?

Mr. Thompson: I ask that the documents the witness has produced be marked Plaintiff's Exhibit 27 for identification.

The Court: It may be so marked.

Mr. Gillen: May it please the Court, during the recess [133] this document was examined. We are prepared to stipulate, in the interest of time, this is a true and authentic photostatic copy of the original record of the bank on this account, and we are willing to stipulate that it may go into evidence, subject to a motion to strike, with the exception of the last three pages, which are for the year 1947

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(Testimony of Harold B. Traunpour.)

and which we would object to if offered in evidence, on the ground they are incompetent, irrelevant and immaterial and beyond the time embraced in the indictment, which goes only to the 31st of December, 1946, as I recall.

Mr. Thompson: Your Honor, the pages to which counsel objects, which are part of this offer, are for January, 1947. It is well known that in the ordinary course of banking business checks issued and passed during December of 1946 or preceding months frequently are not received by the bank——

The Court: I wonder if the records would disclose the checks that have to do with 1946? Could you make some arrangement whereby it would concern only 1946 transactions?

Mr. Avakian: Your Honor, as I understand it, the net worth computations of the government, insofar as this account, would concern the balance of that account on December 31, 1946. I do not see that anything that happened in 1947 could affect that balance.

The Court: I think we could resolve this by admitting [134] this exhibit in evidence, with the understanding that no material appearing in the last three pages, except checks which were received prior to January 1, 1947, would be admitted. That is just a suggestion.

Mr. Thompson: I believe your Honor stated checks received prior to December 31st.

The Court: January 1, 1947.

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(Testimony of Harold B. Traunpour.)

Mr. Thompson: Prior to January, 1947, or January 31st?

The Court: January 1st.

Mr. Thompson: What we had in mind, your Honor, if checks drawn on the account——

Mr. Gillen: We withdraw our objection. Let it all go in.

The Court: All right. It is admitted then.

Mr. Gillen: I should not have said we withdraw the objection. We withdraw the condition imposed on it. We place no condition on it. It may go in without condition.

The Court: Very well.

Q. Mr. Traunpour, are you familiar with the operations in the teller's cage at the Crocker First National Bank and the various stamps that are used by a teller in the Crocker First National Bank?

A. I think I would recognize them.

Q. What does a stamp on a check placed there by the Crocker [135] First National Bank, stating, "Credit to the account of drawer" mean?

A. It is credited to the account of the person who draws the check.

Q. And what would be involved in a transaction of that character?

A. What would be involved?

Q. Yes. I mean, how would that take place? Under what circumstances would that stamp be used?

A. Well, I have very seldom seen that particular

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(Testimony of Harold B. Traunpour.)

stamp used. There is one that is a little more in use, "Credit to the account of drawer."

Q. Well, do you know what that stamp means if it should appear on the check?

A. Well, as I just said, merely that it is credited to the account of the person who signs the check and draws the check.

Q. The maker of the check?

A. The maker of the check.

Q. And would that stamp be placed on a check if the person who drew the check on the account delivered it to the teller for deposit to the same account? Do you understand?

A. Would you clarify that a little.

Q. Would the stamp, "Credited to the account of drawer" be placed by the teller on the check if that check is offered for deposit to the same account upon which it is drawn? [136]

A. It wouldn't necessarily.

Mr. Gillen: I am afraid I am going to have to offer an objection, that this is purely some hypothetical matter that counsel is going into now and it is obvious that Mr. Traunpour, with all due respect to him, is not familiar with the particular significance of certain symbols or stamps of the bank. He said he thought he recognized them, but he seems to be unfamiliar with the particular hypothetical proposal made by the prosecutor.

The Court: I think the question perhaps is not understood by the witness.

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Mr. Thompson: I withdraw the question, your Honor. You may cross-examine.

Mr. Gillen: No questions.

(Witness excused.)

CASPER HARRIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Casper Harris.

Q. Where do you live?

A. San Anselmo.

Q. What is your business?

A. Unemployed at present.

Q. Are you married? [137] A. Yes, sir.

Q. What is your wife's name?

A. Hazel Harris.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, sir.

Q. How long have you known him?

A. Twenty-five or 30 years.

Q. Where have you known him?

A. In San Francisco, also Cal-Neva.

Q. Since in the year 1934 where, if you know, has Mr. Remmer resided?

A. 1934, I wouldn't know.

Q. Since 1934?

A. In the wintertime well Orinda, California, and Cal-Neva.

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(Testimony of Casper Harris.)

Q. In the wintertime?

A. In the wintertime I believe Orinda.

Q. And where in the summer time?

A. In Cal-Neva during the season.

Q. In the year 1945 were you and your wife engaged in any business in California?

A. My wife had a sandwich shop in San Anselmo.

Q. What is the name of the business?

A. H. & H. Sandwich Shop.

Q. Located in San Anselmo, California?

A. Yes, sir. [138]

Q. In the year 1945 did you have any business transactions with Mr. Elmer Remmer in connection with the operation of the H. & H. Sandwich Shop?

A. Yes, sir, I borrowed $2,500 from Mr. Remmer.

Q. Where did that transaction take place?

A. In San Francisco.

Q. Where in San Francisco?

A. I received the money at 50 Mason Street.

Q. From whom did you receive the money?

A. From Mr. Remmer.

Q. You received the sum of $2,500?

A. Correct.

Q. Did you receive it in cash or by check?

A. Cash.

Q. Was a note executed to evidence the obligation? A. No, sir.

Q. What did you do with the $2,500?

A. Gave it to my wife.

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(Testimony of Casper Harris.)

Q. In your conversation with Mr. Remmer relating to the loan, did he indicate to you where or to whom repayments of the loan should be made?

A. No. Checks were made out to Mr. Remmer to his home in Orinda, I believe.

Q. Did you, yourself, make any repayments on the loan?

A. The last payment, yes, sir, in cash. [139]

Q. You say you made that payment in cash?

A. Yes, sir.

Q. Of how much money? A. $250.

Q. When did you make that last payment?

A. I think it was in 1948.

Q. Were the other payments on the loan made?

A. They were made by check, yes, sir.

Q. By whom? A. By Mrs. Harris.

Q. What was the business located at 50 Mason Street where you met Mr. Remmer?

A. It was their office, I believe.

Q. What was the name of it? Did it have a name, as far as you know?

A. Not that I know of. It did have a name, but I can't recall it.

Q. Do you think it was the B. & R. Shop?

A. I don't know.

Mr. Gillen: Just a moment—do you think——

The Court: He has answered he doesn't know.

Q. What character of business was carried on there?

A. It was his office, as far as I know.

Mr. Thompson: You may cross-examine. [140]

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(Testimony of Casper Harris.)

Cross-Examination

By Mr. Gillen:

Q. Mr. Harris, as I understand your direct testimony, you asked Mr. Remmer, whom you had known for 25 or 30 years, to loan you $2,500 for your wife's business, is that correct?

A. Correct.

Q. And he gave you $2,500 in cash and took no note? A. Correct.

Q. And how was the money paid back? You stated by check. What arrangement was made? Did you make any arrangement?

A. It was understood my wife was to pay back $250 a month. The business was running away with her and her checks were slow coming in and Mare Island and the San Francisco Presidio, sometimes her checks would be six months coming.

Q. In other words, she had a wholesale sandwich shop and her business grew so fast and the income came so slow, she wasn't able to handle it?

A. That is right.

Q. And she needed some additional capital?

A. That is correct.

Q. And as I understand your testimony, your wife did pay all this loan of $2,500 back at the rate of $250 per month, by check sent to Mr. Remmer's home and the last payment was made by you in cash to Mr. Remmer for the year 1948, is that correct? A. Correct.

Q. And that last payment was for how much, do you recall? [141]

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(Testimony of Casper Harris.)

A. Two hundred fifty dollars.

Q. That was the last $250 that was owed?

A. Yes, sir.

Mr. Gillen: I think that is all.

(Witness excused.)

MRS. HAZEL HARRIS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. Mrs. Hazel Harris.

Q. You are the wife of Mr. Casper Harris who just preceded you on the witness stand?

A. That's right.

Q. And you live in San Anselmo, California?

A. That is right.

Q. During the years 1945 and 1946 did you operate a business in San Anselmo, California?

A. That is right.

Q. What was the name?

A. H. & H. Sandwich Shop.

Q. Did you have a commercial bank account in connection with the operation of that business?

A. Yes.

Q. Where was that bank account? [142]

A. It started out with the American Trust Bank.

Q. In Anselmo, California? A. Right.

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(Testimony of Mrs. Hazel Harris.)

Q. Did you also have a personal account in that bank? A. That's right.

Q. Do you know Mr. Elmer Remmer?

A. Well, I have met him a few times. He was my husband's friend, but I have met Mr. Remmer several times.

Q. During the years 1945 and 1946 did you send payments to Mr. Remmer?

A. Well, I perhaps addressed the letter to Mrs. Remmer, if I remember right. I wouldn't be positive about that, but I think it was addressed to Mrs. Remmer.

Q. And you did make payments to Mr. Remmer? A. Yes, I made payments the same way.

Q. How many payments did you make during that period? A. Nine.

Q. And in what amounts?

A. $250 each, each check.

Q. Do you have any checks representing the payments that you made to Mr. Remmer?

A. Yes.

Q. Will you produce them please?

Mr. Gillen: If counsel wishes to offer these in evidence, we will stipulate that they may go without objection. [143]

Mr. Thompson: I offer in evidence as Plaintiff's Exhibit 28, your Honor, seven checks, the first being dated September 15, 1945, payable to the order of E. Bremmer for the sum of $250; the second being dated October 15, 1945, payable to the order of E. Bremmer for $250; the third being

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(Testimony of Mrs. Hazel Harris.)

dated November 15, 1945, payable to the order of E. Bremmer; the fourth being dated May 6, 1946, payable to the order of E. Remmer for $250; the fifth being dated October 6, 1946, payable to the order of E. Remmer for $250, the next one dated July 6, 1946, payable to the order of E. Remmer for $250, and the last dated June 6, 1946, payable to the order of E. Remmer for $250.

The Court: By stipulation they are admitted in evidence.

Mr. Gillen: Yes, that is the stipulation; they may be offered in evidence.

Q. Referring to Plaintiff's Exhibit 28, Mrs. Harris, I note three checks drawn to the order of "E. Bremmer." Who is E. Bremmer?

A. Well, that was meant to be Elmer Remmer, but I didn't know him well enough at the time when I first started writing the checks and I thought his name was Bremmer until I was corrected by my husband.

Q. What was the purpose of sending Mr. Remmer those seven checks making up Exhibit 28?

A. To repay the loan.

Q. You testified, I believe, that you made nine rather than [144] seven payments by check to Mr. Remmer. Do you have the other two checks?

A. No, I couldn't locate them.

Q. Were the other two checks that you have not been able to find also drawn payable through the bank account of the H & H Sandwich Shop or

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(Testimony of Mrs. Hazel Harris.)

bank account of Mrs. Hazel Harris in the American Trust Company?

A. That I do not know.

Q. Did you have any other bank accounts at that time?

A. No, I did not. I do not believe so anyway.

Q. Do you know whether or not the other two checks which you have been unable to find were presented to your bank for payment and charged against your account?

A. I don't understand your question.

Q. You understand, Mrs. Harris, when you give somebody a check drawn upon your bank account, it finally comes back to your bank and the bank charges it against your account? A. Yes.

Q. You testified you have delivered to Mr. Remmer two checks which you have been unable to find. Do you know whether or not those two checks were in the sum of $250, were actually charged against your bank account?

A. Oh they must have been. They have to be, but I just have not taken care of my checks evidently and I couldn't find them.

Mr. Thompson: You may cross-examine. [145]

Cross-Examination

By Mr. Gillen:

Q. You know you wrote 9 checks however?

A. That is right.

Q. And initially, as I understand your testimony, your husband having obtained this loan for

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(Testimony of Mrs. Hazel Harris.)

you from a friend to assist you in your business, you were initially under the impression his name was Bremmer instead of Remmer?

A. That is right.

Q. And that was because of your lack of intimate acquaintance? A. That is right.

Q. And after writing it as E. Bremmer, your husband corrected you and told you it was Remmer?

A. That is right.

Q. And thereafter you wrote all other checks to Mr. Remmer, is that correct? A. Yes.

Q. Is it your best recollection, beside a couple of checks written, I believe in the year 1945, latter part of 1945, that all subsequent payments by check by you were made in the year 1946?

A. Well, isn't there a few months between 1945 and 1946 there?

Q. Yes, there is.

A. I wouldn't know which checks are missing.

Q. In other words, according to the checks as introduced by counsel under our stipulation, the first check was written September [146] of 1945, the second October, the third check November, and then there is a space of time, the next check appears to be in May of 1946 and then a check in October of 1946.

A. Perhaps I didn't pay on time as I should.

Q. I beg your pardon, the next check in June, none in July, and the next in October of 1946. Would you say that all of your checks were paid in

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(Testimony of Mrs. Hazel Harris.)

1946 excepting the three which were paid in 1945, is that your best recollection at this time?

A. I really don't know when the others were paid.

Q. Did you completely pay the $2,500, or was additional payment made by some one other than yourself?

A. No, the last payment was made by my husband by cash.

Q. Do you have any recollection now as to whether or not those two checks that you were unable to find were issued in 1945 or during the year 1946? A. I couldn't say.

Q. Would you say it was one year or the other, that is 1945 or 1946?

A. I just couldn't say because I don't remember.

Q. Do you still have that business, the H & H Sandwich Shop? A. No.

Q. When did you give that business up?

A. Shortly after the war was over.

Q. In 1946?

A. One month after the war was over. [147]

Q. By the way, Mrs. Harris, do you recall when you got that money, the $2,500?

A. Well, some time in the year 1945. It would have to be in the year 1945.

Q. What was the necessity for you having that additional capital?

A. Well, my business—it was my first experience in business and I didn't realize it cost as much to go into business as it did and I needed more

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(Testimony of Mrs. Hazel Harris.)

money to carry me along. I was selling wholesale sandwiches and needed more money to pay my help and current bills because the government doesn't pay at the end of the month like a lot of people do, the first of the month. It took them 15 or 20 days sometimes to pay me and the people I bought from demanded their money, so I needed the money to carry on.

Q. You had to have additional capital and your husband effected this loan to you? A. Yes.

Q. Who delivered the $2,500 to you?

A. My husband delivered it.

Q. I take it you put it in your commercial account?

A. I put it in there but I can't find a ledger that I deposited $2,500, but I perhaps used a part in cash for something else, but I don't remember what—different bills coming in for different accounts. I can't say which one on the ledger it would be. [148]

Q. Did you have any partner in that sandwich shop?

A. I really didn't, but I started out to have. After about a week or ten days my sister-in-law started out with me, but she didn't have sufficient capital to keep up with me, so she backed out. That is why her name is on the bank signature when I opened the account.

Q. Did you have any other partner at any time in that business? A. No.

Q. Was Mr. Elmer Remmer, the defendant in

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(Testimony of Mrs. Hazel Harris.)

this case, ever a partner or ever have an interest?

A. I should say not.

Q. And payments that you made to him were exclusively for the return of loan made to you through your husband by Mr. Remmer?

A. Absolutely.

Mr. Gillen: That's all.

Redirect Examination

By Mr. Thompson:

Q. When did you open the business of the H & H Sandwich Shop? A. In the year 1945.

Q. Do you recall when?

A. No, probably my husband would know more about it than I.

Q. Approximately?

A. I don't remember the exact date. It seems to me like it was in June. I am a very funny person, I can't remember dates. It seems to me it was in the fall time, or the late summer or fall. [149]

Recross-Examination

By Mr. Gillen:

A. Mrs. Harris, with regard to the two checks that you were unable to locate, I note in the checks that were introduced in evidence under the prosecution's Exhibit 28, there is no reference made or any check found for the month of November, 1946, but I note in the prosecution's Exhibit 21——

Mr. Thompson: If the Court please, I object to

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(Testimony of Mrs. Hazel Harris.)

counsel reading from any exhibit not admitted in evidence at this point.

Mr. Gillen: I was just looking at that now and see that it isn't. I wonder if I might refresh the witness' recollection by showing her Exhibit 21?

The Court: I think so.

Mr. Thompson: If the Court please, I offer Exhibit 21 in evidence.

Mr. Gillen: I think there is no objection to it.

The Court: Exhibit 21 is now in evidence.

Mr. Thompson: We also offer Exhibit 22 in evidence.

Mr. Gillen: No objection to either of those.

The Court: Exhibit 22 is admitted.

Q. I note in the prosecution's Exhibit 21, which purports to be copy of the activities of a commercial account in the name of Hazel Harris, 100 Park Drive, that in the month of November of 1946 there appear vouchers in the form of some checks issued for $250 each in two instances, down at the bottom of the page. Would that refresh your recollection of the two checks you were unable to find, that either one or both of those might be the [150] checks you couldn't find?

A. One is for $250 and one for $256.

Q. I believe that is right.

A. There would be no reason for the $256 given for the payment and the one of $250 I wouldn't say, because it could be or could not be.

Q. That doesn't assist you?

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(Testimony of Mrs. Hazel Harris.)

A. No, I don't know whether that would be the one or not.

Q. Now I note this exhibit, Mrs. Harris, and it may be examined by you if you wish, or by counsel, this exhibit No. 21 in evidence, that there are a few instances of checks written in the sum of $250. Can you think of anybody other than Mr. Remmer that you would with some regularity write out a check for $250?

A. I think I live the average life. There could be most anybody, I wouldn't know.

Q. That doesn't help you. All right.

(Witness excused.)

WARREN T. SYLVEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Warren T. Sylvey.

Q. Where do you live?

A. 2685 18th Avenue, San Francisco, [151] California.

Q. What is your business? A. Banking.

Q. By whom are you employed?

A. Bank of America, San Francisco.

Q. In what capacity?

A. Assistant vice-president.

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(Testimony of Warren T. Sylvey.)

Q. Are you appearing here pursuant to a subpoena issued and served upon the Bank of America National Trust and Savings Association at San Francisco? A. I am.

Q. Have you brought with you certain records of the Bank of America? A. I have.

Q. Will you produce the signature cards and ledger accounts of the account of B & R Smoke Shoppe for the period March 12, 1943, to January 23, 1945? Are you prepared to supply photostats of the bank's original records? A. I am.

Q. Have you also brought with you the original records of the bank? A. I have.

Mr. Thompson: I ask the records produced by the witness in response to my request be marked Exhibit 29 for identification.

Mr. Gillen. In the interest of time, we are prepared [152] to stipulate that Exhibit 29 for prosecution identification comprise a true and authenticated copy of the original records of the bank for this account and may be offered in evidence if the prosecution so desires, subject, of course, to our motion to strike in the event it is not connected up when it comes to the material issues of this case.

Mr. Thompson: We accept the stipulation, your Honor.

The Court: It may be admitted in evidence, Exhibit 29, subject to motion to strike.

Q. Mr. Sylvey, will you produce signature cards and ledger accounts for the account of the 186

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(Testimony of Warren T. Sylvey.)

Club for the period October 8, 1946, to January 31, 1947?

Mr. Gillen: May we see the originals at the same time?

Mr. Thompson: I ask that the documents produced by the witness at my request, your Honor, be marked Plaintiff's Exhibit 30 for identification. This witness is to produce a number of exhibits and if I could be permitted to call for them and have them marked for identification, then the attorneys might have opportunity to examine them all at once; if we could proceed in this way.

Mr. Gillen: That is the way we suggested a number of days ago, that we be permitted——

The Court (Interceding): We don't care what your suggestion was several days ago. Do you consent to this or not? [153]

Mr. Gillen: The only reason I made this remark——

The Court: I don't care to have any remark made. Let us forget a couple of days ago.

Mr. Thompson: My suggestion wasn't made in a critical way.

The Court: All right.

Mr. Gillen: I don't want to be critical, because we have to read things we don't know about.

The Court: We don't need to have any remarks. Proceed. Let us not have any trouble.

Mr. Gillen: I am not having any trouble. I just want to speak about something.

The Court: I don't want to hear from you.

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(Testimony of Warren T. Sylvey.)

Mr. Gillen: Very well, I will sit down then.

The Court: You may proceed with the examination of the witness.

Q. Mr. Silvey, I show you Plaintiff's Exhibit 30 for identification. Are those photostats of the original records of the Bank of America maintained and kept by the bank in the ordinary and customary course of the business of the bank?

A. They are.

Q. Is it part of the business of the Bank of America to keep and maintain records of that character? A. It is.

Q. And do those records consist of the signature cards and [154] transcript of the ledger account pertaining to the account of the 186 Club?

A. They are.

Q. Do the records contained in Exhibit 30 for identification refer to a period of time from October 8, 1946 to February 17, 1947?

A. They do.

Mr. Thompson: I offer the exhibit in evidence, your Honor.

Mr. Gillen: If I dare, I might suggest that I was going to stipulate to that.

The Court: Just a minute. I don't want any remarks like that—"if I dare." I am not going to tolerate any sarcasm from you or any one else. When you say if you may dare, it is not very kind or courteous remark. Let us go along.

Mr. Gillen: May it please the Court, I am an advocate.

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(Testimony of Warren T. Sylvey.)

The Court: Don't talk, because I will not tolerate——

Mr. Gillen: You are being very unfair. I can't even explain. You are being unfair. You won't even permit me—I am an advocate in this court. You refer to me as outsider and not belonging here.

The Court: We will excuse the jury until Monday morning at 11:00 o'clock, and please remember the admonition you have heard so many times, not to discuss among [155] yourselves or any one else any matter connected with the trial of this case, or form or express any opinion on this case until it is finally submitted to you, and I mentioned at the beginning of the trial and you promised that you would not read the newspaper reports and please do not do so and do not permit any one to talk to you about this case until it is finally submitted. If any should persist in talking to you, please report that person to the Court. We will be in recess until Monday morning at 11:00 o'clock in this case. We have a calendar to call at 10:00 o'clock.

(Jury excused at 4:05 p.m.)

(In the absence of the jury.)

The Court: Now, I want to tell you, Mr. Gillen, I do not want to punish you for contempt, but you are going to force me to do it. I do not want any back talk from you. I try to conduct this trial fairly. I have not any prejudice against anybody from San Francisco or from Africa. Now, I don't want any back talk and when you make a remark,

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"If I dare," addressed to this Court, you can't get away with it. If I have any talk from you any more, I will commit you for contempt of court, understand it.

Mr. Gillen: Might I say to your Honor, I realize I am [156] an officer of this court——

The Court (Interceding): I don't want any talk. I will hear only when you ask questions and address remarks to the jury but none such remarks to me. We will be in recess in this case until 11:00 o'clock and all witnesses subpoenaed are ordered to be here at that time. Court will convene at 10:00 o'clock to call the calendar Monday morning.

Mr. Golden: May I request in another matter we would like to make some arrangement to have matters which are in evidence available at seasonable times and under seasonable conditions so we can examine and take photographs.

The Court: Can you make some arrangement with counsel, Mr. Clerk?

Mr. Golden: We have no objection if we can make proper arrangements with the clerk.

The Court: They may not be taken from the clerk's office. They may be examined at any reasonable time to suit the clerk's office hours.

(Recess taken at 4:15 p.m.) [157]

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Monday, December 3, 1951, 11:35 A.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

Mr. Pike: Your Honor, Mr. Walter M. Campbell, Jr., is present as counsel in the case.

The Court: Exhibit 30 was offered in evidence and no ruling was made. Was there any objection?

Mr. Gillen: No, not yet and we were going to stipulate the exhibit may go in.

The Court: Exhibit 30 is admitted in evidence.

MR. SILVEY

resumed the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Silvey, will you produce the signature cards and ledger accounts for the account of the defendant for the period October 8, 1941 to January 31, 1947.

Mr. Thompson: Your Honor, I ask that these documents the witness has produced in response to my request be marked Plaintiff's Exhibit 31 for identification.

The Court: They may be so marked.

Q. Mr. Silvey, will you produce the signature cards and ledger accounts for the account for the 110 Eddy Street for the period from September 23, 1942 to February 1, 1945, and for the period from February 5, 1945 to January 31, 1947?

Mr. Thompson: Your Honor, I request the ex-

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(Testimony of Warren T. Silvey.)

hibits he [158] has produced in response to my request be marked Plaintiff's Exhibit 32 for identification.

The Court: So marked.

Q. Mr. Silvey, will you produce the signature cards and ledger accounts of the account of William E. Kyne for the period from September 15, 1942 to March 5, 1945?

Mr. Thompson: I ask that the records the witness has produced in response to my request be marked Exhibit 33 for identification.

The Court: It may be so ordered.

Q. Mr. Silvey, will you produce the signature cards and ledger account for the account of the Menlo Club for the period October 2, 1946 to March 11, 1948?

Mr. Thompson: I ask that the records produced by the witness be marked Plaintiff's Exhibit 34 for identification.

The Court: So marked.

Q. Mr. Silvey, from what branch of the Bank of America have the records which you have so far produced at the trial been taken?

A. The Day and Night office, Bank of America in San Francisco.

Q. What is the address of that office?

A. No. 1 Powell.

The Court: I think it might be well to take a recess so you will have time to look over these exhibits.

(Jury and alternate jurors admonished and recess taken at 11:45 a.m.) [159]

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Afternoon Session, December 3, 1951, 2:00 P.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

MR. SILVEY

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Gillen: May it please the Court, defense counsel has examined the prosecution's exhibits for identification Nos. 31 to and including 34. We are prepared to stipulate that they may be offered in evidence without objection.

The Court: Very well.

Mr. Gillen: Of course, that is subject to the provision that we mentioned the other day and your Honor held, subject to the motion to strike in the event they are not connected with this defendant, they being in bank accounts of other names.

Mr. Thompson: That is satisfactory.

The Court: Pursuant to stipulation, Exhibits Nos. 31, 32, 33, and 34 will be admitted.

Q. Now, Mr. Silvey, you have also brought, pursuant to the same subpoena, certain records of the Grand Lake Branch of the Bank of America?

A. I have.

Q. Will you produce at this time the signature card and ledger accounts for commercial account of Mrs. Helen L. Remmer for the period June 1, 1945, to July 31, 1947, together with the [160] fol-

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(Testimony of Warren T. Silvey.)

lowing deposit slips for the account: June 19, 1945, for $250; July 17, 1945, for $250; August 17, 1945, for $200; May 6, 1946, for $400; June 6, 1946, for $250; August 5, 1946, for $350; September 16, 1946, for $250; October 9, 1946, for $250; December 10, 1946, for $250, and January 6, 1947, for $250.

A. All right.

Mr. Thompson: Your Honor, I request that these records, all relating to the account of Mrs. Helen L. Remmer on the Grand Lake Branch of the Bank of America in Oakland, California, be marked Plaintiff's Exhibit 35 for identification.

The Court: It may be so marked.

Q. Mr. Silvey, you have also brought records from the 12th & Broadway Branch in Oakland of the Bank of America? A. I have.

Q. Will you produce the following cashier's checks and applications for cashier's checks, bearing the following numbers: No. 25166567, dated August 14, 1942? A. For $14,000.

The Court: Never mind mentioning the amounts.

A. I am sorry.

Q. Mr. Silvey, you have handed me Bank of America cashier check No. 25166567. You were also subpoenaed to produce the application for that check. Do you have that record? A. I do not.

Q. Where is that record? [161]

A. It has been destroyed.

Mr. Thompson: I ask that the cashier's check

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(Testimony of Warren T. Silvey.)

indicated be marked Plaintiff's Exhibit 36 for identification.

The Court: So marked.

Q. Mr. Silvey, under what circumstances are the bank's applications for cashier's checks destroyed?

A. Six-year period.

Q. You retain them for six years and then they are all destroyed? A. That is correct.

Q. Have you brought with you cashier's check No. 25166830, dated August 19, 1942?

A. I have.

Q. Will you produce it, please?

Mr. Thompson: I ask the check produced, your Honor, be marked Plaintiff's Exhibit 37 for identification.

The Court: So marked.

Q. Mr. Silvey, have you also produced check No. 25107378, dated February 11, 1946?

A. Will you repeat the number?

Q. 25107378. A. I have that number.

Q. The date is incorrect that I read to you?

A. The date is incorrect.

Q. What is the date? [162]

A. February 8, 1946.

Q. You also have produced with it the application for the check? A. I have.

Mr. Thompson: I ask cashier's check and application be marked Plaintiff's Exhibit 38 for identification, your Honor.

The Court: So marked.

Mr. Gillen: Are those Oakland branches?

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(Testimony of Warren T. Silvey.)

Mr. Thompson: Yes, those records are all from the 12th & Broadway Branch in Oakland.

A. Also known as Oakland Main Office.

Q. Have you also produced, Mr. Silvey, cashier's check No. 25107434? A. I have.

Q. Is that dated February 11, 1946?

A. That is correct.

Q. Do you have the application for that check?

A. I do.

Q. Will you produce that, please?

Mr. Thompson: I ask the check and application be marked Plaintiff's Exhibit 39 for identification.

The Court: So marked.

Q. Referring, also, Mr. Silvey, to the records of the Oakland Main Office of the Bank of America, have you produced, pursuant to subpoena, the records of the bank relating to loan [163] No. 25288?

A. I have.

Q. Regarding loan to Mrs. Helen Remmer and Miss Dorothy A. Remmer? A. I have.

Q. Have you handed me the only records you have brought relating to that?

A. No, I have the original. Now when you say the only record, what do you mean?

Q. What is the bank designation of the record you have produced?

A. This is the loan record.

Mr. Thompson: I ask that the record produced, your Honor, be marked Exhibit 40 for identification.

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(Testimony of Warren T. Silvey.)

The Court: Is it understood that the photostat copy may be marked?

Mr. Gillen: Yes.

Q. Mr. Silvey, you also produced certain records of the Tracy Office of the Bank of America, in Tracy, California? A. I have.

Q. Will you produce the signature cards and ledger account for the commercial account of Helen L. Remmer for the period November 30, 1943, to March 19, 1947?

Mr. Thompson: I ask that the records produced be marked Exhibit 41 for identification, your [164] Honor.

The Court: So marked.

Q. Have you also brought with you, Mr. Silvey, the cashier's check and application therefor from the Fresno Office of the Bank of America, check No. 106963, dated February 6, 1947?

A. I have.

Mr. Thompson: I ask that this be marked Exhibit 42 for identification, your Honor.

The Court: So marked.

Q. Referring to the loan account, Mr. Silvey, in the Oakland Main Office of the Bank of America, regarding a loan to Helen Remmer and Dorothy A. Remmer, have you brought with you any other records of the bank relating to that account, other than the transcript of the account which you produced as Plaintiff's Exhibit 40 for identification?

A. I have what is commonly called a credit file.

Q. You have with you the originals of these letters?

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(Testimony of Warren T. Silvey.)

A. Well, they are actually filed duplicates of original letters that were written.

Q. And the letters which you have produced, photostats of letters, relating to the credit file in connection with the loan of Mrs. Helen Remmer and Dorothy A. Remmer, are either copies of letters written by your bank in connection with that transaction or are photostats of the original letters which were received by the bank from some other sources?

A. That is correct. [165]

Mr. Thompson: I ask that that be marked 43 for identification.

Mr. Gillen: May I make this suggestion, if that is on that one loan account, I believe it would be more practical and easier to follow if it was all included in Exhibit 40.

The Court: Either that or mark it 40-A. Which would you suggest?

Mr. Gillen: Either one would be satisfactory.

The Court: It will be marked Exhibit 40-A.

Q. Mr. Silvey, have you also produced records of the Day and Night Branch of the Bank of America relating to an escrow set up at that bank in connection with the transaction between Mr. William E. Kyne and Max Silverman?

A. They are not records of the Day and Night Branch. They are records of our Trust Deposit San Francisco Main Office.

Q. Can you produce those?

Mr. Thompson: I ask that the photostats of the bank records referring to the escrow account be-

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(Testimony of Warren T. Silvey.)

tween Max Silverman and Will E. Kyne be marked Plaintiff's Exhibit 43 for identification.

The Court: So marked.

Mr. Thompson: I would like to inquire whether counsel have as yet had an opportunity to examine the exhibits just marked?

Mr. Gillen: Nothing beyond 34. [166]

Mr. Thompson: Your Honor, those are all the records we have to introduce by this witness. However, he cannot be excused until counsel has had an opportunity to examine them and cross-examine.

Mr. Gillen: Then we will have to have a little time.

(Jury and alternate jurors admonished and recess taken at 2:30 p.m.)

3:00 P.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

MR. SILVEY

resumes the witness stand.

The Court: I want to explain to the jury, counsel was occupied with the examination of records. That is why we kept you so long.

Mr. Gillen: May it please the Court, the defense is prepared to stipulate that the prosecution's Exhibit 35 may be offered in evidence without objection, subject, however, to the defense's motion to strike in the event it is not properly connected up.

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(Testimony of Warren T. Silvey.)

The defense will stipulate, under the same conditions, to the admission in evidence of prosecution's Exhibit 36. Also under the same conditions prosecution's Exhibit 37. Also prosecution's Exhibit 38. Also No. 39, No. 40 and No. 40-A; also to the prosecution's Exhibit 41, and that, of course, contains an Elmer Remmer signature card, so that already is connected with the defendant and would not be subject to that [167] condition that we reserved on the others. And the defense will also stipulate to the admission in evidence of prosecution's Exhibit 43, subject to the same condition, motion to strike in the event that it isn't connected up. The defense will object to prosecution's Exhibit 42 and the objection is based upon the ground that it involves a cashier's check on the Fresno Branch of the Bank of America, the check being dated February 6, 1947. The basis of the objection of the defense is that this is a date after the time period fixed in the indictment, which is through the year 1946.

The Court: Now I understand, Mr. Gillen, of the exhibits which you have just stipulated may be admitted, No. 41 is admitted without——

Mr. Gillen: Without any condition, your Honor, because it is the account of Elmer Remmer at the Tracy Office of the Bank of America and bears his signature on the signature card, so that is directly, of course, connected with the defendant.

The Court: You have heard the objection to No. 42?

Mr. Thompson: Yes, your Honor. In reference

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(Testimony of Warren T. Silvey.)

to Exhibit 42, your Honor, I would like to point out that Mrs. Badovinatz—I think that is how you pronounce her name—of Fresno testified that in February of 1947 her husband told her he was going to obtain a check. We believe this particular cashier's check for five thousand dollars payable to Elmer Remmer is the check involved and that it should be received in evidence, evidencing [168] repayment of a loan which existed during the indictment time.

Mr. Gillen: Of course, your Honor, there is absolutely no basis for that in evidence. In other words, that may have represented a loan made two days before the cashier's check was made, it may have been made two weeks or a year before 1947. In other words, it may have been payment of loan made long prior to the year 1944, the opening year of the indictment, so on that basis I think at this time there is no foundation laid for the admission of that in evidence and until such foundation is laid, if it ever can be, that the objection of the defense is good.

The Court: I wonder if I could look at that check. That is 42?

Mr. Gillen: 42. While you are looking at that, your Honor, may the reporter read the last part of Mr. Thompson's statement?

(Statement read.)

Mr. Gillen: I think probably counsel used that phraseology inadvertently. There is no evidence it

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(Testimony of Warren T. Silvey.)

was in payment for a loan existing in 1946. There is no evidence when the loan is made, no evidence whatever in the record.

Mr. Thompson: Your Honor, I would like to inquire whether counsel will stipulate that Exhibit 42 is a record of the Fresno Branch of the Bank of America kept and maintained in the ordinary and customary course of its business? [169]

Mr. Gillen: We will stipulate that it is an authenticated reproduction of the original check. We do not raise any technical question as to the authenticity of the reproduction.

Q. Mr. Silvey, in reference to Exhibit 37——

Mr. Gillen: It might keep the record clearer if we waited for his Honor to rule on the objection.

Mr. Thompson: Excuse me. I overlooked that, your Honor.

The Court: If I recall the lady's testimony, it seemed that this conversation occurred in February, 1947.

Mr. Gillen: That is correct, between herself and her husband alone at the time. We have the transcript if your Honor would care to see the exact answer she gave. We would like to have your Honor look at it.

The Court: Very well.

Mr. Gillen: There was some technical objection, but the pertinent testimony all appears on page 97 of the transcript. May I hand it to your Honor?

The Court: Yes. At page 95 I see this question: "Will you state at this time what the conversation

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(Testimony of Warren T. Silvey.)

was that you had with your husband in February, 1947?" Then there was an objection and some discussion, and later on she testified here it was in February.

Mr. Gillen: If your Honor will note, she wasn't even asked concerning any personal knowledge she had of the circumstances and when the loan was made and there is no connection [170] in the record.

The Court: Objection will be overruled and the exhibit admitted in evidence as Exhibit 42.

Mr. Gillen: Your Honor is admitting that?

The Court: Yes, sir. My thought is that it is for the jury to determine under all the circumstances surrounding that, that the question here of the Exhibit 42 applies to that same transaction. That is my thought in the matter.

Mr. Gillen: We are not raising that point. In fact, I do not think we have any doubt that that Fresno check refers to the check mentioned by Mrs. Badovinatz. Our point is this, that there is no evidence in the record to show when the loan was made and unless the loan was made within the time period of the indictment, between and inclusive of the years 1944 to 1946, then it should not be before us and we feel your Honor should not have admitted it until and unless the prosecution is able to show that it represented a loan made in 1944, 1945, or 1946. Repayment of a loan in 1947 might have been made two weeks before whatever date it was in 1947.

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(Testimony of Warren T. Silvey.)

The Court: I think still that would be a question for the jury. The ruling will stand.

Mr. Thompson: Did your Honor make formal ruling on the other exhibits?

The Court: Yes, they are all admitted, all subject to a [171] motion to strike except Exhibit 41. I think that was the one that you stated, Mr. Gillen.

Mr. Gillen: We stated there was no condition placed upon that to connect it up.

The Court: The other exhibits are admitted, subject to motion to strike.

Mr. Gillen: So we may have the record clear, your Honor has admitted Exhibit 42 over our objection. May that be admitted over our objection, subject to the motion to strike in the event there is no evidence showing that the loan was made during the period of time named in the indictment?

The Court: No, I think we will let that stand the way it is, Mr. Gillen.

Mr. Gillen: We are just asking to impose the same condition as we are to the other exhibits, with the exception of 41.

The Court: However, I won't place a bar, and perhaps when it comes time to argue these motions you might develop something that will warrant me to reconsider and sustain your motion.

Q. I show you Plaintiff's Exhibit 37, Mr. Silvey, that is a cashier's check of the Bank of America, Main Office, dated August 14, 1942, to the order of the Oakland Title Insurance & Guaranty Company for five thousand dollars, check No. 25166830.

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(Testimony of Warren T. Silvey.)

Were you also requested to produce the application for that [172] particular check? A. I was.

Q. Did you produce it? A. I did not.

Q. Has that application also been destroyed under the same circumstances as the application requested in connection with Exhibit 36?

A. It has been.

Q. Mr. Silvey, on an application for a cashier's check and that portion of it designating the source of the funds to be used to pay for the check, if the word "register" should appear on that blank for application, do you know what that would mean?

A. It would depend on which department the cashier's check was issued out of. There are many, many departments in a bank, and each one maintains a register.

Q. Do you know out of what department of the Oakland Main Office Exhibit 37 was issued?

A. I do not.

Q. By looking at Exhibit 37 could you determine that? A. I could not.

Q. On occasion does the loan department of the bank issue cashier's checks? A. They do.

Q. And assuming that Exhibit 37 was issued by the loan department of the bank and the word "register" appeared on the application for the check as the source of the funds paying for [173] the check, do you know what that would mean?

A. It would mean that a loan that day was registered and the proceeds of the loan paid by cashier's check.

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(Testimony of Warren T. Silvey.)

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Silvey, I want you to look at the signature card in prosecution's Exhibit 41. I am handing you the prosecution's Exhibit 41 and I will ask you to look at a portion of that exhibit which is a signature card and tell us, if you will, what is indicated on there as to the date that the signature card was signed and that account opened?

A. It indicates that it was opened on January 25, 1939.

Q. And that was a commercial account, was it not? A. That is correct.

Q. That means that that commercial account came into existence on January 25, 1939? Correct?

A. That is correct.

Q. Now there is another—I don't know whether it represents a separate card or whether it represents the reverse side of the signature card?

A. It is a separate card.

Q. There is another party's name occurring on there. What is that other party's name?

A. The signature name is E. Remmer by W. R.——

Q. Gift, isn't it? [174] A. Gift.

Q. Now is there any way for you to tell from that exhibit whether or not there existed in the Tracy Branch of the Bank of America an earlier commercial account? A. Prior to 1939?

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(Testimony of Warren T. Silvey.)

Q. Yes. A. No, there is none.

Q. Do you mean there is no way of telling, or you can tell from that exhibit that there was no pre-existing account?

A. From the signature card I am unable to determine whether there was an account prior to January 25, 1939.

Q. So that that wouldn't indicate it was a renewal card or continuance of an old account?

A. No. This would indicate this is a new account opened for the amount of $50 on January 25, 1939.

Q. Now on Exhibit 42, which is the Fresno Bank of America cashier's check dated February 6, 1947, can you tell us which branch that is on? With the Court's permission, I hand you Exhibit 42. Can you tell us which branch that cashier's check was issued to in Fresno? You have two or three branches in Fresno, have you not?

A. That is right. This was issued out of the Fresno Main Office.

Q. Now I would like, with the Court's permission, to show you another exhibit, Exhibit 35. I will identify that as Helen Remmer account in the Oakland Main Bank of the Bank of America; [175] is that correct?

A. No, this account was established at the Grand Lake Branch.

Q. That is right. Can you tell us when that account was opened by Mrs. Helen Remmer?

A. October 28, 1942.

Q. Mr. Silvey, you couldn't make out the open-

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(Testimony of Warren T. Silvey.)

ing date of this account, Exhibit 35, from the photostat; is that correct? A. That is correct.

Q. And you looked on the original?

A. Looked on the original.

Q. The original shows October of 1942; is that correct? A. That is what I believe it to be.

Q. It is blurred on the photostat?

A. And it is a bit blurred on this.

Mr. Gillen: I think that is all; thank you.

Redirect Examination

By Mr. Thompson:

Q. Mr. Silvey, Mr. Gillen showed you Exhibit 41, which is signature card and the transcript of the account of Elmer F. Remmer in the Tracy Branch of the Bank of America. What are the two small cards making up part of that exhibit?

A. The first is a signature card covering the conditions under which the account is maintained, and the authorized signature to withdraw the funds from that account.

Q. On that signature card how many authorized signatures were indicated? [176]

A. There was one.

Q. Whose signature is that?

A. Elmer F. Remmer.

Q. What is the second small card making up part of that exhibit?

A. That is what is called an authorization card.

Q. What is the purpose of it?

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(Testimony of Warren T. Silvey.)

A. For mailing of statements and cancelled checks and for the return of deposited items that may have been deposited in the account and had been returned unpaid to the account and for service charges under certain scheduled conditions.

Q. And that is the card that is signed Elmer Remmer by W. R. Gift? A. That is right.

Q. Was any one other than Elmer F. Remmer authorized to draw checks on this account at any time? A. At no time.

Mr. Thompson: That's all.

Recross-Examination

By Mr. Gillen:

Q. I wonder would you be kind enough to look at, with the Court's permission, the original signature card of Exhibit 41? Mr. Silvey, you testified, in looking at the photostat, that it appeared to you that the account had been opened with a deposit of $50. I will ask you to look at the original and see if the account wasn't opened with an initial deposit of $150? A. Yes. [177]

Q. So the original card shows it was opened with an initial deposit of $150 instead of $50 which you stated in looking at the photostat; is that correct? A. That is correct.

(Witness excused.)

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DANA E. BREMNER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Dana E. Bremner.

Q. Where do you live?

A. 6326 Roanoke Road, Oakland, California.

Q. What is your employment?

A. Oakland Title & Guaranty Company, Oakland.

Q. How long have you been employed by the Oakland Title Insurance & Guaranty Company in Oakland, California? A. About 15 years.

Q. Are you appearing here today pursuant to a subpoena served upon the Oakland Title Insurance & Guaranty Company? A. I am.

Q. Have you brought with you certain of the business records of that company called for in the subpoena? A. Yes, sir.

Q. Will you produce the records of the Oakland Title Insurance & Guaranty Company relating to an escrow No. 312404? [178] Mr. Bremner, the record you have produced has been marked Plaintiff's 44 for identification. I would like to ask you whether those records are records kept and maintained by the Oakland Title Insurance & Guaranty Company in the usual, regular and customary course of the operation of its business?

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(Testimony of Dana E. Bremner.)

A. They are.

Q. Is it part of the business of the Oakland Title Insurance & Guaranty Company to act as escrow agent in real estate transactions?

A. Yes, it is.

Q. Is it also part of the business of the Oakland Title Insurance & Guaranty Company to keep and maintain records of the character comprising Exhibit 44 for identification?

A. We keep the actual records.

Q. And it is part of the business to keep those records? A. Oh, yes.

Mr. Thompson: I offer Exhibit 44 for identification in evidence, your Honor.

Mr. Gillen. If we may have your Honor's permission to confer for a moment off the record with counsel for the prosecution?

The Court: I might say the witness suggested a few moments ago there might be matters in there that are not pertinent.

(Off-the-record conference between [179] counsel.)

Mr. Gillen: May it please the Court, in the interest of not cluttering up the record with voluminous matter that has no reference to any matter we are interested in here—that is, title refers to predecessors in interest—we would be willing to stipulate that Mr. Bremner may testify from the record to any matters that the prosecution feels is pertinent and, of course, subject to our motion to strike if it is not pertinent.

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(Testimony of Dana E. Bremner.)

The Court: Is that satisfactory?

Mr. Thompson: Satisfactory, your Honor.

Q. Mr. Bremner, will you refer to the record you have brought and state generally the nature of the transaction reflected in those records?

A. It is the sale of real property.

Q. Who is the seller?

A. The sellers were James M. Stevens and Betty Ann Stevens, his wife.

Q. Who were the buyers?

A. Helen L. Remmer, a married woman, and Dorothy A. Remmer, a single woman.

Q. What is the description of the property?

A. Do you wish me to read the entire description?

Q. Just the lot and block number and location.

A. Real property in the County of Contra Costa, State of California, described as follows: Portion of Lot 83 as shown on the map of sectionalization of a part of Ranch Laguna de la Palos Colorado, Contra Costa County, California.

Q. Does anything in your files show the common designation for that portion of parcel, such as street number? A. No, none.

Q. And what was the date of the transaction?

A. There are a number of dates. Do you mean the date it was consummated?

Q. Yes, that would be satisfactory.

A. The deed was recorded August 26, 1942.

Q. And the deed you refer to is the deed from

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(Testimony of Dana E. Bremner.)

Mr. and Mrs. Stevens, the sellers, to Helen Remmer and Dorothy A. Remmer, is that correct?

A. Correct.

Q. What is the purchase price for the property?

A. Nineteen thousand dollars.

Q. And from whom did the Oakland Title Insurance & Guaranty Company receive the money to pay the purchase price?

A. The receipt was made out to Mrs. Elmer Remmer although it is signed Helen Remmer, and Dorothy A. Remmer. Fourteen thousand dollars was received from Helen Remmer and five thousand dollars was received from the Bank of America, Oakland Home Office.

Q. Referring to the $14,000 payment, do your records indicate the form that the payment took, that is, whether it was cash or by check?

A. Yes, it was a cashier's check.

Q. And do your records show the number of the cashier's check?

A. Yes, it was No. 25166567 on the Bank of America, Oakland Main Office.

Q. What form did the payment of the $5,000 take?

A. The $5,000 was cashier's check No. 25166830 from the Bank of America, Oakland Main Office.

Q. From whom did you receive instructions on behalf of the purchaser regarding the sale of the property?

A. The parties I mentioned as having signed

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(Testimony of Dana E. Bremner.)

that receipt. That was our instructions from Helen Remmer and Dorothy A. Remmer.

Q. Do your records show whether or not the buyers, or one of them, occupied the property at any particular time?

A. No. The buyers you say? I beg your pardon.

Q. Yes.

A. Yes, there is a notation set forth in these papers: "Premises occupied by purchasers on August 18, 1942. Per Wallace." The initials under that are C. M.

Q. And do your records show anything regarding where the buyers had lived prior to making this particular purchase?

A. The address given by the buyers when we took their escrow instructions was 1607 West Walnut Street, Stockton, California.

Q. Does it show how long they had lived there?

A. Yes, it was since 1939.

Q. In connection with the transaction, what costs were paid by [182] the buyers?

A. I don't know exactly how to answer that because the buyers did not actually pay the cost themselves. It was paid by the bank.

Q. What costs were paid on the part of the buyers?

A. Fire insurance pro-rated, $43.14. Title insurance premium, $112.50; war risk insurance, $15.00; recording quit-claim, $1.30; recording deed, $1.30; recording deed of trust, $3.90. That was a total of $177.14. As against that there was a credit

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(Testimony of Dana E. Bremner.)

of $10.95 for tax pro-rated, making a total of expense of $166.19.

Q. So the total amount that the title company received from the buyers in connection with the purchase of this property was how much?

A. That would be $14,166.19.

Q. And the additional five thousand dollars was received from the bank?

A. Yes, that was proceeds for the real estate loan.

Q. And it was a payment on behalf of the buyers? A. Right.

Q. The total purchase price for the property was 19 thousand dollars? A. Correct.

Q. And what the buyers paid you, either directly or by loans on the property, was $19,000 plus the costs which you related?

A. That is right. [183]

Q. On what dates were the payments made to the title company by the buyers, or on their behalf?

A. The fourteen thousand dollars I referred to was paid to us on August 14, 1942. The five thousand dollars from real estate loan was paid to us August 20, 1942, and the expense bill of $166.19 was paid on August 24, 1942.

Q. Has that particular parcel of property been sold by Helen Remmer——

A. (Interceding): That was an error, I beg your pardon. That must be an error because that was two days before the transaction was closed. September 24th, not August. I read it wrong.

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(Testimony of Dana E. Bremner.)

Q. Which payment was paid on September 24?

A. $166.19.

Q. Has that particular parcel of property been sold by Helen Remmer and Dorothy Remmer?

A. Yes, it has.

Q. On what date?

Mr. Gillen: I don't know, first of all, whether that would be competent, relevant and material, and I think the time on it would be prior to the time we are interested in here. May we see the paper?

A. Yes, certainly. (Witness hands paper to defense counsel.)

Mr. Gillen: We offer the objection, may it please the Court, it is incompetent, irrelevant and immaterial, involves a transaction which commenced in 1942 and ended at some subsequent time [184] to the time involved here. We think it is incompetent, irrelevant and immaterial.

The Court: Objection will be overruled as to this question and see what the answer is. Read the question to the witness.

(Question read—On what date?)

The Court: Now you can answer that question, Mr. Bremner.

A. January 14, 1948.

Q. I don't believe I asked you, Mr. Bremner, the form of payment of the sum of $166 and some odd dollars, representing the costs paid by the buyers?

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(Testimony of Dana E. Bremner.)

A. It was by credit to our account by the bank.

Q. And what bank was that?

A. Bank of America, Oakland Main Office.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Bremner, if you look again at the original escrow transaction, No. 312404, which showed the sale from the Stevens to Helen Remmer and Dorothy A. Remmer, do you have that before you, sir? A. Yes.

Q. Is there a reference there to a quit claim from Elmer F. Remmer to Helen L. Remmer, his wife? A. Yes, there is.

Q. And when was that executed, sir? [185]

A. August 14, 1942. Wait a minute—I beg your pardon—the abstract of that deed the first name is Alma F. Remmer.

Q. What does the abstract show?

A. Alma.

Q. What does the other document show?

A. That was a mistake. I have an abstract of the document from our abstract department and this would be correct, deeded by Elmer F. Remmer, husband, to Helen L. Remmer, his wife, a married woman, and Dorothy A. Remmer, a single woman.

Q. In other words, the effect of that instrument executed by Elmer F. Remmer was to deed any interest he might have in that property to his wife

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(Testimony of Dana E. Bremner.)

and to make it her separate property, is that correct.

Mr. Thompson: We object to that, calls for conclusion of this witness as to the effect of a legal instrument.

The Court: Objection sustained.

Q. Let me ask you this—withdraw that and I will ask you this question. You have stated that you have been connected with the Oakland Title Insurance & Guaranty Company for a period of 15 years last past, is that correct?

A. That is correct.

Q. That has been continuous?

A. Except for a brief period during the war.

Q. Are you also a lawyer?

A. That is correct. [186]

Q. And you handle these escrow matters and transactions, transfers of real property, is that correct? A. That is correct.

Q. What effect does your company give to the filing of record of a quit-claim deed from a husband to a wife with reference to interest in a piece of real property? That would be, of course, in California?

A. In this particular case it was for the purpose of perfecting a joint tenancy.

Q. A joint tenancy between whom?

A. Between the two purchasers, Helen Remmer, a married woman, and Dorothy A. Remmer, a single woman.

Q. In other words, the purpose of obtaining that

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(Testimony of Dana E. Bremner.)

quit claim deed was to effect a joint tenancy so that Helen Remmer, although she was married, would have that as her undivided separate property and not affected by the community property laws of California, is that right?

A. That is right.

Mr. Gillen: I think that is all.

The Court: Any reason why this witness could not be excused?

Mr. Thompson: No, your Honor, but the exhibit is for identification and at the conclusion of the trial if we found it was not needed, it will be returned to this witness, but in the event we should require it later on we would like it to [187] be available.

(Witness excused.)

The Court: I think it well for us to adjourn at this time so we may avoid, as much as possible, any danger of accidents on the highway, due to icy conditions which perhaps might exist, so we will adjourn now.

(Jury and and alternate jurors admonished and recess taken at 4:00 p.m.) [188]

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Tuesday, December 4, 1951, 10:00 A.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

RONALD SAUNDERS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Ronald Saunders.

Q. Where do you live?

A. 9301 Skyline Boulevard, Oakland.

Q. What is your employment?

A. Alameda County East Bay Title Insurance Company.

Q. Where is the Alameda County East Bay Title Insurance Company located?

A. 15th & Webster.

Q. In Oakland, California? A. Yes.

Q. What is your business with that company?

A. That is a hard one—public relations.

Q. Have you appeared in court today pursuant to subpoena served on the Alameda County East Bay Title Insurance Company? A. Yes, sir.

Q. And you have brought with you certain of the records of that company relating to escrow transactions? [189] A. Yes, sir.

Q. Will you produce the records of the Alameda County East Bay Title Insurance Company re-

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(Testimony of Ronald Saunders.)

lating to escrow No. 335148? Mr. Saunders, I show you the records which you have produced, which have been marked Plaintiff's Exhibit 45 for identification. Are those records of the Alameda County East Bay Title Insurance Company kept and maintained in the ordinary, usual, and customary course of the business of the company? A. They are.

Q. And is it part of the business of the Alameda County East Bay Title Insurance Company to keep and maintain records of the character which you have produced? A. It is.

Q. Is it part of the business of the Alameda County East Bay Title Insurance Company to act as escrow agent for real estate transactions?

A. Yes, sir.

Mr. Thompson: I offer Exhibit 45 for identification in evidence, your Honor.

Mr. Gillen: May it please the Court, I would like an opportunity to examine the witness on voir dire as to the basis for possible objection.

The Court: You may do so.

Q. (By Mr. Gillen): Mr. Saunders, you say your connection with the Alameda County East Bay Title Insurance Company is that of [190] public relations? A. Partly, yes, sir.

Q. Now public relations man, in the common sense of the word, is a publicity director and one who creates good public relations or good will between his company and those with whom the company deals, is not that correct?

A. That's right, sir.

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(Testimony of Ronald Saunders.)

Q. And that is your job, is it?

A. I said partly. I also have, and have had, charge of all escrows. I mean open escrows, assigning of the escrows.

Q. Do you have charge of escrow records?

A. Yes, sir.

Q. Do you prepare those records yourself?

A. No, sir.

Q. They are prepared by the counter man, are they not? A. That's right, sir.

Q. So that you are not familiar with the escrows that are prepared by the counter men other than you know there are records kept, is that correct? A. Correct. I am no expert.

Q. Well, I am not asking for that qualification. I am asking for personal knowledge of the records. You have no personal knowledge of the records of your company other than records are kept in the ordinary course of the title insurance company's business, is that correct? [191]

A. That is correct.

Q. And the major portion of your work is public relations, is that so? A. That is right.

Q. Do you hold any particular official title with the company? A. No.

Q. So the particular file that you brought, you were not familiar with other than it is a file kept in the company's office, your company's file?

A. That's right.

Mr. Gillen: Well, may it please the Court——

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(Testimony of Ronald Saunders.)

Mr. Thompson (Interrupting): If the Court please, I think I am entitled to ask additional questions on voir dire.

The Court: You may.

Q. (By Mr. Thompson): Mr. Saunders, are you familiar with the character of records kept and maintained in the escrow department?

A. Yes, sir.

Q. And you know how escrow transactions are handled by the Alameda County East Bay Title Insurance Company? A. That's right, sir.

Q. Are you able to understand the various documents that are contained in an escrow file?

A. Yes.

Mr. Gillen: Of course I think that question is both [192] leading and suggestive and also calling for a man to pass upon his qualifications, like saying, how smart are you?

The Court: Let me have the question, please.

(Question read.)

The Court: I will sustain the objection.

Q. What did you say your duties were in connection with the escrow department?

A. When an order is placed with the company, it is given a number. I partly index those and assign them, if they haven't already been assigned, to the escrow officers and public relations.

Q. And you act in a supervisory capacity over the escrow officers in assigning transactions to them? A. No, sir.

BLEED THROUGH– POOR COPY

(Testimony of Ronald Saunders.)

Q. How long have you been employed by the Alameda County East Bay Title Insurance Company? A. The last six years.

Q. In what department of the company have you worked?

A. I worked in the tax department and public relations and the open escrow account.

Q. And were you designated by anyone in the company to produce these records to court pursuant to the subpoena issued? A. Yes, sir.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. It would be for the Court to determine whether this [193] man is qualified to interpret the records of the company.

The Court: I think he can answer this question.

(Question read.)

A. Yes, I was.

Q. By whom?

A. Mr. Sanborn, manager of the company.

Mr. Thompson: That is all.

Mr. Gillen: May it please the Court, I submit to the Court this witness does not qualify as either the person who prepared the records, the person who keeps the records, the person who is familiar with the details of the records, or the person who has sufficient knowledge of the transacting of escrow matters in a title company to be able to qualify himself to interpret the records that he has brought here. The witness himself has stated his work primarily is that of public relations man,

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(Testimony of Ronald Saunders.)

which is another way of saying publicity man, and also that he does some administrative work in the matter of assigning to counter men escrow transactions that come in and I submit the man is not qualified to interpret, from his own testimony, those transactions, either from personal knowledge or general knowledge, by reason of his position with the title company.

Mr. Thompson: Your Honor, I do not know of any question directed to the witness asking him to interpret anything. The subpoena, as the record shows, was served on the company [194] itself. This witness has testified these records are records kept in the regular course of the business of the company and part of the business of the company to keep these records. We have offered the records in evidence as evidence of the transactions rather than the testimony of any witness.

Mr. Gillen: What we have in mind, your Honor, as the basis for this objection, if we have a witness who produces records and is not qualified to interpret them, we are deprived of the right to cross-examine someone with knowledge of the meaning of the particular records and it is like giving a publicity man from a chemical company a chemical formula and asking him to come in and interpret it.

Mr. Thompson: Your Honor, the records are the best evidence. They speak for themselves, what they contain and what their legal effect is.

The Court: It seems to me a subpoena of this kind should be directed in general terms to the organization or institution with the thought that

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(Testimony of Ronald Saunders.)

they send up somebody who has custody or knowledge of the records. Now this is the second instance here in this case where we are called upon to stretch Section 1732 of the Code. This insurance man who testified to these insurance policies of certain personal property. I had a list of witnesses furnished me by the clerk and his name did not appear on the list of [195] witnesses, but the party who he informed us had knowledge and custody of the records, that name did appear, some lady, a partner in the insurance broker's office. That exhibit would be on much sounder ground if it had been introduced through testimony of that witness rather than the insurance man who testified here. Now here we have the same instance here. They were called upon to designate someone to bring up these records. It seems to me that they should have sent up somebody who has direct knowledge.

Mr. Gillen: That was Mr. Scollin, the insurance brokerage firm.

The Court: Yes, that is the man.

Mr. Thompson: I believe your Honor incorrectly recollects the situation. Mr. Scollin was a partner in the insurance firm which he represented.

The Court: His knowledge of that exhibit was very meager.

Mr. Thompson: I believe your Honor refers to Mr. Hill.

The Court: On this list of names is the name of Mrs. Bridgeford and during the course of Mr. Scollin's testimony it was made to appear that

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(Testimony of Ronald Saunders.)

this lady had knowledge of this particular record and would have been the proper person to be sent up here by the [196] company. It looks as though we have the same situation here. I think we ought to be a little careful about the use of this Section 1732. I think the defendant is entitled to have any records presented through persons who have some knowledge of the record and have had some charge of its custody.

Mr. Thompson: I believe this witness testified he did have some control and supervision of the records, your Honor.

The Court: He testified he gave it a number, something of that kind. Now this Section 1732 is a pretty broad section, but I do not believe it should be stretched out of proportion. (Reads Section 1732) Now I think the effect of this witness's testimony is that he did testify that particular record, Exhibit 45, was a record kept in the regular course of business by the institution he represents and, Mr. Gillen, it seems to me that we have compliance with that section, but I do feel that the defendant is entitled to have these records produced by somebody who really knows something about them, and that is the thought I had when I heard the testimony of this gentleman, Mr. Scollin.

Mr. Thompson: In that connection, your Honor, I would like to suggest that these records are as readily available to the defendant as they are to the government. If they require [197] any explanation of the witness to explain them, it is as readily

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(Testimony of Ronald Saunders.)

available to the defendant as it is to the government.

The Court: Well, I wish if you are going to have any more exhibits of this nature, if possible you should get a representative of the firm or corporation who really has some knowledge of the documents. I will overrule the objection and admit the exhibit. I do that because I think they come within that section, Mr. Gillen, but I think it would be better if they would have these records produced by someone who had the custody.

Mr. Gillen: May it please the Court, as in the instance of the other title record that was referred to yesterday, I note in this file No. 335148 there is considerable immaterial matter that does not relate to any transaction that would affect the defendant in this case or any of the defendant's business affairs and for that reason I suggest that those be extracted from the record before they are introduced in evidence—reference to other people in the chain of title.

The Court: Can you agree with counsel as to matters that come within that category?

Mr. Thompson: Your Honor, it is difficult to do that. This is file pertaining to this particular escrow and I think we might have some difficulty in agreeing what is material and what is immaterial and it is clear that immaterial matters [198] harm anybody.

Mr. Gillen: Other persons, predecessors in in-

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(Testimony of Ronald Saunders.)

terest, those things shouldn't clutter up the record, your Honor, prior owners, and so on.

Mr. Thompson: It is my understanding the exhibit is in evidence, your Honor.

The Court: Well, there has been a request made. I did admit it but I will withdraw the ruling and see *if cannot* get the immaterial matter out of it, if there is immaterial matter in it.

Mr. Gillen: We might do it this way, possibly counsel could extract from that record what he considers material. We could meet that as he introduced that. Possibly we could agree on it, then he could introduce it.

Mr. Thompson: We have three or four other escrows. I suggest, your Honor, we have them marked for identification and then we can get together and agree what to abstract and what is material.

Mr. Gillen: All right.

The Court: All right.

Q. Will you produce escrow No. 337802?

The Court: I ask that the records produced by the witness concerning escrow No. 337802, be marked Plaintiff's Exhibit 46 for identification.

The Court: So marked. [199]

Q. Will you produce escrow No. 311361.

Mr. Thompson: I ask that these records produced by the witness be marked Exhibit 47 for identification.

The Court: So marked.

Q. Will you produce escrow No. 342181?

BLEED THROUGH– POOR COPY

(Testimony of Ronald Saunders.)

Mr. Thompson: I ask that these records be marked Exhibit 48 for identification.

Q. Will you produce the records of escrow No. 350504?

Mr. Thompson: I ask that these records be marked Exhibit 49 for identification.

The Court: Have you completed that list now?

Mr. Thompson: Yes, your Honor. I suggest that we take a recess and perhaps counsel can agree.

Jurors and alternate jurors admonished and recess taken at 10:30.

11:20 A.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

Jury and alternate jurors admonished and noon recess taken at 11:23.

Afternoon Session—December 4, 1951, 1:30 P.M.

Defendant present with counsel.

Presence of the jury and alternate jurors stipulated.

MR. SAUNDERS

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Gillen: May it please the Court, it is my understanding—correct me if I am in error—that

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(Testimony of Ronald Saunders.)

the early recess granted by your Honor today was to comply in this, that the prosecution has taken from the exhibits offered for identification certain data which the prosecution considered material and the defense has no objection to that data going into evidence; however, each exhibit subject, of course, to our right to move to strike in the event it isn't connected up. Now as to the other portions, which I think are generally agreed to be supervisal, have no materiality, no connection with this matter, I understand it is the desire of the prosecution that those exhibits be marked for identification and remain in custodial charge in the event anybody in the future may wish to use them. Mr. Thompson, is that correct?

Mr. Thompson: That is generally correct, Mr. Gillen. At this time I would like to have the portion of Exhibit 45 for identification, which I am handing the clerk, marked Exhibit 45-A for identification.

The Court: Very well. It may be marked Exhibit 45-A. That is the portion you do not intend to offer in evidence at this time?

Mr. Thompson: At this time.

Mr. Gillen: That is the portion to be eliminated from evidence at this time. [201]

Mr. Thompson: At this time we offer in evidence Plaintiff's Exhibit 45 for identification.

Mr. Gillen: No objection.

The Court: It may be admitted.

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(Testimony of Ronald Saunders.)

Mr. Thompson: Exhibit 45 is received in evidence, your Honor?

The Court: Yes.

Mr. Gillen: And 45-A for identification.

Mr. Thompson: We have removed certain documents from Exhibit 46 which we ask to have marked Exhibit 46-A.

The Court: So marked.

Mr. Gillen: That is for identification?

The Court: Yes.

Mr. Thompson: At this time we offer in evidence Plaintiff's Exhibit 46.

Mr. Gillen: No objection, subject to the condition we have stated.

The Court: It may be admitted.

Mr. Thompson: Your Honor, we have removed from Plaintiff's Exhibit 47 for identification certain documents which we ask to have marked Exhibit 47-A for identification.

The Court: So marked.

Mr. Thompson: At this time we offer in evidence Exhibit 47.

Mr. Gillen: No objection. [202]

The Court: It may be admitted.

Mr. Thompson: Your Honor, we have removed from Plaintiff's Exhibit 48 for identification certain documents, which we ask to have marked Plaintiff's Exhibit 48-A for identification.

The Court: So marked.

Mr. Thompson: We offer in evidence Plaintiff's Exhibit 48.

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(Testimony of Ronald Saunders.)

Mr. Gillen: No objection.

The Court: It may be admitted.

Mr. Thompson: We have removed from Plaintiff's Exhibit 49 for identification certain documents, which we ask to have marked Plaintiff's Exhibit 49-A for identification.

The Court: So marked.

Mr. Thompson: We now offer in evidence Plaintiff's Exhibit 49.

Mr. Gillen: No objection.

The Court: It may be admitted.

Q. Mr. Saunders, you have produced in court certain records of the Alameda East Bay Title Insurance Company, which have been marked Plaintiff's Exhibits 45, 45-A, 46, 46-A, 47, 47-A, 48, 48-A, 49, and 49-A. As to all of those exhibits, are those records of the Alameda County East Bay Title Insurance Company? A. Yes, sir.

Q. Which were kept, made and maintained in the regular course [203] of the business of that company?

Mr. Gillen: Objected to as having been asked and answered.

Mr. Thompson: Not as to all exhibits.

Mr. Gillen: I withdraw the objection.

Mr. Thompson: I just ask the general question.

A. Yes, sir.

Q. As to all those exhibits, are those records which it was the business of the Alameda County East Bay Title Insurance Company to keep and maintain? A. Yes, sir.

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(Testimony of Ronald Saunders.)

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Saunders, directing your attention to prosecution's Exhibit 45, and particularly the document in these which appears to be in mimeograph form, I will ask you to look at this—with the Court's permission, I will hand it to you—and tell us whether or not you recognize that form as a mimeographed form used by your company?

A. Yes, sir.

Q. And it is true, is it not, that it is used so frequently and commonly that you have a regular mimeographed form for that purpose?

A. Yes.

Q. Now this mimeographed form is a form where persons having their real estate transactions, transfer of realty, request that [204] the title company keep the title in its name, is that correct?

A. Yes, sir.

Q. I will ask you, with the Court's permission, to look at the other exhibits, exhibits through 49, and tell us whether or not you find the same mimeographed forms directing or authorizing the title company to keep the title in its name? I do not think you will find it in 49, but I think up to 48.

A. In Exhibit 46 there is an unexecuted form.

Q. Would you just glance at the others. Tell us whether or not those same forms occur in the others? A. Yes, sir.

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(Testimony of Ronald Saunders.)

Q. By the way, in looking at that, any other instances where the unexecuted forms appear, such as in 46? Does unexecuted mean that the direction was not signed by anybody? That referred to 45, Exhibit 45, did it not referred to the same kind of action? A. I do not have 45.

Q. I have 45 down here, I am sorry.

A. Yes, sir.

Q. Refers to the same transaction?

A. Exhibit 45; yes, sir.

Mr. Gillen: With the Court's permission, I should like to read this particular form to the jury.

The Court: Yes, sir.

Mr. Gillen: This is dated February 15, 1945, under date [205] of Oakland, California. It is the mimeographed form which Mr. Saunders has identified as the form prepared and used by his company in instances where persons, in participating in a real estate transfer, desire the title company to retain the title of the property in the name of the title company. It reads: (Reads from Exhibit.) And thereafter is description of the land on the form, which is unnecessary to read, and the signature line bearing the purported signature of Joseph C. Haughey.

That is all, thank you.

Redirect Examination

By Mr. Thompson:

Mr. Saunders, will you refer to Plaintiff's Exhibit 45 and give the description of the property

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(Testimony of Ronald Saunders.)

you are holding under that escrow, just the lot numbers and block number and county.

A. Lot 4, Block 104, as designated on the map entitled "Richmond Annex Addition, Contra Costa County, California."

Q. And is the Alameda County East Bay Title Insurance Company holding title to that property under one of the holding agreements which was read by Mr. Gillen?

A. You didn't give the correct title.

Q. What is the correct name?

A. Alameda County East Bay Title Company.

Q. Thank you. A. We are.

Q. And for whom are you holding the property?

A. It is signed Joseph C. Haughey. [206]

Q. Mr. Saunders, will you refer to Plaintiff's Exhibit 46 and give the description of the real property involved in that escrow?

A. Lots 11 and 21 in Block 104, as designated on the map entitled, "Richmond Annex Addition, Contra Costa County, California."

Q. Is the Alameda County East Bay Title Company holding title to that property under one of the holding agreements? A. Yes, sir.

Q. For whom? A. Joseph C. Haughey.

Q. I also show you Plaintiff's Exhibit 47. Will you please give the description of the property involved in that escrow?

A. Lots 5, 6, 7, 8, 9, and 10 in Block 104, as designated on the map entitled "Richmond Annex Addition, Contra Costa County, California."

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(Testimony of Ronald Saunders.)

Q. Is the Alameda County East Bay Title Company holding title to that property under one of the holding agreements? A. Yes, sir.

Q. For whom? A. Joseph C. Haughey.

Q. I also show you Plaintiff's Exhibit 48. Will you give the description of the property involved in that escrow?

A. It is a long description. Would you like it in full?

Q. Can you give it by lot designation and [207] block?

A. Parcel 1, Lot 17 in Block 104, as designated on the map entitled "Richmond Annex Addition, Contra Costa County, California," and parcel 2, a portion of Lot 20 in Block 104, as designated on the map entitled, "Richmond Annex Addition, Contra Costa County, California," and there are metes and bounds description.

Q. That is sufficient. Is the Alameda East Bay Title Company holding title to that property under one of the holding agreements? A. Yes, sir.

Q. For whom? A. Joseph C. Haughey.

Mr. Thompson: That is all.

Mr. Gillen: No further questions.

(Witness excused.)

BLEED THROUGH– POOR COPY

JOSEPH C. HAUGHEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Joseph C. Haughey.

Q. Where do you live?

A. 2200 16th Avenue, San Francisco.

Q. What is your business or occupation?

A. Attorney at law. [208]

Q. In the City of San Francisco?

A. Yes.

Q. Were you in the courtroom during the testimony of Mr. Saunders? A. I was.

Q. And did you hear read here the holding agreement with respect to Lots 4, 5, 6, 7, 8, 9, 10, 11 and 21 of Block 104, Richmond Annex Addition, Contra Costa County? A. I did.

Q. Are you the same individual named in that holding agreement? A. I am.

Q. As being the person for whom the title company is holding that property? A. I am.

Q. Will you relate the circumstances under which that property is being held for your direction?

A. Well, I will have to call upon confidential relationship that exists between myself and the party for whom I worked. I am unable to testify unless my client waives, I mean the party I was working for at that time.

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(Testimony of Joseph C. Haughey.)

Q. By that to whom do you refer?

Mr. Gillen: May it please your Honor and Mr. Campbell, we will waive, on behalf of the defendant, Elmer Remmer, the confidential relationship of attorney and client which binds [209] Mr. Haughey and permit Mr. Haughey to testify fully.

Mr. Haughey: As further protection for me, I would like Mr. Remmer to waive that personally.

Mr. Gillen: Will you waive the confidential relationship binding Mr. Haughey, Mr. Remmer?

Mr. Remmer: I waive it.

Q. Very well, proceed to relate the circumstances.

A. In either April or May, 1943, Mr. Remmer was interested in some property in El Cerrito, Contra Costa County, which is across the Bay from San Francisco. He had made arrangements for the purchase from Stanley Parsons, located on San Diego Street—I don't recall the other streets—and it is my recollection he picked me up in San Francisco and drove me over to the Bank of America, 12th & Broadway, and on the way over he told me that he was buying this property, this building on it, contained a bar, and that although he was buying it, he didn't want to have it in his own name.

Q. Did he state why he did not?

A. Yes, he said he was getting interested in a gambling venture in El Cerrito and there was some jealousy among other people that came up there to operate there at the time and he thought, in order

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(Testimony of Joseph C. Haughey.)

to make it easier for himself to operate there, he would prefer that his name not be in the title, so at my suggestion—I told him, I said, "There is no problem to that. Much property in San Francisco is held in the name of title companies," for various reasons, to evade real estate brokers coming around and bothering the rightful owner; sometimes four or five people are interested in a parcel and as a matter of convenience have it put in the name of a title company, and I told him it could be done very easily, all he would have to do is to instruct the title company to put this property in the title company's name, subject to my instructions or my wife's instructions or anyone's instructions and he thought that was best to do and he told me, he said, "Well, let's put it through that way." So we proceeded to the bank and we entered the officer's quarters——

Q. (Interceding): Have you related all the conversation you had at that time?

A. As best I can recollect it.

Q. That is all that you recall at this time?

A. That is all I recall at this time.

Q. Was anything said in that conversation with respect to whether or not the property would then appear on the tax rolls in the name of the real party in interest?

A. I don't recall that was even mentioned.

Q. You have no recollection?

A. No recollection.

Q. Very well, proceed.

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(Testimony of Joseph C. Haughey.)

A. So we proceeded to the Bank of America at 12th & Broadway and Mr. Remmer was greeted by one of the officers and [211] apparently was a friend of long standing——

Q. Mr. Haughey, you are an attorney, you understand that you are to relate what took place and not your impression.

A. Well, two or three other gentlemen came over and conversed with Mr. Remmer, employees of the bank, I think and a couple of other officers, at least one was an officer, his name was Bill Fitzmaurice—I think he has since died——

Q. (Interrupting): Very well.

A. And after we were there maybe 15 minutes, Mr. Fitzmaurice handed over to Mr. Remmer some cash, which Mr. Remmer put in his pocket and we proceeded to the Alameda County Title Company, which is three or four blocks from the bank.

Q. In what form was that cash?

A. Currency.

Q. Was it a large roll or a small roll of bills?

A. As I recall, he put it in a side pocket and we walked along and that is all the regard he had for it at the time—he just put in a side coat pocket. So we went up to the title company and I introduced myself to one of the counter men and told them there was an escrow—I think the escrow was already established by Mr. Parsons.

Q. Mr. Parsons was the seller?

A. Yes. Told him that we were there to complete the deal and I had the money and Mr. Remmer

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(Testimony of Joseph C. Haughey.)

handed me the money. I don't know whether the counter man saw him give it to me or not, but [212] I told him I had the funds, I paid over the money to the counter man and signed the one that pertained to that particular deal, sale by Parsons to Remmer.

Q. That is referring to the holding agreement.

A. I am assuming you have one, Mr. Campbell, without referring to it.

Q. How much money did you hand over to the title company on that occasion?

A. It is my recollection 25 thousand dollars. I may be in error, but the tax for it itself will show what the amount was.

Q. Yes, all right. I am going to show you at this time Plaintiff's Exhibit 45, and referring particularly to the holding agreement.

A. This one is dated 1945. I think there is an earlier one than this. The original transaction is 1943.

Mr. Gillen: It is Exhibit 47, Mr. Campbell.

Q. There was more than one transaction, was there not?

A. Yes, I think all told three or four.

Q. I will hand you all three exhibits.

A. I will take one at a time.

Q. So you may examine as to——

A. In connection with the one here identified as Plaintiff's Exhibit 45, bearing date of February 15, 1945——

Q. Pardon me, Mr. Haughey, if you will ex-

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(Testimony of Joseph C. Haughey.)

amine the three and refer to the one in which you referred in your testimony where [213] you paid the 25 thousand dollars. I think that is No. 47.

A. Yes, Stanley N. Parsons and Clara E. Parsons, his wife. This is dated May 3, 1943. No, that is the statement of the title company—April 27th—I think 26th, originally written April 27, 1943. It was 24 thousand dollars paid at that time, apparently.

Q. If you examine the file you will find a thousand dollars deposit had already been made, is that correct? A. That is right.

Q. That is the first transaction which you had of that nature? A. Yes, that is right.

Q. And that covers what lots?

A. Lots 5, 6, 7, 8, 9 and 10, Block 104.

Q. All right, sir. Are you familiar with those premises yourself?

A. Just generally. I usually see that at night time, probably three different times.

Q. Do you know what was located at that time on those premises?

A. Yes, there was a night club and bar there at one time.

Q. Under what name?

A. At one time—I don't know the sequence of it at all—one time 21 Club and another time the 90 Club.

Q. Now will you turn to the next transaction, which I believe is Exhibit 46. [214]

A. Yes, sir.

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(Testimony of Joseph C. Haughey.)

Q. Was that a similar transaction?

A. It was.

Q. And when was that transaction had?

A. It looks like the escrow was established March 24, 1945.

Q. And did you handle the details of that transaction in exactly the same fashion, or similar fashion, to that which you have described?

A. No, I did not. I see the instructions are signed by Robert Lincks.

Q. Who is he? A. I don't know.

Q. Is he not the real estate agent involved in the transaction? A. I don't know who he is.

Q. That holding agreement was also executed with relation to that?

A. On April 27, 1945, I directed a letter to the Alameda County State Title Insurance Company, 14th & Franklin, attention Mr. Calvert, re escrow No. 337802, which was the escrow established by Mr. Lincks, and that relates, part of the letter says—do you want me to read it in evidence?

Q. No, state the effect of it.

A. (Reads): "Further that you forward to me your usual holding agreement to convey title only upon instruction of the undersigned, Joseph C. Haughey * * * *." Signed by myself, Joseph [215] C. Haughey.

Q. So that property is also being held under holding agreement? A. That is right.

Q. What is the consideration paid?

A. According to the letter, four thousand five

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(Testimony of Joseph C. Haughey.)

hundred sixty, to be disposed in accordance with instructions left with you by Robert Lincks.

Q. Who furnished those funds?

A. I don't recall how the money was received, whether cash or check or how it was paid.

Q. For whom were you holding that property?

A. Elmer Remmer.

Q. Now, will you refer to Exhibit 45?

A. Yes.

Q. Is that also being held by the title company, that is, the title, under instructions from you?

A. Yes.

Q. Under a similar arrangement?

A. Yes, February 8, 1945, I enclosed cashier's check.

Q. What was the amount? A. $2800.

Q. And what was the property description there?

A. Lot 4 in Block 104, being portions of Lots 11, 12 and 13.

Q. And you say that you forwarded a cashier's check in that [216] connection?

A. Yes, I see my secretary mailed that. She signed my name there.

Q. Who supplied you with the funds with which to purchase that cashier's check?

A. I have no recollection from where the funds came, whether in check or cashier's check or how it came, but I see there was a cashier's check evidently sent.

Q. Was that your own money that you were

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(Testimony of Joseph C. Haughey.)

sending? A. I do not think so, not mine.

Q. Whose was it?

A. It was for the account of Elmer Remmer. Who supplied it, I don't know.

Q. Are you holding that property for the account of Elmer Remmer? A. I am.

Q. Now, all of the property which has been included in those three exhibits are all contiguous lots, are they not?

A. That's right, as far as I know. That was the purpose, it was my understanding. The acquisitions were made in order to prevent outlet to another street, to increase the parking area.

Q. Yes, we will come to that in a moment. Now, do you continue to hold those for his account up to this date? A. Yes.

Q. And have ever since that date? [217]

A. I have.

Q. Ever since their acquisition?

A. That is right.

Q. Now, in connection with your holding that property, Mr. Haughey, did you also have occasion to execute an agreement with one Brown, whereby the properties described in those three exhibits, that is to say, Lots 4, 5, 6, 7, 8, 9, 10, 11 and 21, were utilized as security for any transaction?

A. I did.

Q. Have you a duplicate original of that agreement with you? A. Yes I have.

Q. That is the document which you have produced?

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(Testimony of Joseph C. Haughey.)

A. Yes, in pursuance to the subpoena which directed me.

Mr. Gillen: If counsel for the prosecution desires to put this in evidence, we stipulate it may be put in evidence without objection.

Mr. Campbell: This document marked Plaintiff's Exhibit 50 for identification will be offered in evidence.

The Court: Very well, it may be admitted in evidence, Exhibit 50.

Q. Now, referring to government's Exhibit 50, which I am going to hand you in a moment, Mr. Haughey, at whose instructions did you prepare that document?

A. This was the result of some negotiations between Joseph A. Brown, an attorney representing Gene Schriber, and myself, at [218] the time Mr. Remmer purchased the Menlo Club.

Q. When you say purchased the Menlo Club, do you refer to the acquisition of the lease of the premises?

A. That's right, premises of 1830 and 32 Turk Street, San Francisco.

Q. And in connection with the acquisition of that lease, were the lots referred to used as security for a note which was given in the acquisition of that lease?

A. Yes. Not all the lots that have been referred to here, but certain designated ones in this letter.

Q. I am referring to those set out in Exhibits 45, 46, and 47; that is to say, Lots 4, 5, 6, 7, 8, 9, 10, 11 and 21. A. That's right.

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(Testimony of Joseph C. Haughey.)

Q. Is that correct? A. That's right.

Q. What was the total consideration to be paid for the acquisition of the lease of the Menlo Club premises?

A. One hundred seventy-five thousand dollars.

Q. Did you handle the negotiations in that regard?

A. Most of them. Some of the negotiations were handled in my absence between Mr. Remmer and Mr. Brown and others. I was not present at all negotiations.

Q. Now, in regard to those negotiations, who was the principal that you represented?

A. Elmer Remmer. [219]

Q. Referring to that document, it would appear that one Billington was to acquire the lease in his name. A. That is right.

Q. Who is Billington?

A. Joseph Billington is here in the court room. He is also known as Frankie Denny. He was a friend of Mr. Remmer's for many years, ever since they were boys.

Q. And the lease was acquired in the name of Joseph Billington, was it not?

A. That is right.

Q. Rather than in the name of Elmer Remmer?

A. Rather than in the name of Elmer Remmer.

Q. Was that pursuant to instructions given to you by Elmer Remmer? A. That is right.

Q. When was that lease acquired?

A. On or about April 30th of 1945, that is, the

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(Testimony of Joseph C. Haughey.)

agreement was reached. The date the transaction was signed, I don't know.

Q. April 1, 1945? A. No, May 1st.

Q. On that occasion was any consideration made to the lessor?

A. As to the actual transfer of money at that time, I have no definite recollection. It was my understanding that down payment was to be 25 thousand dollars and the balance secured by three promissory notes, each in the sum of 50 [220] thousand dollars, accepted by Billington and guaranteed by Remmer.

Q. And was the 25 thousand dollars paid in your presence?

A. As to that I have not a definite recollection at this moment, Mr. Campbell. I am trying to determine just when and where that money was paid or how.

Q. Did you see the three notes that were executed at that time?

A. I have copies of three of them in my office in San Francisco.

Q. You do not have them present?

A. No, I had them in my hands the other day.

Q. Do you recall at this time upon what date those notes matured?

A. I think they were payable—as I recall it—either three months or six months after. They were staggered in that manner, the first one three months after date or six months and the second a like period and the third a like period. I think they

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(Testimony of Joseph C. Haughey.)

would be paid for, as I recall, within a year and a half, something like that.

Q. Did you have anything to do with the payment of those notes? A. None whatever.

Q. Let me ask you this, from your knowledge of the transaction, as I understand from your testimony, the 175 thousand dollars was consideration for security of the lease, is that correct?

A. It was consideration for the lease. It was to be a ten-year lease and there were certain physical assets, I think, in [221] there, the material and operation of the business, regular established bar and restaurant, and I forget whether that included the purchase of that. I think it did include the stock in trade and the fixtures of the premises, together with the fact that they were getting a ten-year lease.

Q. Do you recall the names of the establishments located there?

A. I might be wrong; I think there is the 18 Church Street bar, was known as the Turf Club; the place adjoining the restaurant was known as the Menlo Coffee Shop, and the adjoining premises, 32, was combination cigar stand and card room and known as the Menlo Cigar Stand and Menlo Social Club.

Q. Was there a Tiney Waffle Shop?

A. I think that was the name of the restaurant, that is right, Tiney Waffle Shop.

Q. In regard to this lease, was there also to be paid a stipulated monthly rental?

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(Testimony of Joseph C. Haughey.)

A. I think there was and I think that is contained in the lease.

Q. Do you recall, from having seen the lease at that time, what those amounts were?

A. No, I wouldn't want to venture.

Mr. Gillen: I submit, your Honor, the lease would be the best evidence of the terms. We have a copy of the original duplicate of the lease.

Mr. Campbell: I suggest, your Honor, we will proceed [222] along our own lines.

Mr. Gillen: Which we are willing to offer.

The Court: Counsel makes a suggestion. Do you care to follow that at this time?

Mr. Campbell: I think it might be marked for identification.

Mr. Gillen: We can offer it in evidence; if you want to use it, we will let you use it.

Mr. Campbell: We haven't seen that.

Q. Now, I am going to show you at this time government's Exhibit 48, which has already been identified here. A. Yes.

Q. That, I believe, refers to Lot 17 and part of Lot 20? A. That's right.

Q. In Block 104 of Richmond Annex Addition, is that correct? A. That's right.

Q. Are you also holding that property subject to the instructions of Elmer Remmer? A. I am.

Q. When was that property acquired?

A. The holding agreement bears date July 19, 1945. The escrow was established, or search was made, title report is dated June 28, 1945.

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(Testimony of Joseph C. Haughey.)

Q. What was the consideration paid for that property?

A. On July 25, 1945, I wrote to the Alameda County East Bay [223] Title Insurance Company, re Escrow 342191, Lots 17 and 20, Block 104:

> "Gentlemen:
>
> "Enclosed is holding agreement bearing date July 19, 1945, between your company and the undersigned, respecting the above property. It is my understanding that check for the sum of $4056.65 payable to your order, has been delivered to you, that sum being the balance of purchase price and expenses.
>
> "Very truly yours,
>
> "/s/ JOSEPH C. HAUGHEY,
>
> "Per * * *"

who was my secretary at that time. And now where that money came from, is something I don't know.

Q. Do you know in what form it came to them?

A. I have no knowledge whatsoever. From my letter, "It is my understanding the check has been delivered to you * * *." I don't recall at this time.

Q. For whom do you hold that property?

A. For Elmer Remmer.

Q. Was that property included in the property which was made security for the lease on the Menlo Club property?

A. I don't think so because this bears date July 25, 1945, and the other bears date May 1, 1945.

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(Testimony of Joseph C. Haughey.)

Q. Is that the property you referred to which was acquired to give further ingress to the property? A. I believe it is one of the parcels.

Mr. Campbell: At this time, with the Court's permission, [224] I would like to read Government's Exhibit 50 to the jury.

The Court: You may do so.

Mr. Campbell: It is on the letterhead of Joseph C. Haughey, attorney at law, Phelan Building, San Francisco 2, May 1, 1945, (Reads Exhibit). And then are attached three documents, purporting to authorize Joseph Brown to convey the property referred to under the provisions of the holding agreement theretofore executed by Joseph C. Haughey, which I will not read.

Q. Now, is the Joseph Billington referred to in this document the same Joseph Billington that you referred to in your testimony?

A. One and the same.

Q. And to your knowledge did Joseph Billington have any interest whatsoever in these transactions? A. As far as I know, he did not.

Q. Was he anything more than a nominee of Mr. Remmer's?

Mr. Gillen: Objected to as leading and suggestive.

The Court: Objection will be sustained.

Q. Who is Joseph A. Brown to whom this document is addressed?

A. He is an attorney in the Young Building in San Francisco and he was representing Gene

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(Testimony of Joseph C. Haughey.)

Schriber in the negotiations for the sale of the Menlo Club to Elmer Remmer.

Q. Who is Gene Schriber?

A. He is in the court room here. He is the owner of the Menlo [225] Club.

Q. Was he also, if you know, the owner of the premises upon which that club was situated?

A. To the best of my knowledge he was at the time these negotiations were entered into.

Q. He was or was not? A. He was.

Q. Did or did not these negotiations include the transfer of the title to the real property?

A. To the best of my knowledge they did not.

Q. The property referred to in government's Exhibits 45, 46, and 47, that is to say, that dozen or so lots in Contra Costa County, in what particular city are they located?

A. El Cerrito, which is in Contra Costa County.

Q. You refer to the fact that there was a 21 Club located there, is that correct?

A. That is my recollection of the name. The address was 90 San Diego Street, but I think the designation at one time either at the time Mr. Remmer acquired the place or after, it was known as the 21 Club.

Q. Do you know whether or not any other establishments were located on that property after Mr. Remmer acquired it?

A. I do not know. I have not seen the property in some time.

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(Testimony of Joseph C. Haughey.)

Q. Although you still have full control over the property?

A. It doesn't interest me in seeing it because I have no financial [226] interest in it whatsoever.

Q. When did you cease to be Mr. Remmer's attorney? A. January, 1947.

Mr. Campbell: I think that is all

Cross-Examination

By Mr. Gillen:

Q. Mr. Haughey, you stated that Mr. Billington, who was named in the lease and agreement with relation to the acquisition of the Menlo Club property, the restaurant, the bar, club, and so on, was also known as Frankie Denny?

A. That is right.

Q. The reason he was also known as Frankie Denny was because in his youth he was a professional boxer, is that right?

A. I never knew his name was Billington. I always knew him as Frankie Denny.

Q. Because he was a boxer?

A. I knew him personally for years as Frankie Denny.

Q. And you did know he and Mr. Remmer had grown up as boys together? A. Yes.

Q. Now, I am going to ask you, Mr. Haughey, it is true, is it not, that prior to the time you were Mr. Remmer's attorney, a senior attorney in your office, Mr. Taffe, was attorney for Mr. Remmer for a number of years? A. That is right.

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(Testimony of Joseph C. Haughey.)

Q. And upon the passing of Mr. Taffe you took over Mr. Taffe's [227] work for Mr. Remmer?

A. That is right.

Q. I presume you are familiar with the signature of Elmer Remmer? A. Yes.

Q. And have been familiar with it for many years during the time Mr. Taffe represented him, as well as being his attorney?

A. Yes, Mr. Remmer was a client of Mr. Taffe's father. I have known him since 1929.

Q. Mr. Taffe's father was Joe Taffe?

A. Yes.

Q. I am going to ask you to look at the prosecution's exhibit 50, particularly with reference to the second page of that exhibit, under the wording, "The undersigned do fully consent to the foregoing escrow," and bearing the purported signature of Joseph Billington and Elmer Remmer, and ask you to look at the last signature there and tell us whether or not that is the signature of Elmer Remmer, the defendant in this case?

A. It does not appear the same.

Q. Mr. Haughey, I am going to show you, with the permission of the Court, a document which has been designated Defendant's B for identification, a purported lease, and ask you to look at the last page of this document and tell us whether or not you recognize the signature on that page?

A. Well, it looks like Mr. Remmer's handwriting to me, but I [228] wouldn't vouch for it.

Q. How does it compare with the handwriting——

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(Testimony of Joseph C. Haughey.)

Mr. Campbell: We object, if the Court please, this man has not been qualified as an expert. He is being asked to compare certain documents.

Mr. Gillen: I will withdraw the question.

Q. You have not been Mr. Remmer's attorney since 1947? A. January, 1947.

Q. And let me ask you whether, looking at the lease I have handed you and looking at the prosecution's Exhibit No. 50, whether or not that refreshes your recollection that Mr. Remmer's handwriting and your signature is on both of those documents?

Mr. Campbell: Objected to as improper cross-examination.

The Court: Objection overruled.

A. Well, the only way I can answer that question is by saying this, it appears to me defendant's B for identification, the signature affixed to that exhibit on page 8 looks more like Mr. Remmer's handwriting than the signature affixed to plaintiff's Exhibit 50. Whether they are one and the same, I do not know.

Q. Let me ask you if you recollect this, Mr. Haughey—is it not within your recollection that Mr. Schriber and Mr. Brown, his attorney, required that Mr. Remmer personally guarantee the transaction about the lease?

A. Oh yes, they insisted on that. [229]

Q. And they required Mr. Remmer's signature to be attached, not only to the agreement, which is Plaintiff's Exhibit 50 in evidence, but also to the

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(Testimony of Joseph C. Haughey.)

lease which has been designated as defendant's Exhibit B for identification?

A. That is right, as a guarantor, you might say.

Q. So that Mr. Remmer's name appeared in that transaction of the Menlo deal, did it not?

A. That's right.

Q. Now, do you recall, Mr. Haughey, that you carried on and conducted the entire transactions for Mr. Remmer and that he was present only at one negotiation, so far as the attorneys are concerned, Mr. Brown and yourself?

A. I wouldn't say, for this reason—I have definite recollection at one time negotiations were entered into and the deal was off. The money, as I recall was all prepared and set to be paid over and a dispute arose, I don't know whether between Remmer and Brown or Remmer and Schriber. The deal was off for two or three days, then negotiations were resumed. What took place in between time, I don't know.

Q. Well, is it within your recollection and memory that you conducted considerable of the negotiations with Mr. Brown and Mr. Schriber?

A. That is right, as portrayed by the paper work in evidence here.

Q. This lease was prepared by Mr. Brown, was it not? I am referring [230] now to defendant's Exhibit B for identification. A. That is right.

Q. And I take it, as Mr. Remmer's attorney, you were called upon to examine and study that lease and approve it and advise your client to sign it or

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(Testimony of Joseph C. Haughey.)

not to sign it, is that correct? A. That's right.

Q. And Mr. Billington signed as lessee and Mr. Remmer signed as guarantor of the lease?

A. That is right.

Mr. Gillen: I would like to offer this lease, may it please the Court, as defendant's next in order.

Mr. Campbell: May I ask a question or two on voir dire, if the Court please?

The Court: Yes, sir.

Q. (By Mr. Campbell): Mr. Haughey, I give you back this defendant's B for identification and ask you if you will examine that document carefully and state whether or not, to your knowledge, that is the original lease or an original duplicate?

A. I would say——

Q. (Interrupting): Have you examined it carefully?

A. It says copy above and it is apparent to me, or at least it is my belief, it is a carbon copy of the original.

Q. Well, have you read the document?

A. Some time ago, yes.

Q. You mean the document which you hold in your hand? [231]

A. What recalls in my mind is the last paragraph, the guarantee. The reason I recall it so vividly is the way Mr. Brown dictated without referring to any form.

Q. I understand that, but I am referring to the body of the indenture, which covers several pages.

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(Testimony of Joseph C. Haughey.)

Are you able to say that that is a copy of the original lease? A. Off hand?

Q. Yes.

A. No, I wouldn't be able to say that on recollection, no, I wouldn't say that.

Q. Are you able to say those are the signatures of Gene Schriber and Joseph Billington?

A. Yes, that is Gene Schriber's signature.

Q. Is that the signature of Joseph Billington?

A. I believe that is Billington's. I will vouch for Schriber's. I am almost positive it is the signature of Schriber.

Q. As to the body of the lease, are you able to say that is either the original lease or an exact copy thereof?

A. I can only answer that by saying it is my belief it is a copy of the original.

Q. Can you state definitely that it is?

A. As a matter of recollection of it, no, I could not say that.

Mr. Campbell. Then we object.

Mr. Gillen: Of course it is fundamental any one who makes a lease makes more than one copy. The lessee gets one [232] and the lessor.

The Court: Objection overruled. The exhibit is admitted in evidence.

Q. (By Mr. Gillen): Mr. Haughey, you said your most vivid recollection of any wording in that document was the guarantee that was required to be signed by Mr. Remmer in that lease?

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(Testimony of Joseph C. Haughey.)

A. That is right. The dictation of Mr. Brown, without any recourse to a form book.

Q. You admired him? A. Right.

Q. Now, Mr. Haughey, it is true, is it not—and with the Court's permission, I will show you what is now defendant's B in evidence, the lease—it is true, is it not, the beginning of the guarantee by Elmer Remmer starts on page 7, which is the same page which bears the signature of Gene Schriber as lessor and Joseph Billington as lessee?

A. That is right.

Q. And then it carries over to the final page of the document, which bears Mr. Remmer's signature, is that correct? A. That is right.

Mr. Campbell: With the permission of the Court, I should like to read that portion to the jury, starting on page 7 of defendant's Exhibit B:

> "I, Elmer Remmer, for and in consideration of the execution of said lease to Joseph Billington, do absolutely and unconditionally, for [233] value, guarantee the full provisions of said lease and payment of the rent therein provided for. I agree in case is instituted to enforce any terms of the said lease or collect any rent, I will pay a reasonable attorney's fee. I waive all notice of default or non-provision and agree that the lessor may * * *"

bearing the signature, Elmer Remmer. I think that is all.

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(Testimony of Joseph C. Haughey.)

Redirect Examination

By Mr. Campbell:

Q. Mr. Haughey, I am going to show you again defendant's Exhibit B and ask you to state whether or not that document bears any notarial acknowledgement? A. It does not.

Mr. Gillen: That would be incompetent, irrelevant and immaterial.

The Court: He already answered the question, it does not.

Q. Does that document show any evidence of ever having been recorded?

Mr. Gillen: Just a moment——

A. Under California law it isn't necessary.

The Court: Just a moment—do you have an objection?

Mr. Gillen: I will let the answer stand.

Q. Have you answered my question?

A. I said under California law——

Q. (Interceding): That is not my [234] question.

A. No, none whatsoever. It couldn't be recorded unless it was acknowledged.

Q. Does it show any evidence of having been recorded?

A. It does not, never was, to the best of my knowledge. Maybe the original was, but this one wasn't.

Q. Does that document show any place for a notarial acknowledgment to be executed?

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(Testimony of Joseph C. Haughey.)

A. The same space here——

Q. I mean does it show the language.

A. No, it hasn't got it typed in, but slip can be attached to it, as often is done by the notary.

Mr. Campbell: That is all.

Mr. Gillen: I think that is all.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 2:50 p.m.)

3:05 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

GENE SCHRIBER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Gene Schriber.

Q. Where do you live? [235]

A. 3015 19th Avenue, San Francisco.

Q. What is your occupation?

A. Property owner.

Q. That is your only occupation? A. It is.

Q. Are you acquainted with the defendant here, Elmer Remmer? A. I am.

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(Testimony of Gene Schriber.)

Q. Over what period of time have you known him? A. I would say since about 1940.

Q. Did you have occasion, during the year 1945, and particularly on or about May 1, 1945, to enter into some business agreement with him?

A. I did.

Q. You have been subpoenaed to produce here a certain lease agreement, together with supplemental agreements. Have you done so?

A. Yes, I have.

Q. Will you produce them?

A. This is the original lease and bill of sale.

Q. And the third document is the receipt, is it not? A. That's right.

Mr. Campbell: I will ask to have these marked for identification at this time, in the following order —a lease as produced as 51 for identification, the bill of sale as 52 for identification, and the receipt as 53 for identification. [236]

Mr. Gillen: The defense, may it please the Court, has no objection to these three documents, 51, 52, and 53, now being for identification, going into evidence if the prosecution desires to offer them.

Mr. Campbell: They will be offered as 51, 52, and 53.

The Court: They will be admitted.

Q. Handing you these three documents, which you have identified as 51, I believe, is the original lease, is that correct? A. Correct.

Q. No. 52 is a bill of sale. I note, Mr. Schriber,

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(Testimony of Gene Schriber.)

that that document is not executed. Do you have the original of that document?

A. That is the only one I have, unless Mr. Brown has it.

Q. Your attorney has that?

A. He may have it. I haven't got it.

Mr. Gillen: Is that the receipt?

Mr. Campbell: Bill of sale.

Q. Do you have an executed copy, Mr. Schriber, of that bill of sale?

A. No, this is all I have.

Q. I observe that the bill of sale refers to the sale of certain fixtures, does it not?

A. Yes, it does.

Q. At the property known as Tiny's Bar and Tiny's Restaurant, is that correct? [237]

A. And the Menlo Club.

Q. That is in connection with the lease which you have produced here?

A. Yes, that is in connection with the lease.

Q. I also observe that both the lease which you hold and that bill of sale are in the name of Joseph Billington? A. That is correct.

Q. Do you know Joseph Billington?

A. Yes, I know Joseph Billington now. At that time it was only a name to me.

Q. At the time the documents which you hold, government's exhibits 51 and 52, that is to say, the lease of the Menlo Club, Tiny's Bar and Tiny's Restaurant, were executed, April 30, 1945, and May 1, 1945, Joseph Billington was unknown to you?

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(Testimony of Gene Schriber.)

A. It was just a name. I knew him under another name, Frankie Denny.

Q. Did you know him personally? A. Yes.

Q. How long had you known him?

A. Maybe two or three years.

Q. With respect to the lease, with whom did you negotiate? A. Mr. Remmer.

Q. By Mr. Remmer, you refer to Elmer Remmer, the defendant here? A. That is correct.

Q. Did you have any negotiations with Joseph Billington, or [238] Denny, as you then knew him?

A. None whatsoever.

Q. When did you first learn that his name was to be placed on these documents?

A. Well, that is a little hard for me to say, but I think it was right around close to the 30th of April.

Q. Now, referring to the lease which covers the premises at 1830 and 32 Turk Street, in the City of San Francisco, are you the owner of those premises? A. Yes.

Q. When did you acquire those premises?

A. 24th day of April, 1945; I am sure that is the date.

Q. To what document are you referring?

A. You asked me when I acquired the property?

Q. Yes.

A. I happen to have it on a calendar here. It was Wednesday, the 25th.

Q. And these documents were executed on April 30th, is that correct?

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(Testimony of Gene Schriber.)

A. That is correct, the bill of sale. The lease was drawn later.

Q. Referring to government's Exhibit 51, the lease, I observe that that is dated May 1st——

A. As per our agreement, yes.

Q. (Continuing): ——and apparently it would appear to be executed [239] on May 1st. Was that document in fact made and executed on that date?

A. Well now I don't know if it was that exact date or a day or two later, but it was very close to May 1st.

Q. Now, that document calls, does it not, for the payment of 175 thousand dollars?

Mr. Avakian: May we ask which document counsel refers to?

Mr. Campbell: I am referring to the document in the witness' hand, government's Exhibit 51.

Q. For the payment of 175 thousand dollars for a ten-year lease on the described premises, is that correct? A. That is incorrect.

Mr. Avakian: Your Honor, if we may object—I believe counsel is mistaken. Exhibit 51, the lease, I do not believe contains that language.

Mr. Campbell: I will use the exact language of the document. May I have it again?

Q. Referring to government's Exhibit 51—yes, I will stand corrected—the lease itself calls, does it not, for a total payment of 219 thousand dollars rental for the premises described?

A. That's right.

Q. In addition to that, I take it from the bill of

(Testimony of Gene Schriber.)

sale or from the receipt, government's Exhibit 53, an additional 175 thousand dollars was paid as consideration for that lease, is [240] that correct?

A. No, that is not correct.

Mr. Avakian: Just a moment——

Q. What was the transaction?

The Court: Do you have an objection?

Mr. Gillen: Objected to as leading and suggestive and assuming something not in evidence. There is no evidence that the sum of 175 thousand was paid.

The Court: Did you hear the witness' answer?

Mr. Gillen: No, I didn't hear it.

The Court: He answered no. Do you want the answer stricken?

Mr. Gillen: No, your Honor, we will let it stand.

Q. At the time of the execution of these documents, did you receive any sum of money, Mr. Schriber? A. Twenty-five thousand dollars.

Q. By whom was that paid to you?

A. That I can not tell you because it was left with my attorney, Joseph A. Brown, and I don't know who delivered the money. They came over and I had the documents signed and they picked them up and left twenty-five thousand dollars in cash. I didn't get it until the following day.

Q. Had you, yourself, previously operated these premises? A. For a period of time, yes.

Q. In your own behalf or for others? [241]

A. In my own behalf.

Q. And what was the nature of the operation

(Testimony of Gene Schriber.)

on the premises acquired under the terms of this lease? A. I don't understand the question.

Q. What was the nature of the operation?

A. It was a card room and bar and restaurant.

Q. By card room, what do you mean?

A. Well, they play games with cards, like panguingue and low ball and form of poker, any legal game that was allowed in the State of California, that is what they had there.

Q. To your own knowledge did those operations continue after the lease was executed?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled. You may answer the question. A. Yes, they did.

Q. And over what period of time did you observe that operation with the card room continued after the execution of the lease?

A. Well, that is something I just don't remember the exact time but approximately I would say close to two weeks.

Mr. Campbell: At this time, if the Court please, I should like to read to the jury Plaintiff's Exhibit 53.

(Reads Exhibit 53.)

Q. Was the original signed and delivered to some one? [242]

A. It must have been, yes.

Q. To whom was it delivered?

A. Joseph A. Brown had it in his office and it

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(Testimony of Gene Schriber.)

was picked up there at the time I received the twenty-five thousand dollars.

Q. By Joseph A. Brown, do you refer to your attorney? A. Yes.

Mr. Campbell: If the Court please, I wish at this time to read certain portions of Plaintiff's Exhibit 51, the lease.

The Court: You may do so.

Mr. Campbell (Reads): "This indenture made and entered into this first day of May, 1945, by and between Gene Schriber of the City and County of San Francisco, State of California, and Joseph Billington, of the same place, hereinafter called, respectively, the lessor and lessee: Witnesseth: That the lessor, in consideration of the rents, covenants and agreements hereinafter contained, to be paid, kept and performed by the lessee, and upon the condition that each and all of the said covenants and agreements shall be fully kept and performed by the lessee, does by these presents, lease, demise and allow unto the lessee, for the purpose of conducting thereon a restaurant and cocktail bar, those certain premises situated in the City and County of San Francisco * * *"

And then describing the ground and upper floor of the building [243] known as 1832 Turk Street and the premises known as 1832 Turk Street:

> "* * * for the term of ten years at a total rent or sum of 219 thousand dollars, payable as follows: For the first five years at the rate

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(Testimony of Gene Schriber.)

of $1650 per month, payable monthly in advance, the next five years at the rate of $2000 per month."

I will not read the body of the lease except for certain provisions—I will not read any of the body of the lease. The signatures of Gene Schriber and Joseph Billington, then follows the language as read to you by Mr. Gillen.

Q. In connection with that document, Mr. Schriber, as respect to the bill of sale and receipt, with whom were your negotiations?

A. Mr. Remmer.

Q. And over what period of time did they take place?

A. Well, it was a little over a day when we come to an agreement.

Q. And you say that you received the initial payment on the 175 thousand dollars of 25 thousand dollars, is that correct? A. That is correct.

Q. And how much of the entire 175 thousand dollars have you received?

A. One hundred fifty thousand of it.

Q. In addition to that, have you also received the monthly rentals as stipulated? [244]

A. I have.

Q. During the period 1945 and 1946, inasmuch as the lease calls for a payment of $1650 a month from and after May 1, 1945, did you receive the sum of $1650 a month from Mr. Remmer?

A. Yes.

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(Testimony of Gene Schriber.)

Q. Is that any part of the 150 thousand which you received?

Mr. Gillen: Of course, that is assuming that that was received in 1946. Objected to on the ground it is assuming something not in evidence.

The Court: Objection will be overruled. Answer the question.

Q. May I have the answer?

(Question read.)

A. You mean is that $1650 part of the 150 thousand dollars?

Q. Yes. A. No.

Q. Were any of the sums which you received paid to you by Joseph Billington?

Mr. Gillen: I think that would be calling for opinion and conclusion of the witness. Does he mean personally?

Q. Personally by Mr. Billington? A. No.

Q. Now, you said that at the time of these negotiations, or at the time these documents were signed by you, you received 25 thousand dollars in cash at your attorney's office, is that correct? [245]

A. That's correct.

Q. Did you subsequently have a conversation with Mr. Remmer regarding that 25 thousand dollars? A. I did, yes.

Q. When was that?

A. Well, I don't remember the exact date of it. It wasn't important at that time, though I can relate the conversation.

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(Testimony of Gene Schriber.)

Q. Approximately how long was it after you received the 25 thousand dollars?

A. Well, I would say about six weeks.

Q. And where did the conversation take place?

A. That I don't remember.

Q. Do you recall if any one else was present?

A. No.

The Court: I don't understand your answer. Was there any one else present?

A. He asked me if I recall any one and I said no.

Q. You don't recall, or was there any one present?

A. I don't know if there was or not.

Q. Now, will you relate that conversation?

A. Yes. Mr. Remmer asked me if I would mind to let him issue me a check for that 25 thousand dollars. He had hired Mr. Maundrell to set up a set of books and wanted that check for his business so he would have a check for his transactions. [246]

Q. What did you do?

A. He issued me a check and I returned the 25 thousand dollars to him and accepted the check.

Q. Do you recall by whom the check was signed?

A. Yes, sir, Maundrell.

Q. Signed by Maundrell?

A. That is right.

Q. Have you ever seen that check since that time? A. Never have.

Q. Was the check delivered to you?

A. I don't recall if I cashed the check or cashed

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(Testimony of Gene Schriber.)

it at 52 Mason Street. I don't recall, but I just vaguely remember that I cashed it with some one else.

Q. And have you ever seen the check since that time? A. I have not.

Q. Was there any other signature on the check other than that of Maundrell?

A. Not to my memory.

Q. Do you recall Maundrell's first name?

A. Harold Maundrell.

Q. Do you recall that there was any imprinted or printed signature appearing above the signature of Harold Maundrell?

A. I don't remember whether there was or not.

Q. Do you recall upon what bank that check was drawn? A. No, I don't. [247]

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Schriber, from your testimony I take it that you had acquired the property which houses on the ground floor of the Menlo Club the Menlo Cigar Stand and Menlo Social Club, the Turf Club, which was a bar or tavern, a restaurant, Tiny's Waffle Shop, and which also housed some quarters on the second floor, just a short time before you entered into the lease arrangement, sale of the premises, is th .t right? A. That is right.

Q. As I recall your testimony, it was on the 25th of April, 1945, that you actually became the owner

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(Testimony of Gene Schriber.)

of the building and on the 30th of April and May 1st these documents were executed in your transactions with Mr. Remmer, with Mr. Billington being the designated person to hold the lease?

A. That is correct.

Q. Now prior to that time the combined rent for that building had been $825 a month, had it not, or half of the $1,650 a month?

A. That is right.

Mr. Campbell: Objected to as immaterial.

Q. And the 219 thousand dollar figure set forth in the lease which Mr. Campbell read to you, that comprised the total amount of the lease, month to month, over a period of ten years, with the rent being fixed at $1,650 per month for the first five years and two thousand dollars per month for the last five years, is that [248] correct?

A. That is correct.

Q. Now I will show you here the prosecution's Exhibit 51 in evidence and defendant's Exhibit B in evidence. One indicates as an original and the other a copy of the lease, the property we are now referring to. With the Court's permission, I would like to present them to the witness. Will you look at those and tell us whether you recall those being prepared by your lawyer, Mr. Joseph A. Brown, in San Francisco?

A. That is correct. Mr. Brown prepared both of these.

Q. Will you look at the signatures on page 7 and tell us whether or not you recognize your signature

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(Testimony of Gene Schriber.)

on both of those documents, both plaintiff's Exhibit and defendant's exhibit?

A. Both my signatures.

Q. You signed them both. Now you notice that on page 7, immediately after your signature and Mr. Billington's signature, there is commenced the wording of a guarantee under the obligations of that lease, do you notice that? A. Yes.

Q. And on the following page there is a signature contained. Do you know whose signature that is? A. I assume it is Elmer Remmer's.

Q. Do you recall whether it was at your request or demand, or at your lawyer's request or demand, or whether it was voluntarily that Mr. Remmer guaranteed the obligations of that lease to [249] you?

Mr. Campbell: Objected to as a compound question.

The Court: Objection will be overruled.

Q. Do you understand the question, Mr. Schriber? A. I would like to have you read it.

(Question read.)

A. Well, I think it was at my request, because Joseph Billington was only a name to me and that was quite a large sum of money there involved and I wanted Mr. Remmer's guarantee it would be paid.

Q. That was the reason for the signing of the guarantee by Mr. Remmer?

A. That is right.

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(Testimony of Gene Schriber.)

Q. Now there was some security put up, was there not, in the form of some lots in El Cerrito? Do you recall that? A. That is right.

Q. I am going to show you plaintiff's Exhibit 50, which is the letter from Mr. Haughey to Mr. Brown, your attorney, regarding the placing the lots as security. I will ask you to look at the second page of that exhibit and note whether or not Mr. Remmer also signed a consent to those lots being used for that purpose?

Mr. Campbell: I suggest the document speaks for itself.

The Court: Objection overruled.

Mr. Gillen: It is preliminary.

A. I don't think I could answer this question because I am not familiar enough with Mr. Remmer's analyzing to state. [250]

Q. Do you recall there was a request made to Mr. Remmer to join in consenting?

A. And I remember that this is his signature, yes.

Q. By the way, Mr. Campbell asked you a moment or two ago if any part of the additional 150 thousand dollars that you were to receive under the agreement of sale, over and above the 25 thousand dollars cash that you received, was any part of the money under the lease and you answered no. It is something separate?

A. That was altogether separate.

Q. Now that 25 thousand dollars which you received and which you later gave back and accepted

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(Testimony of Gene Schriber.)

a check for, at the request of Mr. Remmer, so there would be a check transaction and a record of the transaction, any additional payments were made over a period of time, were they? A. Yes.

Q. Do you recall how much additional over and above the initial 25 thousand dollars was paid in the year 1946?

A. There was another 25 thousand dollars paid, making a total of 50 thousand dollars in 1945.

Q. Mr. Avakian has called my attention — I mean in the year 1945, I should have asked you. You received 25 thousand dollars in the year 1945 initially when the transaction took place?

A. That is correct.

Q. Did you receive any other payments in the year 1945? [251] A. Yes, I did.

Q. Can you tell us what payments you received?

A. On September 8th I received 25 thousand dollars more.

Q. So you received in the year 1945 the sum of 50 thousand dollars? A. That is correct.

Q. Did you receive any payment in the year 1946?

A. Yes, two payments in 1946; one February 28th for 25 thousand dollars and another one on May 1st for 25 thousand dollars.

Q. So that in the years 1945 and 1946 you received a total of 100 thousand dollars?

A. That is correct.

Q. And that left a balance under that agreed

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(Testimony of Gene Schriber.)

figure of 75 thousand dollars to be paid, is that correct? A. Correct.

Q. Now you say that Mr. Remmer, when he made a request of you that the 25 thousand in cash initially paid to you on the 175 thousand dollar agreement, be returned to him and replaced by a check? A. Correct.

Q. And you said in your direct examination that he stated to you he had engaged the services of Mr. Harold Maundrell to set up books for use in the business, is that correct? A. Correct.

Q. And that he desired to have a check record of the transaction? [252] A. That is correct.

Q. Then I understood you to testify that to accommodate him you returned the 25 thousand dollars in cash and accepted in lieu thereof a check, which was signed by Harold Maundrell, is that correct? A. Correct.

Q. And it is your recollection that you cashed that check through some one other than through Mr. Maundrell or Mr. Remmer? A. Yes.

Q. You do not recall the bank that the check was on? A. No, I do not.

Q. Mr. Schriber, the second payment of 25 thousand dollars which you received under that 175 thousand dollar agreement that we mentioned here, which you say you believe you received in September of 1945——

A. That is correct, September 8th.

Q. ——was that in the form of a check, that payment?

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(Testimony of Gene Schriber.)

A. That was in the form of three checks, split up, one for 15 thousand, one for 8,500 and one for 1,500.

Q. Do you recall whose checks they were? I mean do you recall who the payer was who signed that?

A. I think Mr. Maundrell did. I am sure he did.

Q. As I recall your testimony, you said the next payment you received was the sum of 25 thousand dollars paid in February of [253] the following year, 1946, is that correct? A. Correct.

Q. Was that payment made in the form of a check? A. Yes.

Q. And do you recall who signed that check?

A. Maundrell.

Q. Do you recall the final payment of the year 1946, I do not think you gave us the month.

A. May 1, 1946.

Q. Do you recall what form the payment was received by you of the 25 thousand dollars on that date? A. A check.

Q. By whom was that check signed?

A. Maundrell.

Q. By Mr. Maundrell. Now in addition to those four payments that you have mentioned here on the agreement, Mr. Schriber, there was also, I understood you to say, paid to you $1,650 per month on rent, is that correct? A. Yes.

Q. And in what form of payment did you receive the monthly rental? A. By check.

Q. And who signed those checks?

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(Testimony of Gene Schriber.)

A. Maundrell.

Q. So that the beginning of each and every month, if that was [254] the starting point of the rental, you received a check for $1,650 signed by Mr. Maundrell? A. That's right.

Mr. Gillen: I think, may it please the court, that this is all the cross-examination we have of Mr. Schriber. We would like, however, for Mr. Schriber to be on call for possible further cross-examination.

The Court: Do you suppose you would want him tomorrow or some time later in the trial?

Mr. Gillen: Possibly a little later in the trial, your Honor.

The Court: Well, he could be excused now and return to San Francisco.

Mr. Campbell: I have one question on redirect, if the Court please.

Redirect Examination

By Mr. Campbell:

Q. You stated, Mr. Schriber, that you received fifty thousand dollars on this deal in 1945?

A. That is correct.

Q. Have you any books or records to which you can refer, which you can produce, with regard to the payments which you received? A. No.

Q. Isn't it a fact that you received 75 thousand dollars in 1945?

A. It is not. I was to receive 75 thousand but I didn't and [255] the reason was because I also

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(Testimony of Gene Schriber.)

agreed to deliver a liquor license to Mr. Remmer and I was unable to do so and the bar got closed up from early September until late in December and I have correspondence right here with me between my attorney at that time, Herbert Erskine, and Elmer Delaney, about the liquor license being transferred to me from Mrs. Bailey, which she refused to do at the Board of Equalization in the City of San Francisco closed that bar up.

Q. At any rate, you are positive that 50 thousand dollars was all that you received?

A. Yes, I am, and that is the reason I didn't get it.

Recross-Examination

By Mr. Gillen:

Q. Mr. Schriber, the incident you are referring to now is this, that you were to receive the third payment of 25 thousand dollars in the year 1945?

A. According to my agreement, yes.

Q. And according to the agreement you were also supposed to transfer over to Mr. Remmer the California State liquor license?

A. That is right.

Q. To enable the tavern to conduct business?

A. That is correct.

Q. And without that, under California law, the tavern couldn't conduct business?

Mr. Campbell: Objected to as calling for legal conclusion. [256]

The Court: I think the objection is good.

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(Testimony of Gene Schriber.)

Mr. Gillen: I will withdraw that.

Q. At that time your attorney handling some of your affairs was Mr. Herbert Erskine, who is now recalled as the late United States District judge, as the party involved? A. That is right.

Mr. Campbell: Objected to as immaterial.

The Court: It may stand.

Q. At that time the party that you acquired the property from was represented by Mr. Elmer Delaney as attorney? A. Correct.

Q. You were unable to obtain transfer of the liquor license in order to transfer it over to Mr. Remmer? A. That is correct.

Q. And as a result of that, Mr. Remmer did not have the benefit of the tavern being open from September until some time after the first of the year of 1946, is that correct?

A. Closed until the first of the year. I think late in December of the same year they got open.

Q. And for that reason you did not press the third payment and he did not agree to pay the third payment until the liquor license was forthcoming?

A. He refused to pay it for that reason.

The Court: Mr. Schriber may be excused, subject to his recall? He may return to San [257] Francisco.

Mr. Gillen: Yes, your Honor.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.)

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Wednesday, December 5, 1951, 10:15 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

JOSEPH BILLINGTON

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Joseph Billington.

Q. Where do you reside?

A. 456 B Street, Oakland.

Q. What is your business or occupation?

A. I am interested in a tavern in Oakland.

Q. What is the name of the tavern?

A. East Shore Inn.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, sir.

Q. How long have you known him?

A. Approximately all my life.

Q. Mr. Billington, you were here in court yesterday? A. Yes, sir.

Q. You are the same Joseph Billington referred to in the testimony? A. That's right.

Q. I am going to show you plaintiff's Exhibit 51, which purports [259] to be a lease or indenture entered into between yourself and one Gene Schriber, and ask you if that is your signature appearing thereon? A. Yes, it is my signature.

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(Testimony of Joseph Billington.)

Q. Have you ever read that document?

A. No, sir, I haven't.

Q. That is your signature appearing thereon?

A. It is, yes.

Q. Was your signature placed there at the request of any one?

A. Well, I was asked to sign the lease.

Q. Who asked you to sign the lease?

A. Mr. Remmer.

Q. Did you, yourself, have any interest in that lease? A. No, sir.

Q. You will observe that the lease refers to premises occupied by certain enterprises known as Tiny's Bar, Tiny's Restaurant, and the Menlo Club.

Mr. Gillen: That would be the Turf Bar.

Q. The Turf Bar, pardon me. A. Yes, sir.

Q. Did you at any time have any interest in those enterprises? A. No, sir.

Q. Did you at any time have anything to do with the operation of those enterprises?

A. No, sir. [260]

Q. Did you at any time have anything to do with the operation of any enterprises at 18 Turk Street, 30 Turk Street, or 32 Turk Street in the City of San Francisco? A. No, sir.

Q. Did you at any time receive any profits as a result of any operations conducted on those premises? A. No, I didn't.

Q. I show you at this time government's Exhibit

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(Testimony of Joseph Billington.)

52, which purports to be a bill of sale to you of certain liquor licenses and other matters, and ask you if you have ever seen that document or the original thereof? A. No, sir, I have never seen this.

Q. Or did you ever see the original of that?

A. No.

Q. Did you at any time have any interest in any of the matters set forth in that bill of sale?

Mr. Gillen: May it please the court, in the interest of time, we are perfectly willing to stipulate that Mr. Billington's name appears on the documents that have been introduced by stipulation by the defense and that he was requested to place his name on those documents by the defendant and that he had no interest and drew no income from any of those enterprises, if that will save time.

Mr. Campbell: I think we should have the testimony.

Mr. Gillen: It was only in the interest of [261] time.

The Court: You may proceed.

Q. Did you at any time have any interest in those liquor licenses? A. No.

Q. I show you government's Exhibit 53, which purports to be a receipt, identified by the witness Gene Schriber, wherein it is related that you had paid to him the sum of 25 thousand dollars on account of the purchase price of Tiny's Bar, Tiny's Restaurant and the Menlo Club and agreed to pay an additional sum of 150 thousand dollars, and I

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(Testimony of Joseph Billington.)

will ask you if you ever saw that receipt or the original thereof?

A. I do not recall ever seeing any such receipt like that.

Q. Did you ever at any time pay to Gene Schriber, or to any one on his account, the sum of 25 thousand dollars? A. No, sir.

Q. Or did you at any time pay Mr. Schriber any other sum whatever? A. No, sir.

Q. Or have you ever had any business dealings with Mr. Schriber with relation to those premises on Turk Street? A. No, sir.

Q. Now, were you ever employed by Mr. Remmer?

A. Well, I was employed by Mr. Remmer and Mr. Kyne at 110 Eddy Street at one time.

Q. By Mr. Remmer and who? [262]

A. Mr. Willie Kyne.

Q. Were you also employed at the 21 Club?

A. Yes, sir, I was.

Q. In El Cerrito? A. Yes, sir.

Q. And over what period of time were you employed there?

A. Well, I am not too sure. It seems to me it was 1943 to September, 1945. I am not positive. I have forgotten the dates myself. I don't remember.

Q. And what was the nature of your employment at the 21 Club?

A. Well, I was in charge of the bar. I was on the floor also.

Q. Did you also work in the restaurant there?

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(Testimony of Joseph Billington.)

A. Well, yes, I did, yes. It was all one room there, the bar and the restaurant.

Q. And was that the 21 Club located at 90 San Diego Street in El Cerrito?

A. That would be the address, I believe, 90 San Diego Street.

Q. What was the nature of the enterprise? What was conducted on those premises?

Mr. Gillen: Objected to as already asked and answered. He says a bar and restaurant.

The Court: Objection overruled.

A. Well, restaurant and bar and casino.

Q. What do you mean by casino?

A. Well, they had games in back. [263]

Q. What type of games?

A. Roulette, twenty-one, craps.

Q. Was there also a game known as barbuti played there? A. Not to my knowledge.

Q. Did you have anything to do with the operation of the gaming room?

A. No, sir, I did not.

Q. Who had charge of that?

A. Well, I don't remember just who did have charge of that. I was so seldom in there. Mr. Pechart and Mr. Kessel were around there and who worked back there, I just knew by names; I didn't know their titles or what they did.

Q. What were your principal duties?

A. Well, my principal duties were to watch the front end of the bar and the restaurant and meet people.

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(Testimony of Joseph Billington.)

Q. What compensation did you receive for your services?

A. Well, I received, I believe it was $75 a week and later it was $100 a week for my services.

Q. Did you at any time have any proprietary interest in those premises or in that operation?

A. No, no, I didn't.

Q. Who employed you to work there?

A. Mr. Remmer.

Q. And were you subject to his orders at all times?

A. Well, I guess so. Mr. Remmer wasn't around there too much. [264] Didn't see too much of Mr. Remmer.

Q. Did you look to him for orders, instructions?

A. Well, as I say, I never seen too much of Mr. Remmer, so there wasn't any instructions coming.

Q. Very well. You did, however, did you not, file a partnership return for that enterprise for the year 1944?

A. Well, I can't answer the question. I don't know.

Q. I wish to show what purports to be a partnership return of income for the year 1944 and ask you if that is your signature affixed thereto?

Mr. Gillen: Just a moment. Is this something that has been placed before the court for identification?

Mr. Campbell: I beg your pardon. I would like to have that marked for identification.

Mr. Gillen: If it is, I would like to see it.

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(Testimony of Joseph Billington.)

The Court: Marked Exhibit 54 for identification.

Mr. Campbell: While counsel is examining that, I will ask to have this marked 55 for identification.

Mr. Gillen: The defense is willing to stipulate that those two returns are the returns of Mr. Billington for the years 1944 and 1945.

Mr. Campbell: I wish to interrogate the witness, Mr. Gillen.

The Court: You may proceed.

Q. I show you government's Exhibit 54 for identification and [265] that you examine that and state whether or not that is your signature affixed thereto?

Mr. Gillen: I don't know whether we made ourselves plain. We are willing to stipulate that those two documents may be admitted.

The Court: You mean admitted in evidence?

Mr. Gillen: Yes.

The Court: Exhibit 54 by stipulation is admitted in evidence.

Mr. Campbell: I presume the same stipulation will be made as to 55?

Mr. Gillen: Yes.

The Court: Exhibit 55 will be admitted in evidence.

Mr. Campbell: With the Court's permission, I would like to read the exhibits.

The Court: You may do so.

Mr. Campbell (Reads Exhibit 54): There is-

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(Testimony of Joseph Billington.)

attached a document entitled "Agreement." (Reads agreement.)

Q. Mr. Billington, did you receive any of the share of profits of that enterprise?

A. One year I got two thousand dollars.

Q. Was that as a share of the profits or as a bonus?

A. I believe that was working on the job, five per cent or something was paid for working there.

Q. That was in connection with your job? [266]

A. I guess so.

Mr. Campbell: Reading government's Exhibit 55: (Reads) From Schedule I: "Partner's Share of Income and Credits. J. Billington, 456 Lee Street, Oakland, California, $3,638.17."

Q. Did you receive any such amount?

A. Not to my knowledge. I don't remember.

Q. You don't remember receiving any such amount? A. No.

Mr. Campbell: (Reads balance of Exhibit.)

Q. Now, Mr. Billington, it has been stipulated here that these documents were signed by you. So there will be no question, you might examine your signature there.

A. Yes, that is my signature.

Q. Now, at the time you signed those returns did you read them over? A. No, sir, I did not.

Q. Until this day did you know what was contained in those returns? A. No, sir.

Q. Do you know whether or not the figures

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(Testimony of Joseph Billington.)

which I read to you include the gaming room as well as the operation of the bar and restaurant?

A. I couldn't answer the question truthfully because I really don't know. [267]

Q. What was the nature of the restaurant operation there? Was it simply a cafe, night club, or what?

A. Well, it was the same as night club, had a dining room.

Q. Was there entertainment there?

A. They did have some entertainment at different times, yes.

Q. How many people could be seated in that restaurant?

A. Oh, probably 85, I believe, I am not sure.

Q. How large was the bar that was operated there?

A. Well, the bar went across the back of the room, possibly 20-foot bar; I couldn't tell you truthfully because I don't know. About 20 feet, I suppose.

Q. I believe you stated that you had received two thousand dollars at one time, is that correct?

A. That is correct.

Q. Do you recall in what year you received that?

A. No, I don't know, I don't know what year.

Q. How large was the gaming room on those premises?

Q. Well, they weren't too large. I don't know

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(Testimony of Joseph Billington.)

how long this room is—well, say 35 feet, just guessing.

Q. Would it be as large as this room?

A. No, it isn't as large. Might have been practically as long but not as large.

Q. How much equipment was in there?

A. Well, that I don't know. I didn't know what was back there, as far as equipment was [268] concerned.

Q. You don't know how many tables were there?

A. No, I couldn't answer that.

Q. Do you have any knowledge yourself of what the income was from any part of that operation during the years 1944, 1945, and 1946?

A. Mr. Campbell, I wouldn't know what it was.

Q. Who kept the books and records?

A. I believe Mr. Simmons, as you stated.

Q. That is Mr. G. E. Simmons?

A. I believe so, George Simmons.

Q. Did you have anything to do with the handling of the receipts at the end of the day?

A. Well, on the bar I did sometimes, yes.

Q. Did you have anything to do with the receipts from the gambling room? A. No, sir.

Q. Did you have anything to do with the receipts from the restaurant?

A. No, I don't think I ever had anything to do with them. I was used to the bar and the bar was my line.

Q. Did you have anything to do with the payment of the expenses of any part of the operation?

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(Testimony of Joseph Billington.)

A. No. Only expenses, probably a liquor bill, or something like that.

Q. In other words, daily bills, I take it? [269]

A. Well, yes, like liquor bill or bills like that.

Q. Where a delivery man would present a bill, is that correct?

A. Well, no. You see, we had to have two signatures on those checks and I forget the other man to sign the check—well, Mr. Simmons had authority and I but Mr. Simmons generally did all the stuff unless he had to put my signature on, then he would send it out.

Q. Was your name on some bank account in connection with that operation?

A. Well, I don't know. I think they had a bank account in the Mechanics Bank, but I don't know whether in my name truthfully or whose name it was.

Q. Did you have anything to do with handling that bank account? A. No, sir.

Q. You say your signature was required on the checks?

A. Well, sometimes, you go to the bank, like you have an account and have them recognize my signature for a check.

Q. Well, on expenses that were paid out by the 21 Club, did you have to sign that check?

A. No; no, sir.

Q. What checks did you have to sign?

A. Well, now, I am kind of confused. I think I signed pay checks.

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(Testimony of Joseph Billington.)

Q. Do you recall that you signed anything else?

A. I don't recall.

Q. Were those pay checks for the entire enterprise, that is, [270] for the bar, the restaurant and the gambling?

A. I think it was for the bar and the restaurant. I don't recall ever having anything to do, as I say, with the back room, to my knowledge.

Q. Do you know whether or not there was more than one bank account maintained?

A. That I don't know.

Q. Who would present you checks for signature?

A. Oh, Mr. Simmons.

Q. Would those checks be filled out at the time they were handed to you, or were they given to you in blank?

A. I can't answer the question truthfully.

Q. You don't remember?

A. It seems to me they must have been filled in. I really don't remember.

Q. Do you recall upon what bank or banks those checks were drawn?

A. Well, there is a bank there in El Cerrito. It could have been the Mechanics, I am not sure.

Q. You are not sure what bank?

A. There is a little bank in El Cerrito. I don't know whether it was that bank.

Q. You know the checks were drawn on that bank in El Cerrito?

A. Well, I believe they were.

Q. What is your best recollection? [271]

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(Testimony of Joseph Billington.)

A. Well, I can't say, Mr. Campbell. I have really forgotten. I know there was a bank in El Cerrito and outside that I don't know anything about the bank, the one bank I ever heard or knew anything about.

Q. Did you know anything about any other account? A. No, sir.

Q. Do you know whether or not the returns which I read to you properly set forth the income of the 21 Club for those two years?

A. Not knowing, I couldn't say. I don't know.

Q. You don't know? A. Don't know.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Billington, you stated in your direct examination that you and Mr. Remmer, the defendant in this case, had been lifelong friends, is that correct? A. Correct.

Q. As a matter of fact, you and Mr. Remmer were little boys together? A. That's right.

Q. And played together as children and grew up together, is that correct? A. Grew up together.

Q. And for a time you were a professional boxer, were you not? [272]

A. That's right, sir.

Q. And your professional boxing name was Frankie Denny? A. That's right.

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(Testimony of Joseph Billington.)

Q. And then after that you injured yourself driving an oil tank? A. Right, sir.

Q. And after a time Mr. Remmer had you go to work for him, is that correct? A. Yes.

Q. When you were requested by Mr. Remmer to sign the lease on the Menlo Club and the other properties, the Turf Tavern and the Tiny's Restaurant, isn't it a fact that Mr. Remmer told you that he wanted you to sign the lease and hold that lease in your name because he trusted you and he would be away a good deal of the time?

A. That's right.

Q. And isn't it a fact that the reason Mr. Remmer told you the reason he wanted some one he trusted, he wanted Mrs. Remmer protected in case anything happened?

A. That was his statement.

Q. And that he could rely on you to hold the property, is that correct? A. Yes.

Q. Now, he told you at that time, did he not, that he would guarantee the lease so that there wouldn't be any liability on [273] you?

A. That's right.

Q. And as a matter of fact—if I may have the Court's permission to approach the witness with an exhibit—as a matter of fact, Mr. Billington, showing you prosecution's Exhibit 51, which has been identified as the original Schriber lease, following the signature of Mr. Schriber and yourself, Mr. Remmer did sign, guaranteeing the performance of the lease, the obligations thereunder, is that correct?

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(Testimony of Joseph Billington.)

Mr. Campbell: We suggest the document speaks for itself, if the Court please.

The Court: You may answer the question.

A. Yes.

Q. And Mr. Remmer also signed with you to take on the escrow agreements, which have been designated prosecution's No. 50, the escrow agreement, between Mr. Schriber and yourself, is that correct? A. That's right, sir.

Q. Now, then, did you ever make an income tax return, wherein you claimed that you had derived any benefit financially from any of the Menlo Club property or its other enterprises, such as the bar or the Tiny's Restaurant?

A. No, I never returned.

Q. You never did receive any income out of either the Menlo Club, cigar stand, restaurant or bar, is that correct? [274] A. Correct.

Q. Either by way of salary or by way of any bonus or profit, is that correct?

A. Nothing; no, sir.

Q. Now you did, however, go to work for a time at the 21 Club in El Cerrito, that has been testified to here? A. Yes.

Q. And you were more or less the floor manager of the bar and the restaurant, is that correct?

A. Right.

Q. And for that you received a salary?

A. Right.

Q. And I understood you to say initially it was $75 a week, a little later it was increased?

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(Testimony of Joseph Billington.)

A. I believe as near as I can remember that is right.

Q. A little later your recollection is that it was increased to $100 a week? A. That's right.

Q. And then you said that you recall at one time that you received something in the neighborhood of two thousand dollars, in the nature of a bonus, based on percentage of the business?

A. I received two thousand dollars, yes, sir.

Q. And that was over and above your salary, in addition to your salary?

A. Yes, that would be. [275]

Q. You drew your salary every week and this was some bonus given to you at the end of the year?

A. That is right.

Q. And that is what you have recalled, is it, that you have made an income tax return on, showing the collection of some financial benefit by you over and above your salary? A. Yes.

Q. So you made the two returns those two years, one being your individual return on salary and the other being a partnership?

A. As near as I remember Mr. Simmons made that out.

Q. Did you direct Mr. Simmons what to do, or did you simply turn over to Mr. Simmons the income concerning your personal affairs and Mr. Simmons prepared what he considered he should prepare? A. Yes.

Q. Mr. Simmons is an accountant?

A. Yes, sir.

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(Testimony of Joseph Billington.)

Q. He has a brother also, Mr. Lester Simmons, works with him? A. Yes.

Q. You are not an expert in accountancy or bookkeeping, or anything of that kind?

A. No, sir.

Q. You have been a boxer and truck driver before? A. That is correct.

Q. And you turned all your personal affairs to Mr. Simmons, the [276] accountant to be made out as they should be made out?

A. That is right.

Q. As near as you know this was a true and correct report made to Mr. Simmons as to money that passed through your hands?

A. Mr. Simmons had my tax and wages and everything.

Q. In other words, Mr. Simmons was as familiar with that as you were?

A. That is right, more so.

Q. Mr. Avakian thought you were not sure that you understood a question I asked, so I will put it to you again. In regard to the San Diego Club or the 21 Club, rather, bar and restaurant over which you had supervision as sort of a general manager, as near as you can recall now did Mr. Simmons, the accountant, receive a full and correct report on everything that was made by the place and everything that was paid by the place?

A. Yes.

Mr. Campbell: Objected to as incompetent, in view of the witness' testimony that he knew noth-

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(Testimony of Joseph Billington.)

ing about the receipts of certain portions of the business.

Mr. Gillen: I am only asking for certain portions, the bar and restaurant, over which he had supervision.

The Court: You may answer the question. You may answer it after you hear it read.

(Question read.)

Q. You understand I am confining that to what you knew, not the [277] gaming room, but the bar and restaurant portion.

(Question read.)

A. Yes, sir.

Q. Now, when you answered before that Mr. Simmons was as familiar, even more so, with the profits and expenses, were you referring in your answer to the bar and the restaurant of the 21 Club?

A. Well, the bar and restaurant. As I stated, I didn't know anything about the other part.

Q. What I am trying to get at is was Mr. Simmons as familiar as you were with the money that was taken at the bar and restaurant?

Mr. Campbell: Objected to as calling for his conclusion.

The Court: Objection sustained.

Q. Did Mr. Simmons look over the accounts with you or look over the accounts very frequently of the bar and the restaurant?

BLEED THROUGH– POOR COPY

(Testimony of Joseph Billington.)

Mr. Campbell: If he knows.

Mr. Gillen: Of course if he knows. I am not asking for anything he doesn't know.

A. I know I see him working on the books and just what he was doing, I can't state.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Campbell:

Q. Counsel showed you Plaintiff's Exhibit 51, the original indenture and the guarantee agreement. Did you ever read that [278] before, Mr. Billington? A. No.

Q. He also showed you Government's Exhibit 50, which you signed and is signed by Elmer Remmer. Did you ever read that before?

Mr. Gillen: Objected to as improper redirect. I didn't ask him anything about reading. I asked him if the signatures were contained and he was informed Mr. Remmer was going to guarantee these terms?

The Court: Objection overruled. What exhibit were you referring to just now?

Mr. Campbell: Referring to Government's Exhibits 50 and 51.

The Court: Let us have the question.

(Question read.)

A. No, I never read it.

Q. Now, counsel asked you relative to whether or not you had reported on your individual in-

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(Testimony of Joseph Billington.)

come tax returns any of the income of the Menlo Club? A. No, sir.

Q. You did, did you not, report, however, income of Elmer Remmer from other enterprises on your individual returns.

Mr. Gillen: Just a moment. I am going to object to the question as improper redirect, and secondly as being a complex question. It is not clear.

The Court: Let us have it read again. [279]

(Question read.)

Mr. Gillen: I think I should add to that, may it please the Court, that Mr. Billington is Mr. Campbell's witness and I think Mr. Billington, as would be any other witness, is entitled to see any document from which Mr. Campbell is making reference and I submit he is attempting to cross-examine his own witness.

The Court: Objection overruled. Answer the question.

Let us have the question read so you know and understand it.

(Question read.)

Mr. Gillen: Just a moment. I would like to understand the question and I am going to object to it as a complex question.

The Court: Objection overruled. Read the question to the witness so we will understand it.

(Question read.)

A. Not to my knowledge.

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(Jury and alternate jurors admonished and short recess taken at 11:05 a.m.)

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BILLINGTON

resumes the witness stand on further

Redirect Examination

By Mr. Campbell: [280]

Mr. Campbell: I was about to use this exhibit to refresh the witness' recollection.

Mr. Gillen: I would like to look at the exhibit. In the first place the exhibit is a return dated 1943, which is earlier than the time of the time boundaries of the indictment, which begins in 1944. In the second place, it is improper redirect examination and it wasn't touched upon on cross. The cross touched only the field that was explored by counsel in direct examination, and third, as I indicated before, this witness is Mr. Campbell's witness and he is now seeking to cross-examine his own witness or to impeach his own witness, I don't know which.

Mr. Campbell: That is not quite correct, your Honor. Counsel asked the witness if he had ever reported, as I recall, any of Mr. Remmer's income upon his own personal returns.

Mr. Gillen: No, that isn't the question I asked at all.

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(Testimony of Joseph Billington.)

Mr. Campbell: I call on the record.

Mr. Gillen: I asked him if he ever reported receiving any income of any nature from the Menlo Club on his own individual return.

(Record read.)

The Court: At this present time we really have nothing before the Court.

Mr. Gillen: Yes we have.

The Court: No question has been propounded. He [281] indicated the purpose to show this exhibit to the witness, that is all I can recall.

Mr. Gillen: Well then, it is premature.

The Court: We will go right along for the time being and then you may interpose the same objection.

Mr. Gillen: Very well.

Mr. Campbell: I will approach the matter in another manner.

Q. I am going to show you Plaintiff's Exhibit 56 for identification and ask you if that is your individual income tax return for 1943?

Mr. Gillen: Objected to as incompetent, irrelevant, and immaterial, not proper redirect examination. Isn't within the confines of the direct examination or the cross-examination. Nothing was asked of this man concerning his income tax return for 1943, which is before the time of the indictment, either by Mr. Campbell on direct or myself on cross-examination.

Mr. Campbell: I wish to point out to your

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(Testimony of Joseph Billington.)

Honor that counsel interrogated the witness as to his association with Mr. Remmer over a long period of time, as to his prior employment and activities. For that reason I believe this is material.

The Court: This question here, it seems to me, to be merely a question going to see if the witness can identify this exhibit, that is all. Objection to this question will be overruled. Now you may answer. [282]

(Question read.)

Mr. Gillen: May the witness answer yes or no?

The Court: Please answer yes or no.

A. Well, it is my signature and must possibly be the income tax for that year.

Mr. Campbell: This will be offered in evidence as Government's Exhibit 56.

Mr. Gillen: To which, of course, we offer the objection upon all the grounds heretofore urged, which your Honor thought were premature at that time, and I think properly so.

The Court: In view of the statement of Mr. Campbell, I would think it is probably not proper redirect examination.

Mr. Campbell: I then ask leave of the Court to reopen the direct examination for the purpose of offering this exhibit.

The Court: The direct examination may be reopened.

Mr. Gillen: Then we object to it on the ground it is the income tax return of this witness at a time earlier than this involved in the indictment,

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(Testimony of Joseph Billington.)

may it please the Court. I would like your Honor to see the exhibit.

The Court: What have you to say on that subject, Mr. Campbell?

Mr. Campbell: Well, the exhibit on its face will show its materiality.

The Court: I mean as to the year 1943? [283]

Mr. Campbell: It will show wilfullness and a plan or scheme.

Mr. Gillen: Well, I am going to have, for the record, to assign counsel's remark in the presence of the jury, as to wilfullness conduct. I would like your Honor to see the exhibit I wonder if I could prevail upon your Honor to instruct the jury to disregard the remark of counsel.

The Court: I take that remark to be that counsel indicates that it might show a plan, rather than the word "scheme." Is that your idea?

Mr. Campbell: Yes, your Honor.

The Court: Of course, that word "scheme" has the sound——

Mr. Gillen: It is an unpleasant word.

Mr. Campbell: Well, I retract it in that sense.

The Court: I take it that you mean it might show a plan. Do you want me to see that exhibit?

Mr. Gillen: Yes, your Honor. I would like to invite your Honor's attention again to the matter that this gentleman on the witness stand, Mr. Billington, is Mr. Campbell's witness and he is apparently attempting to impeach his own witness without laying a proper foundation.

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(Testimony of Joseph Billington.)

The Court: Objection will be overruled. It may be admitted in evidence.

Mr. Campbell: If I may read from this Exhibit 56, your Honor? [284]

The Court: Yes.

Mr. Campbell: (Reads Exhibit 56.)

Q. Did you, during the year 1943, operate the San Diego Social Club as your own personal business.

Mr. Gillen: To which we offer an objection, may it please the Court, that it is improper redirect examination, incompetent, irrelevant and immaterial, not within the time confines of the indictment, which commences in 1944; also that he is impeaching his own witness without laying the proper foundation. And may I say this to your Honor, counsel a moment ago, in his anxiety to be able to ask these questions of the witness, pointed out to your Honor that I had asked in cross-examination concerning this witness' long association with Mr. Remmer. Your Honor will recall that counsel——

The Court: I don't want to interrupt, but haven't we lost sight of the fact that I permitted counsel to open up the direct examination? Your objection seems to be based on the theory this is redirect.

Mr. Gillen: That is true, you did permit. May I ask your Honor then to reconsider that there is no foundation laid here to impeach this witness and the other objection I was going to make would

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(Testimony of Joseph Billington.)

be defeated by the fact that you had ruled counsel could reopen.

The Court: Objection will be overruled.

(Question read.) [285]

A. Not to my knowledge.

Q. Did you have anything to do with the San Diego Social Club in 1943?

A. I think I did in 1943. I don't just remember the date when I went into the place.

Q. What was the nature of your association there, if you recall?

Mr. Gillen: Just a moment—I am going to object as having been asked and answered in the original direct examination. If your Honor will recall, it has been established here that the 21 Club and the San Diego Club were one and the same organization. That was established here yesterday by Mr. Haughey and it had been an interchangeable name, at one time the San Diego Social Club, another time called the 21 Club. Now Mr. Billington answered in his original direct examination that he had been employed there from 1943 until about September of 1945.

The Court: Objection will be overruled. You may answer the question.

(Question read.)

A. Well, as I say, it was all one business. I suppose it was all in the same building.

The Court: I don't believe the witness understood the question.

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(Testimony of Joseph Billington.)

Mr. Campbell: May I reframe the question?

The Court: Yes. [286]

Q. What was the San Diego Social Club, Mr. Billington?

A. Well, San Diego Social Club and 21 Club were all the same, to my knowledge.

Q. Was the San Diego Social Club any particular part of the 21 Club?

A. Well, I guess that was the casino.

Q. I believe you testified you had nothing to do with the casino, is that right? A. Correct.

Q. Mr. Billington, Mr. Gillen was asking you about your career as a fighter under the name of Frankie Denny. Are you generally known as Frankie Denny or as Joseph Billington?

A. Well, both names.

Q. Generally speaking, under which name are you known?

A. Well, Frankie Denny would be most.

Mr. Gillen: May it please the Court, it is our information that there was a partnership return filed in connection with this same enterprise, the San Diego Club and 21 Club, for the same year, the year 1943, and that partnership return was filed in 1947 as a result of an audit. I believe that the government has in its possession now that 1943 partnership return. I should like to see it for the purpose of possibly asking a further question or two of Mr. Billington. May we have that?

Mr. Campbell: I don't have that in my possession [287] personally. We will make a search for it.

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(Testimony of Joseph Billington.)

Mr. Gillen: There are a number of accountants here and gentlemen from your department. I wonder if we might ask——

The Court: Can you inquire of any of the gentlemen?

Mr. Campbell: Yes. May this be marked for identification?

The Court: Counsel wants to see it.

Mr. Campbell: I think it should be marked for identification.

The Court: It may be marked for identification, Plaintiff's Exhibit 57.

Mr. Avakian: Your Honor, may we inquire of the prosecution as to whether they are willing to stipulate Plaintiff's Exhibit 57 for identification was filed and was based upon a report of an audit made by Internal Revenue Agent Lester T. Farley?

Mr. Campbell: No, we are not willing to stipulate.

Mr. Avakian: May we then inquire of the government if they will produce the report of Revenue Agent Glen Gould and Lester T. Farley covering operations of the 21 Club and San Diego Social Club for the year 1943?

Mr. Campbell: I submit, your Honor, these matters have no relevancy to the witness on the stand here. There may be some proper place in the proceedings for such a request on the part of counsel, but certainly not proper interrogation of this [288] *witness.*

The Court: Is there any objection to allowing

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(Testimony of Joseph Billington.)

counsel to see the exhibit? The agents report—have you any objections?

Mr. Campbell: Those matters, of course, your Honor, are confidential government reports, just as any other working papers of the government.

The Court: Well, do you need these matters for cross-examination of this witness?

Mr. Avakian: Yes, your Honor. (Further discussion.) May we at this time request the Court to direct the prosecution to produce the document at the earliest possible time?

The Court: I will not make that order now. We will proceed. It will stay right where it is now. Proceed with the cross-examination.

Recross-Examination

By Mr. Gillen:

Mr. Gillen: We would not be prepared to continue our recross-examination of Mr. Billington at this time. May he be excused and directed by the Court to make himself available?

The Court: Yes, you will be excused temporarily.

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EARL GILLINGHAM

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. Earl Gillingham. [289]

Q. Where do you live?

A. 25 Capra Way, San Francisco.

Q. What is your business?

A. Treasurer and office manager of Bullock & Jones, 340 Post, San Francisco.

Q. What is the character of business conducted by Bullock & Jones? A. Men's wear.

Q. It is a retail clothing establishment, is that correct, men's wear? A. That's right.

Q. And is this business limited exclusively to retailing men's apparel?

A. That's right. I would say yes, definitely.

Q. Have you brought with you, pursuant to subpoena, the records of Bullock & Jones relating to an account with Elmer Remmer?

A. I have.

Q. Will you produce that?

Mr. Thompson: I ask that the document be marked Plaintiff's Exhibit for identification next in order, your Honor. That will be Exhibit 58.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.) [290]

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Afternoon Session—December 5, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. GILLINGHAM

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Avakian: Your Honor, before we resume with this witness, may we make two requests of the Court?

The Court: Yes, sir.

Mr. Avakian: First of all, with respect to the remark that was made by Mr. Campbell of the prosecution, regarding Plaintiff's Exhibit 57 for identification, as a return filed after the commencement of the investigation, in view of the fact that there is no such evidence in the record, we wish to assign that as misconduct on the part of the prosecution and request the Court to instruct the jury to disregard that remark.

Mr. Campbell: If the Court please, that statement was made in response to a statement made by Mr. Avakian regarding the return.

The Court: (Instructs the jury.)

Mr. Avakian: My second request is this, your Honor, Plaintiff's Exhibit 51 was produced by a gentleman whose name I do not know and we believe he has in his possession other documents material to this case. We would ask the Court for

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(Testimony of Earl Gillingham.)

an order requesting that the gentleman identify himself and to [291] remain available with his evidence until such time as he is excused by the Court.

The Court: That request will be denied. I think the state of the record is this gentleman is under direct examination.

Q. Mr. Gillingham, I show you Plaintiff's Exhibit 58 for identification, which consists of a transcript of an account in two pages and three pages of typewritten information on account paper. Will you state whether or not those documents are records of Bullock & Jones of San Francisco?

A. These first two sheets are original ledger sheets of Mr. Remmer's ledger account. The three typewritten sheets are merely summary of the original sheets, the regular ledger sheets.

Q. The last three sheets are copies which you have made from the original ledger sheets?

A. That is correct.

Q. And are those original ledger sheets records of Bullock & Jones kept in the ordinary and regular course of the conduct of its business?

A. They are.

Q. And is it part of the business of Bullock & Jones to keep and maintain records of that character? A. Yes, it is.

Mr. Gillen: May it please the Court, in the interest of time, the defense is willing the exhibit may be offered in evidence without objection and in the interest of clarity or [292] simplifying the exhibit and accommodating Bullock & Jones, the

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(Testimony of Earl Gillingham.)

summary will be acceptable to the defendant, with this exception, I notice there are some pencil notations made on the bottom of the sheet, I do not know by whom they are made, but they appear to be immaterial and I suggest that they be erased or covered.

Mr. Thompson: That is satisfactory. I can ask the Court to erase those.

The Court: Exhibit 58 is admitted in evidence, of course, with the pencil remarks erased.

Q. Mr. Gillingham, I show you Plaintiff's Exhibit 58, is that the account of Mr. E. Remmer with Bullock & Jones for the years 1944, 1945, and 1946? A. It is.

Q. And what information on the account is given under the column date?

A. The date of purchase and date of cash payments.

Q. What information is given under the next column of the exhibit?

A. One column is debits, the next column is credits.

Q. By the next column of the exhibit, I refer to the second column. A. Second column.

Q. Left-hand side of the exhibit, what information is given?

A. Information of cash payment and article which was bought. [293]

Q. What information is given under the column DR.? A. Those are charges.

Q. Charges to the account?

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(Testimony of Earl Gillingham.)

A. Charges to the account.

Q. And what information is given under the column Cash CR.?

A. That includes all credits credited to the account of Mr. Remmer.

Q. Under the second column of the exhibit we find notation under date of 12-28-44, M. O. 7088-9.

A. That is merchandise order.

Q. And what is a merchandise order?

A. A merchandise order is order for merchandise, the amount of which is determined by the purchaser and is made payable to the customer, made payable to the person who presents the merchandise order, made payable to the bearer.

Q. So far as Bullock & Jones is concerned, any one that brings in a merchandise order issued by Bullock & Jones, he delivers that to the company in exchange for merchandise of the same value?

A. That's right.

Mr. Thompson: Your Honor, with the Court's permission, I would like to read Exhibit 58.

The Court: Yes.

Mr. Thompson: (Reads Exhibit 58.) You may cross-examine. [294]

Cross-Examination

By Mr. Gillen:

Q. Mr. Gillingham, where it is noted on the transcript of the account which you furnished the court and which is now called Plaintiff's Exhibit 58, the reference to cash and the amount opposite

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(Testimony of Earl Gillingham.)

the date means there has been a payment or credit noted on that account?

A. 1946, it means that there has been a credit, a cash credit, and also—1946 was all cash, that's right.

Q. That means there has been a payment made on the account?

A. Payment has been made, that is right.

Q. You don't know whether it is payment by check or payment by cash, you can't tell from that?

A. No, I cannot.

Q. These might have all been checks?

A. That is right.

Q. You simply put it down to cash to indicate it is payment on account of money rather than merchandise?

A. That is right. If it is return of merchandise we would note it, so indicated.

Q. Now, the merchandise orders that you have referred to here are the common merchandise orders we are all familiar with when you give an order for 20 or 25 dollars and they go and select whatever merchandise they desire themselves?

A. That is correct.

Q. How long have you been connected with Bullock & Jones? [295]

A. Well, since October, 1929.

Q. And before that you were in the clothing business, also?

A. No. I was in the automobile business.

Q. In your experience in the clothing business

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(Testimony of Earl Gillingham.)

since 1929, it has been your experience, has it not, that usually people buy merchandise orders for gifts to other people, is that right?

A. That is correct.

Q. It is very uncommon at all that people buy merchandise orders for themselves?

A. That is right.

Q. I noted that in the figures that were read out by Mr. Thompson, there were some odd amounts, for example, merchandise order for $23.60, another merchandise order, or several of them, for $10.81. Let me ask you if that contemplated covering the California sales tax?

A. I presume that does, yes.

Q. In other words, three per cent sales tax on the purchase of merchandise? A. Yes.

Q. I notice some other merchandise orders where they were for over $100 without any odd figure attached, that is for $100—can you enlighten us on that? What would that mean? Would that mean that the customer had a merchandise order for $100 and he would have to pay his own sales tax? A. That is quite possible. [296]

Q. Or buy less than $100 worth of merchandise to have his sales tax covered, is that right?

A. That is right.

Q. I notice there was one item in the year 1944, in the month of December, merchandise order—I beg your pardon—yes, merchandise order $250, but it gives the designation M.O. No. 7088-9, that means that that was two merchandise orders, does

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(Testimony of Earl Gillingham.)

it not? Is that correct? A. That is correct.

Q. So each merchandise order might have been for $125, making a total of $250?

A. That is correct.

Q. I notice also in an item on the 19th of December, 1945, there is at the bottom of the column a notation of M.O. 8221-4, $400; that would indicate, would it not, that there were four merchandise orders in that instance? A. That is right.

Q. Probably for $100 apiece?

A. That is correct.

Q. On the matter of the items of "hat renovated, $5.00," does that mean where a man brings in a hat and has it blocked and cleaned and new band and make it last another year?

A. That is right, that is complete renovation.

Q. I wonder, Mr. Gillingham, if you have handy there the total of the merchandise orders that were purchased on this account [297] each year?

A. Repeat that, please.

Q. I wonder if you have totaled the merchandise order items? Have you done that?

A. The total of the merchandise orders year by year?

Q. Yes.

A. It is right on that summary sheet I gave you.

Q. Are those your pencilled notations?

A. Yes.

Q. I am sorry we had those rubbed out, Mr. Gillingham. May I approach the witness with the exhibit. Your eyesight is good, Mr. Gillingham, you might be able to solve some of this and I will give

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(Testimony of Earl Gillingham.)

you a piece of paper. Would you be kind enough to total the merchandise orders?

A. You want them year by year?

Q. If you please.

A. The year 1944, $250; 1945, $505.33; 1946, $416.34.

Q. Do you have that total, Mr. Gillingham?

A. Of all of that?

Q. Yes. A. $1,171.67.

Q. So that he purchased $1,171.67 worth of merchandise orders? A. That's right.

Q. Now is it true that there are reflected upon your records there that in all over that three-year period the total cash [298] payments amounted to $1,323.61? A. We have this total paid, yes.

Q. The over-all total?

A. Yes, that is right.

Q. Mr. Gillingham, do you have any knowledge of whether or not these merchandise orders were purchased as gifts for business associates or employees?

A. I wouldn't know for what purpose they were bought.

Mr. Gillen: I think that is all, thank you.

Mr. Thompson: That is all.

(Witness excused.)

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JOHN C. McCAFFERY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. John C. McCaffery.

Q. Where do you live?

A. 19 Stuyvant Circle, New York, New York.

Q. By whom are you employed?

A. A. Sulka & Company.

Q. What is the character of the business operated by A. Sulka & Company?

A. Haberdashery and custom merchandise.

Q. Is that for both men and women, or just men? [299]

A. For men, sir.

Q. And what cities of the United States do you operate merchandise businesses?

A. New York, Chicago, and in the wintertime we have a Palm Beach office.

Q. Where is your business located in New York?

A. 661 Fifth Avenue.

Q. Where is it located in Chicago?

A. Michigan & Madison, Chicago.

Q. What is your position with A. Sulka & Company?

A. I am manager of the department of accounts.

Q. How long have you been so employed?

A. I will be there three years this coming May. I now will be two and one-half years.

Q. Have you brought with you, pursuant to sub-

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(Testimony of John C. McCaffery.)

poena, certain records of A. Sulka & Company relating to an account with Elmer Remmer?

A. Yes, I have.

Q. Will you produce them, please?

A. Certainly.

Mr. Thompson: I ask that the documents produced by the witness be marked Plaintiff's Exhibit 59 for identification.

The Court: So marked.

Q. Mr. McCaffery, you have produced original records and also made a typewritten transcription of them? [300] A. That is correct, sir.

Mr. Gillen: In the interest of time, your Honor, the defense is prepared to stipulate, if counsel is desirous of offering this Exhibit 59 in evidence, there will be no objection and at his convenience, if he desires to offer the transcription from the original ledger sheets, there will be no objection.

Mr. Thompson: We offer Exhibit 59 in evidence, your Honor.

The Court: The exhibit includes both the transcript sheet and the copy of it?

Mr. Gillen: Yes, your Honor.

The Court: It will be admitted in evidence.

Q. Mr. McCaffery, Plaintiff's Exhibit 59 consists of the account of Mr. Elmer Remmer with A. Sulka & Company in its New York store and Chicago store for the years 1944, 1945, and 1946, is that correct? A. That is correct.

Q. And in the first column of each of these pages is given a date upon which the transaction took place? A. That is correct.

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(Testimony of John C. McCaffery.)

Q. What information is given in the second column under the heading of "Account Rendered and Item"?

A. The second column is itemization of merchandise purchases and payments for it.

Q. What is given under the third column, [301] charges?

A. That is record of the purchases made.

Q. And the amounts charged for each purchase?

A. That is correct.

Q. And what information is given under the column headed "Credits"?

A. The column headed "Credits" covers merchandise returned and payments made.

Q. What information is given under column "Pay Last Amount in This Column"?

A. That is the balance.

Q. Will you examine the exhibit and state whether or not any payments were made on account of return of merchandise?

A. There is no return of merchandise.

Q. And all items under the column headed "Credits" represent payments by the purchaser?

A. Payments made, that is correct, sir.

Q. Are you able to tell whether those payments were made by cash, check or some other form?

A. Yes, sir. The payments made are designated whether by check, money order or cash.

Mr. Thompson: I would like to read this exhibit to the jury, your Honor. (Reads Exhibit 59.)

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(Testimony of John C. McCaffery.)

Q. Mr. McCaffery, is a cravat sometimes known as a necktie? A. That is correct, sir.

Mr. Thompson: You may cross-examine. [302]

Cross-Examination

By Mr. Gillen:

Q. You were subpoenaed, Mr. McCaffery, all the way from the New York office?

A. That is right, sir.

Q. With these records?

A. That's right, sir.

Q. On Exhibit 58 in evidence, which the defense stipulated could be put in evidence, I note in red typewriter ribbon a number of items giving credits under the designation of "Money Order." You recall those, do you not? A. I do, sir.

Q. Now I notice on your original cards, in connection with those money order credits, that there was also on your card c.o.d., that means cash on delivery, does it not? A. That is correct.

Q. So that in the transcript that you prepared here to facilitate the reading or interpretation of these original ledger sheets, when you put down money order, you didn't mean Mr. Remmer sent a money order to you? A. No, sir.

Q. But rather the merchandise was shipped from New York or Chicago to San Francisco or elsewhere on c.o.d. order? A. That is correct.

Q. And it was shipped by postal service, where the postman collected the amount of the charge at the time of delivery? [303]

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(Testimony of John C. McCaffery.)

A. That is right, to be shipped parcel post and payment to be made through the postoffice.

Q. And your company received payment from the postoffice in the form of money order, is that correct? A. That is correct.

Q. And how Mr. Remmer paid for those c.o.d packages, you don't know?

A. That is correct, sir.

Q. Let me ask you this, does your firm do quite a large Christmas business?

A. Yes, a very large Christmas business.

Q. And lots of people come in there and buy large orders of things to give away to business associates and employees and so on?

A. That is correct, sir.

Q. From your experience in this business, it would appear, would it not, that when there were purchases under the account of Elmer Remmer on December 5, 1946; 350 cravats, meaning 350 neckties, and additional 50 cravats, meaning an additional 50 neckties, or altogether 400 neckties, it would appear that these were Christmas gifts, would it not? A. That would be my reaction.

Q. You wouldn't expect a man to buy that many cravats for his own neck?

A. That is correct. [304]

Q. I take it that it is your experience during the month of December is the time when your Christmas business becomes pretty active?

A. That is correct, sir.

Q. I wonder if you would be kind enough, Mr.

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(Testimony of John C. McCaffery.)

McCaffery, if you haven't done it already, if you would be kind enough to total the necktie purchases for the last three years, and it will be entirely agreeable with the defense, in order not to take up the Court's or jury's time, to have Mr. McCaffery do this and return to the stand when he has it completed, if you desire to go ahead with something else.

The Court: Very well.

Mr. Gillen: Other than that we have concluded our cross-examination.

The Court: Will you kindly do that?

A. I have the dollar breakdown here. I want to make sure what you wanted.

Mr. Gillen: The number of ties. I wonder if you would be kind enough to show us the number of neckties purchased each year and totals each year and grand total of neckties and grand total of money, if you please. A. Yes, sir.

Mr. Gillen: We have completed our cross-examination.

The Court: Have you any further questions?

Mr. Thompson: No, your Honor. [305]

The Court: After these totals are given, may the witness be finally excused?

Mr. Gillen: Yes.

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RAMONA TINKLER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Ramona Tinkler.

Q. Where do you live, Miss Tinkler?

A. 791 Fourteenth Avenue, San Francisco.

Q. Where are you employed?

A. In the Alcohol Tax Unit of the Bureau of Internal Revenue in San Francisco.

Q. How long have you been employed by the Alcohol Tax Unit of the Bureau of Internal Revenue in San Francisco?

A. I have been in the Bureau of Internal Revenue thirty years, but not all with the Alcohol Tax Unit.

Q. How long have you been with the Alcohol Tax Unit?

A. Since its organization in 1934, I think.

Q. What is your present position with the Alcohol Tax Unit?

A. I am secretary to the Assistant Supervisor.

Q. Are you familiar with the procedure in the office of the Alcohol Tax Unit for the past several years, relating to the filing of floor stock tax returns on alcoholic liquors? [306]

A. Yes, I think so. Form 758 is filed by the taxpayer in duplicate with the Collector of Internal Revenue, with the payment of the tax due. The

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(Testimony of Ramona Tinkler.)

Collector then sends the duplicate, with the inventory—the inventory is attached to the original and duplicate, too—and the Collector sends the duplicate with the inventory to the Alcohol Tax Unit for auditing and then they are filed in our office.

Q. And by inventory do you refer to the inventory of the liquor upon which the tax is computed and paid?

A. Yes, the liquor that is on hand at the time the tax is paid.

Q. Have you brought with you from the San Francisco office of the Alcohol Tax Unit, a return filed showing the payment of floor stock tax on certain Gallagher & Burton whiskey?

A. Yes, I have.

Mr. Thompson: May the return produced by the witness be marked plaintiff's exhibit next in order, No. 60?

The Court: It may be so marked.

Mr. Gillen: In regard to Plaintiff's Exhibit 60 for identification, may it please the Court, the defense is prepared to stipulate that this may be introduced in evidence, if the prosecution so desires, subject, however, to the defendant's right to object to the same and move to strike in the event that it is not connected up with the defendant in any material respect.

The Court: Will counsel accept that stipulation?

Mr. Thompson: Yes, your Honor. [307]

The Court: Very well. It will be admitted, subject to motion to strike in the event it should not be connected.

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(Testimony of Ramona Tinkler.)

Mr. Thompson: Your Honor, we would also at this time like to offer in evidence Exhibit 15 for identification, which is the other duplicate of that same return filed with the Nevada collector.

(Discussion by counsel.)

The Court: It may be admitted in evidence, Exhibit 15.

Q. Miss Tinkler, referring to Plaintiff's Exhibit 60, what does the first page of that exhibit consist of, constitute?

A. A return of floor stock tax on distilled beer and malt liquors and wines under the Revenue Act of 1943.

Q. By whom was the return made?

A. You mean the name of the business?

Q. Yes.

A. It was made for Cal-Neva, Incorporated, Lake Tahoe, for retail liquor dealer.

Q. And by whom was it signed?

A. It was signed Cal-Neva Lodge, Inc., Elmer Remmer, president. It was filed with the Collector of Internal Revenue at Reno.

Q. And what is the amount of floor stock tax reflected? A. $7,853.18.

Q. Does the return show whether or not that tax was paid?

A. Yes, the Collector's stamp is "Received with remittance [308] May 19, 1946, Collector of Internal Revenue, District of Nevada."

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(Testimony of Ramona Tinkler.)

Q. Does the return show the total gallonage of distilled spirits involved?

A. Yes, under quantity it shows 2,493.072 distilled spirits proof gallons.

Q. And attached to the first page of the exhibit is an itemized inventory of the liquor referred to on the first page, is that correct?

A. Yes, 1,194 cases.

Q. 1,194 cases. Does it show of what brand of liquor?

A. The entire 1,194 cases is Gallagher & Burton bourbon. The company has no wine or beer.

Q. On the third page of the inventory does it show what kind of liquor Gallagher & Burton was?

A. Well, there is a notation in pen, "Whiskey all 5ths, 86.8 proof."

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Miss Tinkler, the inventory which is attached to Plaintiff's Exhibit 60 in evidence, is that prepared by your office or an inspector of your office?

A. Probably by the taxpayer.

Q. It is checked by agents of your office to determine the accuracy of the inventory?

A. I don't know. [309]

Q. Now in the 1,194 cases, I note at the top of the first page of the inventory a notation, "46 cases damaged." Do you know whether or not that means that those cases were destroyed or whether the 1,194 would be over and above the 46 cases damaged?

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(Testimony of Ramona Tinkler.)

A. No.

Q. Would you look at that inventory and tell me, isn't that an inventory by someone in your office? When I say "your office" I mean in the Tax Unit office?

A. I don't understand that question.

Q. The inventory itself. A. Yes.

Q. Would you look at that and tell me whether or not that isn't prepared by some field agent out of the Alcohol Tax office?

A. I don't know. My understanding is that all inventories attached to Form 758 are prepared by the taxpayer.

Q. And accepted without check of a field agent by your office?

A. Well, they might be checked later.

Q. Now this exhibit would reflect to you—looking at it as a government document—would reflect to you that this was the report or return on floor tax of the Cal-Neva corporation?

A. Cal-Neva Lodge, Incorporated.

Q. That that whiskey belonged to, and the obligation to pay the floor tax, was upon the corporation, is that correct?

A. Yes, signed by the president of the corporation.

Q. Is there any requirement by the government that that should [310] be signed by any officer of the corporation? A. I don't know.

Q. It doesn't designate who should have to sign it?

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(Testimony of Ramona Tinkler.)

A. The taxpayer—"Whether taxpayer or corporation, state whether individual owner or member of firm or officer of corporation and give title of officer of corporation."

Q. So any officer of the corporation could sign that?

Mr. Thompson: Objected to as calling for her legal conclusion.

The Court: Objection sustained.

Mr. Gillen: It was my impression that this lady was asked as an expert in this office about the meaning of the document. That is why I am pursuing it further.

The Court: Well, on this question, I think that is a matter the statute will explain. You will find the answer in the statute.

Q. Now I will ask you to look at this exhibit again, No. 60, and note particularly under "Subscribed and sworn to before me this 19th day of May, 1944," the name of J. R. Bastian, D. C., below it, where it says, "Official Title." Can you tell us, if you know, what that signature means, what D. C. means?

Mr. Campbell: We will stipulate that refers to the deputy collector for the District of Nevada.

Mr. Gillen: All right, we accept that stipulation.

Q. Now let me ask you to look at the signature again and the [311] date that is written there, "J. R. Bastian" and D. C. and date, and compare with the other handwriting on that date and tell

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(Testimony of Ramona Tinkler.)

us if it doesn't appear to be written by the same person.

Mr. Campbell: Objected to as calling for her conclusion. She is not qualified as an expert. The document will speak for itself to any one as well as to her.

The Court: She may answer the question. Objection overruled.

A. I wouldn't know.

Q. You notice there was a notation made at the bottom of the total of the tax due, 5 per cent penalty, $373.96, and a total of $7,853.18. Does that assist you in determining whether or not that was made out by the deputy collector or whether it was made out by the Cal-Neva Lodge Incorporation?

A. I wouldn't know.

Q. Well, you are satisfied, are you not, that the taxpayer wouldn't have made out a penalty to himself? A. I don't know.

Q. You know the penalty for any delinquent payment is fixed by the collector?

A. I don't have anything to do with figuring tax.

Q. Tell us what you know about collecting floor tax.

Mr. Campbell: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained. [312]

Mr. Gillen: May I respectfully suggest to your Honor it is my understanding I may cover the exact ground covered by direct examination.

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(Testimony of Ramona Tinkler.)

The Court: Yes. What do you know about the practice of law, suppose somebody asked you that question? You could talk for a long time and I think this witness could talk probably as long.

Q. Now, Miss Tinkler, you did state that such a form as you hold in your hand there, with the inventory attached, is the form that is used by the Alcohol Tax Unit of the Internal Revenue Department for the collection of a floor tax of liquor on hand, is that correct?

A. Used by the Internal Revenue Service.

Q. And when that return is made, the law is that the payment of the tax due should be paid at the same time?

Mr. Campbell: Objected to as calling for legal conclusion.

The Court: Let me have that question.

(Question read.)

The Court: She may answer the question if she can.

A. I don't know whether that is the law. I think that is the way it is handled.

Q. Didn't you testify that it is made out in duplicate, that Form 758 must be filed in duplicate with the remittance in the amount of the tax shown on the return, isn't that so? [313]

A. That is my understanding.

Q. What is? A. That is the procedure.

Q. And then I believe you identified that document by saying that the return was made and there

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(Testimony of Ramona Tinkler.)

was acknowledgment of remittance in the amount due, namely in the amount of $7,853.18, noted as having been received or paid on May 19, 1944, is that correct?

A. That is the Collector's notation on it.

Q. And you will note also there was imposed on the tax that was due a delinquent penalty of five per cent of the tax due, isn't that true?

A. I don't know whether that is delinquent penalty or not. It is 5 per cent penalty.

Q. It states it is 5 per cent penalty, isn't that correct? A. It states in the form.

Q. And adds some 300 odd dollars, isn't that so?

A. $373.96.

Q. Isn't it within your knowledge customarily for deputy collectors of Internal Revenue to make out a return for taxpayers or to assist in making out of returns of taxpayers?

Mr. Campbell: Objected to as improper cross-examination. This witness testified she was employed with the Alcohol Tax, not by the Collector's office.

The Court: Objection sustained. [314]

Q. You receive those returns back in your office, do you not? A. Yes.

Q. Do you have any knowledge on the subject of whether or not the tax collector prepares those returns and imposes the penalties when penalties are due?

Mr. Campbell: Objected to as not the best evidence.

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(Testimony of Ramona Tinkler.)

The Court: Same ruling.

Q. What penalties are connected with the failure to make payment on floor tax in time?

Mr. Campbell: Objected to.

The Court: Objection overruled.

A. I don't know.

Q. Are there any penalties imposed for the failure to comply with the requirements that you set forth here in your direct examination, namely, that Form 758 must be filed in duplicate with payment of the tax due remitted at the same time?

Mr. Campbell: Objected to on the ground she has stated she didn't know.

The Court: Let her answer the question if she can.

A. I don't know anything about the penalties. I don't know what the law says about the penalties.

Q. You know there are penalties?

Mr. Campbell: Objected to as argumentative.

Mr. Gillen: Of course it is argumentative. It is cross-examination. May I finish my question? [315]

The Court: Go ahead.

Mr. Gillen: I will restate the question.

Q. From your thirty years' experience with the Bureau of Internal Revenue and from your personal experience with the Alcohol Tax Unit of that Bureau since its inception in 1934, has the course of your work and knowledge of preparation to qualify yourself for that work, brought to your attention that there is a penalty attached for failure to pay alcohol floor tax?

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(Testimony of Ramona Tinkler.)

A. Well, I don't have anything to do with the——

Q. (Interrupting): I am asking if you have any knowledge whether or not there are penalties attached to a failure to comply with the requirements of Form 758?

Mr. Campbell: Objected to as immaterial whether or not she knows.

The Court: She can answer the question.

A. I don't know that there are penalties.

Q. You don't know whether there are any penalties to it?

A. I don't have anything to do with it.

Q. Regardless of whether you have anything to do with it or not, you don't know whether there is any penalty imposed?

A. I assume there is, but I don't know anything about them.

Q. Do you have any knowledge what a five per cent penalty is imposed for? A. No, I do not.

Q. Do you have any knowledge of what penalty is imposed, if any, [316] if you fail to file your return in time by the fixed or required date?

A. No.

Q. Do you have any knowledge what any penalty is imposed for?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Q. In connection, I mean with floor tax?

The Court: The ruling will stand. I think you have covered the ground on that point.

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(Testimony of Ramona Tinkler.)

Mr. Gillen: With the Court's permission, I would like the jury to see the first page, all for that matter, but particularly the first page of prosecution's Exhibit 60. May I pass it to each one of the jurors?

The Court: You may. Does that conclude your cross-examination?

Mr. Gillen: I believe.

The Court: Have you any further questions?

Mr. Thompson: No, your Honor.

(Witness excused.)

Mr. Gillen: I had intended to mention, if I did not mention, that I would like the jury, in examining the exhibit, to note the similarity in handwriting between the signature of the Deputy Collector and the addition of figures and filling in of the form.

The Court: Are you ready to proceed? [317]

Mr. Gillen: I believe Mr. McCaffery is prepared now.

JOHN C. McCAFFERY

resumes the stand on further

Recross-Examination

By Mr. Gillen:

Q. Mr. McCaffery, at the conclusion of your cross-examination, I requested that you further enlighten the jury the total, year by year, the number of cravats or neckties that were purchased from your firm for Elmer Remmer's account, plus amount

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(Testimony of John C. McCaffery.)

of money paid for those ties for each year, and then also, if you will, give us the grand total of number of articles of merchandise and cost of merchandise. Have you done that, sir? A. Yes, I have.

Q. Would you be kind enough to give us the results?

A. 1943, 18 cravats, $108 in New York. No purchase of cravats in Chicago. That is total of $108 for 1943. In 1944, 42 cravats in New York, $252; 36 cravats in Chicago, $216. That is total of 78 cravats for 1944, at a total of $468. In 1945, 36 cravats in New York at amount of $204; 24 cravats in Chicago at amount of $144, which is a total of 60 cravats in 1945, with a total of $348. In 1946, 504 cravats purchased in New York for $3,611. No cravats purchased in Chicago. Total of 504 cravats for 1946, with a total of $3,611. Do you want the total of all cravats?

Q. Yes. I asked you for the totals of 1944 to 1946, which are the years we are concerned with. You gave us the year [318] 1943.

A. The only reason I mentioned the $108, payment in 1944, that covered 1943 purchases.

Q. May have been purchased in late 1943?

A. Sir, it was purchased October and November, 1943.

Q. Now your statement of $3,611 for 1946, was any part of that paid in 1947, can you tell us?

A. Repeat the question.

Q. Your last bill for 1946, you give a total of merchandise purchased $3,611.

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(Testimony of John C. McCaffery.)

A. That is right, sir.

Q. For 1946; was any of that 1946 bill paid in 1947? A. No, sir; that is paid in 1946.

Q. When in 1946? A. December 27th.

Q. All right. Now would you give us the totals, please?

A. The 660 cravats that I have, I have to deduct the 18 in 1943, that I mentioned; in other words, that is 642 cravats.

Q. For the three years, 1944, 1945, and 1946?

A. That is right, sir.

Q. And then the total would be your total less $108? A. That is correct.

Q. What was your total?

A. Well, sir, the total I had was $4,535.

Q. And that included the $108 in 1943? [319]

A. That is correct.

Q. So if we deduct that, we get the exact amount for the three years we are interested in?

A. That is correct. That would be $4,427.

Mr. Gillen: I think that is all.

(Jury and alternate jurors admonished and recess taken at 2:30 for 15 minutes.)

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2:45 P.M.

(Defendant present.)

(Presence of the jury and alternate jurors stipulated.)

HARRY E. STEWART

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your full name, please?

A. Harry E. Stewart.

Q. Where do you live? A. Reno, Nevada.

Q. How long have you lived in Reno, Nevada?

A. About 62 years.

Q. Do you own and operate a business in Reno, Nevada? A. I do.

Q. What is the name of that business?

A. Nevada Transfer & Warehouse Company.

Q. How long have you operated that business?

A. Forty-four years. [320]

Q. What is the nature of that business?

A. Well, a general trucking movement, transportation of household goods and storage of miscellaneous articles, merchandise and household goods.

Q. During the years 1943 to 1947, inclusive, did you have occasion to receive for storage a quantity of Gallagher & Burton whiskey? A. I did.

Q. Have you produced with you in court the

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(Testimony of Harry E. Stewart.)

records of the Nevada Transfer & Warehouse Company relating to the storage and disposition of that liquor? A. Yes, sir.

Q. Mr. Stewart, you have handed me two records which have been marked Plaintiff's Exhibit 61 for identification, will you state generally the nature of the records, without stating what information is contained on them?

Mr. Gillen: I wonder if we might see them.

Mr. Thompson: I am doing that for counsel's assistance, your Honor, so he will know what the records are.

A. This larger sheet is inventory sheet, or a physical inventory of numbers of cases received and distributed. The yellow card is a combined physical record, as well as a financial cash record.

Q. Mr. Stewart, I hand you Plaintiff's Exhibit 61 for identification. Are those records of the Nevada Transfer & [321] Warehouse Company which are kept and maintained by the company in the regular operation of its business?

A. They are.

Q. Those are the original records?

A. They are, sir.

Q. And is it part of the business of the company to keep and maintain records of that character?

A. Yes, sir.

Mr. Thompson: I offer Exhibit 61 in evidence, your Honor.

Mr. Gillen: To which we will offer an objection, your Honor, unless there is a better foundation laid.

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(Testimony of Harry E. Stewart.)

The exhibits bear three different names and I think that further interpretation or some clarification will have to be made. It would appear to me that there is considerable matter contained in this exhibit which would not affect or have any connection with the defendant in this case. It appears to be record of the storage of liquor and delivery of liquor to three different persons or corporations and a better foundation should be laid.

Mr. Thompson: If the Court please, I am perfectly willing to ask the witness to testify from the exhibit, but it is my understanding the exhibit should be received in evidence before he testifies regarding to explain the entries on it. The foundation of business record is laid and that is all that is required at this time. [322]

The Court: You might ask him a question in regard to any circumstances that might be pertinent to the issues here.

Q. Mr. Stewart, referring to Exhibit 61 for identification and the storage of liquor reflected by that exhibit, for whose account was the liquor stored originally?

A. Originally for Cal-Neva Lodge, Inc., E. R. Remmer; later transferred to the Bank Club at Reno, Nevada.

Q. Upon whose order was the liquor delivered from the Nevada Transfer & Warehouse Company?

A. Signature of Remmer, up to the time it was transferred to the Bank Club; after that to the Bank Club.

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(Testimony of Harry E. Stewart.)

The Court: I think that would cover the objection. Exhibit may be admitted in evidence.

Q. Mr. Stewart, referring to Exhibit 61, what date was the liquor received by the Nevada Transfer & Storage Company for storage?

A. December 30, 1943, we received 1194 cases Gallagher & Burton 5ths whiskey.

Q. Upon what dates and to whom were deliveries of that whiskey made out of the storage?

A. Under date of June 30, 1944, one hundred cases; July 12, 1944, one hundred cases.

Q. Would you please state to whom or to what firm your delivery was made? [323]

A. I thought I might accomplish that by mentioning the name once. Going over it again—on June 30, 1944, first delivery of 100 cases delivered to the Cal-Neva Lodge truck on order presented by the driver and signed E. Remmer. On July 12, 1944, 100 cases was delivered to the same truck on order signed by E. Remmer. On 9-10, 194 cases was delivered to the Cal-Neva Lodge truck on order signed by E. Remmer and delivered to the driver of said truck.

Q. What was the year? A. 1945.

Q. That last one was September 10, 1945?

A. Right. On May 9, 1946, Cal-Neva Lodge truck driver showed up at the warehouse and delivered to us, for account of Cal-Neva Lodge, 100 cases of Gallagher & Burton whiskey, bringing it up to a total of 900 cases. At that time, according to this record, the driver brought with him an order

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(Testimony of Harry E. Stewart.)

signed by E. Remmer, transferring the 900 cases to the Bank Club.

Q. How many cases of whiskey remained in storage on December 31, 1946?

A. May I ask as a clarification for whose account?

Q. In storage under this inventory?

A. In storage under this inventory there was 750 cases.

Q. For whose account were you holding that at that time? A. Bank Club at Reno.

Q. Have you brought with you the order you refer to relating to [324] the transfer of the balance of the merchandise to the Bank Club?

A. Yes, sir.

Q. Mr. Stewart, you have handed me the order referred to and it has been marked plaintiff's Exhibit 62 for identification. Is that the original order to which you referred? A. Yes, sir.

Mr. Thompson: I offer it in evidence, your Honor.

The Court: It may be admitted in evidence, Exhibit 62.

Mr. Thompson: It reads as follows: "Please release 900 cases of liquor to the Bank Club. E. Remmer, Cal-Neva Lodge."

Q. I notice, Mr. Stewart, the order is undated. Will you please state how you fix the date of that order?

A. According to the physical inventory record on this larger sheet, the driver who brought in

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(Testimony of Harry E. Stewart.)

the 100 cases, listing the inventory from 800 to 900, brought this order with him. By the use of this record here made up by one of my employees at the time, indicates that that was the date.

Q. And what was the date on which the driver brought in the 100 cases to your warehouse?

A. May 9, 1946.

Q. And on that date, upon receipt of that 100 cases, you then had in storage 900 cases, is that correct? A. Correct.

Q. Now later on during the year 1946 were any cases released [325] out of storage?

A. Yes, November 26, 1946, 150 cases were released.

Q. And to whom? A. To the Bank bar.

Q. And so on December 31, 1946, you then had in storage 750 cases, is that correct?

A. That is right, sir.

Q. Will you produce, if you have it, the order releasing 150 cases to the Bank Club?

A. I can show you a receipt. The order would be phoned to my office.

Mr. Thompson: I ask that the receipt be marked plaintiff's exhibit next in order. I offer plaintiff's Exhibit 63, the receipt from the Bank Club, your Honor, in evidence.

Mr. Gillen: We offer objection to that, may it please the Court, as incompetent, irrelevant and immaterial. The basis for the objection is this—we feel that after a transfer was made of the 900 cases to the Bank Club from the Cal-Neva Club, that

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(Testimony of Harry E. Stewart.)

anything the Bank Club did thereafter in the way of withdrawing its own liquor from the warehouse —they apparently became possessed of it—would not be binding in any way on the defendant. What the Bank Club did in withdrawing this liquor after that, we think would be incompetent, irrelevant and immaterial.

Mr. Thompson: If the Court please, we intend to connect [326] it up later. We will withdraw our offer so long as it is understood that the only objection reserved is that one connecting it up.

The Court: If you withdraw the offer, counsel may make any objection that might occur to them.

Q. Mr. Stewart, plaintiff's Exhibit 63 is the original receipt taken from the files of the Nevada Transfer & Warehouse Company relating to the delivery of 150 cases of Gallagher & Burton whiskey? A. Yes, sir.

Q. And it is part of the business of the Nevada Transfer & Warehouse Company to keep and maintain records of this character? A. Yes, sir.

Q. And this particular record, Exhibit 63, was made, kept and maintained by the Nevada Transfer & Warehouse Company in the regular course of the operation of its warehouse business?

A. That's right, sir.

Q. Have you produced also, Mr. Stewart, the inventory of the 1194 cases of liquor in storage, Showing the serial numbers of the cases?

A. Yes, sir.

Q. May I have it please? A. Yes, sir.

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(Testimony of Harry E. Stewart.)

Mr. Thompson: I ask that this inventory be marked Exhibit [327] 64 for identification, your Honor.

The Court: So marked.

Q. Mr. Stewart, I hand you Exhibit 64 for identification. Will you state what it is, please?

A. The serial numbers on the 1194 cases of liquor taken by my employees at the time the liquor was delivered to the warehouse.

Q. Is this also a record of the Nevada Transfer & Warehouse Company which is kept and maintained in the regular course of the operation of its business?

Q. It is requirement of the Alcohol Tax Unit, complied with by the Nevada Transfer & Warehouse Company.

Mr. Thompson: I offer it in evidence, your Honor, Exhibit 64.

The Court: It may be admitted in evidence.

Q. Mr. Stewart, do your records show from whom you received delivery of the 1194 cases of whiskey for storage?

A. Yes, sir, received from the Sierra Wine & Liquor Company at the plant, loaded on to our trucks and brought to the warehouse.

Q. And will you state again the date of that delivery from the Sierra Wine & Liquor Company?

A. December 30, 1943.

Q. Now during the period of the storage of that whiskey, from the date it was received until December 31, 1946, what payments, if any, did Nevada

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(Testimony of Harry E. Stewart.)

Transfer & Warehouse Company receive on [328] account of the storage and other charges?

Mr. Gillen: Objected to because it is obvious to us now that for a period of time there was another store there, another owner of that liquor, at least 900 cases of that liquor, so that I think that question would be too comprehensive.

Mr. Thompson: I will reframe the question, your Honor, and ask for payment of storage charges and other expenses to May, or the end of May, 1946.

Mr. Gillen: May 9th.

Mr. Thompson: All right, May 9th.

The Court: That is the date the 900 cases were transferred to the Bank Club?

Mr. Gillen: Yes, your Honor. As modified, I see no objection to the question.

The Court: Read the question.

(Question read): "Now during the period of storage of that whiskey from the date it was received until May 9, 1946, what payments, if any, did the Nevada Transfer & Warehouse Company receive on account of the storage and other charges?"

A. $708.96 under date of April 30, 1945.

Q. Do you have any record or recollection of who made that payment?

A. Cal-Neva Lodge, Inc., the record shows check signed by Perkins. [329]

Mr. Thompson: You may cross-examine.

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(Testimony of Harry E. Stewart.)

Cross-Examination

By Mr. Gillen:

Mr. Gillen: May it please the Court, since plaintiff's exhibit 63, I believe it is, since the offer of that in evidence was withdrawn by the prosecution, I would like to reserve any cross-examination of Mr. Stewart until such time as evidence might be produced to connect that with the defendant. Now Mr. Stewart resides in Reno and if we need him, we shall ask that he be instructed to return.

Mr. Thompson: If the Court please, I do not see any reason to reserve cross-examination on that account. He has testified, so far as we know, to all he knows regarding that exhibit for identification and we have no objection at this time to counsel questioning him about it.

The Court: Well, I will excuse Mr. Stewart with the understanding he will be available upon adequate notice, a day or two notice, in the event you should want to cross-examine. That will be the understanding.

(Witness excused.)

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PIERINO C. BARENGO

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your full name, please?

A. Pierino C. Barengo. [330]

Q. Where do you live?

A. 1429 Arlington Avenue, Reno.

Q. How long have you lived in Reno, Nevada?

A. Thirty-seven years.

Q. Do you have any connection with a business in Reno, Nevada?

A. Yes, at the present time I am partner and manager in the Sierra Wine Company.

Q. How long have you been engaged as partner and manager of that company?

A. As partner just for this year. As manager since 1934.

Q. During the year 1943 did you have a transaction with Elmer Remmer? A. I did.

Q. And when and where did that transaction take place?

A. Well, in his capacity as manager of Cal-Neva, I had regular sales of liquor to him as regular procedure of business. In addition, November 10th—do you want me to continue?

Q. November 10th of what year?

A. 1943; he came to me and told me that he had obtained, through friends in the East, some Burton & Gallagher whiskey.

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(Testimony of Pierino C. Barengo.)

Q. How much?

A. To start with it was supposed to be one carload, which amounted to 1200 cases. He gave at that time deposit to me in the amount of 34 thousand dollars, covering the purchase [331] price of the whiskey, freight, taxes and any other expenses.

Q. How was that payment of 34 thousand dollars made? A. That was made in cash.

Q. And on what date was that?

A. November 10th.

Q. Of 1943? A. Right.

Q. What subsequent transactions did you have with Mr. Remmer relating to the purchase and disposition of that whiskey?

A. On November 16th he advised another car was coming and they would have two cars coming, and gave an additional deposit of 20 thousand dollars.

Q. How was that payment made to you?

A. That was made in cash.

Q. When you say cash, do you mean currency?

A. I mean currency.

Q. Was that whiskey received by the Sierra Wine & Liquor Company? A. Yes, it was.

Q. On what date? A. November 16th.

Q. 1943?

A. November 16th and November 18th, two days. Just to reexamine my records on this—November 16th.

Q. Now, when the money was paid to you, Mr. Barengo, the first [332] sum for 34 thousand dollars

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(Testimony of Pierino C. Barengo.)

and the second sum for 20 thousand dollars, who paid the money to you? A. Mr. Remmer.

Q. Personally? A. Personally.

Q. On November 16th did the Sierra Wine & Liquor Company receive two carloads of Gallagher & Burton whiskey?

A. No, in rechecking my records, we received the first car on the 12th and the second car on the 16th. I have to correct it again—those are the dates of the sight drafts. We have here notation received November 14th and November 30th. Those are positive.

Mr. Gillen: What are those dates? The dates the liquor was received?

A. Those are the dates we received. The first car we received the 14th of November, 1200 cases; the second car received the 30th of November, 1200 cases.

Q. What kind of liquor was it?

A. Gallagher & Burton.

Q. Both carloads? A. Both carloads.

Q. Did you, after the receipt of the whiskey, or at any time, have any conversation with Mr. Remmer regarding how it should be disposed of?

A. Yes, at the time he ordered it he said it seemed like a [333] rather large amount of whiskey and he said he ordered for himself and some of his friends who were also engaged in the bar business. Liquor at that time being very scarce, we also had had other instances where that had happened.

Q. And do your records show what disposition

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(Testimony of Pierino C. Barengo.)

the Sierra Wine & Liquor Company made of the whiskey after it was received?

A. Yes, it does.

Q. Will you testify to the dates and places of delivery?

A. On November 15th we delivered 500 cases to the Palace Club.

Q. That is November 15, 1943? A. 1943.

Q. And did you receive any payment on account of that delivery? A. $13,865.

Q. Who paid that money?

A. The Palace Club.

Q. All right. What other deliveries did you make? A. Fifty cases to Club 222.

Q. On what date please?

A. The 16th of November.

Q. Is that 222 Club located in Reno?

A. It was, yes.

Q. And also the Palace Club? A. Yes.

Q. And did you receive any payment on that delivery? [334]

A. Yes, we received $1,386.50.

Q. And who paid you that money?

A. Well, I would say that we collected it from 222 Bruce.

Q. And did you make any other deliveries?

A. Yes, made delivery of 300 cases to the Bank Club and we made a delivery of——

Q. (Interceding): What date was the delivery to the Bank Club?

A. I don't have that positive date here. I don't

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(Testimony of Pierino C. Barengo.)

have a copy of the invoice for it. I have just the notation that it was sent there. I presume it to be the 16th.

Q. Of what? A. November.

Q. 1943? A. 1943.

Q. And did you receive any payment at that time?

A. Received $8,319 from the Bank Club.

Q. Did you also make a delivery to the Silver Dollar Club.

A. There was 100 cases delivered to the Silver Dollar Bar. One order that we sent and we got paid for, $2773; another order, 100 cases, $2772, which Mr. Remmer collected.

Mr. Gillen: May I have the dates on those two orders?

A. The first one is 16th of November, 1943. I don't have the date of the other one. I believe it was the next day, the 17th.

Q. What is the total amount of money which the Sierra Wine & Liquor Company collected during the year 1943? As I understand, [335] it was all during the month of November, 1943, which you have testified to, relating to the two carloads of whiskey?

A. Between the deposits and what we collected from the sales was a total of $80,343.50.

Q. Did that total sum represent an overpayment for the whiskey?

A. The amount is $17,739.50.

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(Testimony of Pierino C. Barengo.)

Q. And what did you do in connection with the amount of overpayment?

A. Check was made out to cash, given to Mr. Remmer, in the amount of $17,739.50.

Q. Do you have that check with you?

A. I have the check here.

Q. Will you produce it, please? Mr. Barengo, I show you plaintiff's Exhibit 65 for identification. Is that a check drawn on the account of the Sierra Wine & Liquor Company?

Mr. Gillen: We will stipulate if he wants to offer it in evidence, in the interest of time.

Mr. Thompson: We offer it.

The Court: Very well, it will be admitted in evidence. Exhibit 65.

Mr. Thompson: (Reads exhibit.) Endorsed on the back William Kyne.

Q. Mr. Barengo, is that your signature as the maker of the check? [336]

A. That is my signature.

Q. And to whom did you deliver that check?

A. Mr. Remmer.

Q. That is the defendant in this case?

A. Right.

Q. On what date?

A. 17th of November, 1943.

Q. Who is William Kyne who endorsed the check, if you know?

A. I know a William Kyne. I don't know if that is the Mr. William Kyne.

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(Testimony of Pierino C. Barengo.)

Q. You didn't deliver this check to a man named William Kyne?

A. I did not. At that time I didn't know him.

Q. Do you have any record of the Sierra Wine & Liquor Company, Mr. Barengo, which summarizes the transactions which you have just related in your testimony?

A. I have the regular ledger sheets of the Cal-Neva Lodge for November of 1943, and the years 1944, 1945, 1946 and 1947. Included in these are the transactions that I mentioned. There is no record there of the sales made to the Bank Club, Club 222, Silver Dollar or Palace Club, as those charges are made direct to those particular accounts, ledger sheets.

Mr. Thompson: I ask that the liquor account produced by the witness be marked plaintiff's 66 for identification and I offer it in evidence.

Mr. Gillen: We will offer the objection to that, may [337] it please the Court, it serves no more than duplication in part of what this gentleman did and not as completely as he testified and does not reflect in any part the transactions of his firm with the Cal-Neva Lodge, a corporation. We think it is incompetent, irrelevent and immaterial under the circumstances.

The Court: It will be admitted in evidence, Exhibit 66.

Q. Mr. Barengo, referring to plaintiff's Exhibit 65, which is the check to cash for $17,739.50, was that check actually charged against the account of

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(Testimony of Pierino C. Barengo.)

the Sierra Wine & Liquor Company and paid out of the account at the bank?

A. That is the only way it could have gotten paid.

Q. Well, was it paid? A. Yes, it was paid.

Q. You have testified, Mr. Barengo, to the receipt of two carloads of Gallagher & Burton liquor and the delivery of 950 cases, as I understand your testimony, 300 cases to the Bank Club, 50 cases to the 222 Club, 100 cases to the Silver Dollar Bar, and 500 cases to the Palace Club, making a total of 950 cases. What did the Sierra Wine & Liquor do with the balance of the whiskey?

A. There was the other sale of 100 cases to the Silver Dollar Bar which was collected by Mr. Remmer.

Q. That would be 1050 cases.

A. Left a balance of 150 cases, of which, in that particular [338] car there had been three cases broken in transit, which left 147 cases, which we kept as security for payment of tax and commission covering the entire transaction.

Q. And did you receive payment of the tax and commission on the transaction?

A. A few years later.

Q. Well, in what year did you receive payment?

A. October of 1945.

Q. And from whom did you receive the payment?

A. I received payment August 9th—I should have referred to this?

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(Testimony of Pierino C. Barengo.)

Q. Of 1945?

A. In 1945, from the Bank Club.

Q. In what amount? A. $4,896.57.

Q. $4,896.57, is that correct? A. Right.

Q. Upon receipt of that payment, what did you do with the 147 cases of whiskey which you were then holding, as I understand it?

A. That amount was in payment of the 147 cases.

Q. And when you received that money you delivered the cases to the Bank Club, is that correct?

A. That is right.

Q. How about payment of your storage expenses, freight and commission that you referred to? [339]

A. That was covered in this $4,896.57. We made an agreement that we would receive the whiskey——

Q. (Interceding): Are you referring to an agreement you made with Mr. Remmer?

A. Made a verbal agreement with Mr. Remmer that we were to receive $1.20 per case for handling this particular shipment.

Q. And your fee then would be $1.20 times 2400, is that correct? A. That is correct.

Q. Do you know what that amounts to? Do you have a record of it? A. It would be $2880.

Q. That was your commission? A. Yes.

Q. Or your charge for handling the transaction?

A. That is correct.

Q. What other expenses did you have in connection with the transaction?

A. We paid the tax, but most of that money, the tax money, was included in the deposit because the

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(Testimony of Pierino C. Barengo.)

deposit was more actually than the amount of money needed to pay for the whiskey.

Q. Do you have a breakdown of the sum that was paid to you by the Bank Club in 1945?

A. Do I have a breakdown of that amount?

Q. Yes. [340]

A. It may be here in the letter which it appears we demanded payments. The price of whiskey increased, due to the fact there had been some floor tax put on whiskey during that time, from 1943 until it was paid for in 1945. This letter that was written to Mr. Remmer, which has a breakdown of 147 cases, is itemized as to interest and storage charges and insurance, etc. It isn't written by me. It is written by an attorney at possibly the direction of my father and uncle, because at that time I was in the service. This breakdown increases the amount to $5713.60.

Q. What are the items?

A. 147 cases of——

Mr. Gillen: Just a moment. What kind of memorandum is this?

Mr. Thompson: Will you show the memorandum to counsel, please?

Mr. Gillen: Yes, I would like to see it. He is refreshing his memory from something he didn't prepare himself. May it please the Court, I offer an objection to the last question and answer. As I recollect by his answer or two before, the gentleman on the witness stand said he was in the service

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(Testimony of Pierino C. Barengo.)

and apparently there was some correspondence on the part of his father and lawyer.

The Court: I think your objection is good. The objection is sustained and questions and answers relating [341] to that memorandum will be stricken from the record.

Mr. Gillen: Thank you, your Honor.

Q. At any rate, Mr. Barengo, in 1945 you did receive the final payment on that one carload of whiskey, is that correct? A. We did.

Q. And the amount of that payment was what?

A. $4,896.57.

Q. You received that from the Bank Club upon delivery of the 147 cases to the Bank Club?

A. Correct.

Q. Now what did the Sierra Wine & Liquor Company do with the second carload of whiskey?

A. That car there would have been a breakage of six cases, which were charged to the railroad company and payment received from them on those six cases. The balance of 1194 were delivered to the Nevada Transfer Company, 12-30-43.

Q. That was on December 30, 1943?

A. Yes.

Q. And upon whose order or request was that liquor delivered to the Nevada Transfer & Warehouse Company? A. On my order.

Q. And did you have any conversation with any one relating to what disposition should be made of that whiskey?

Mr. Gillen: Just a moment. [342]

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(Testimony of Pierino C. Barengo.)

The Court: Just answer that question yes or no.

A. Yes.

Q. With whom? A. Mr. Remmer.

Q. And when did that conversation take place?

A. About the 18th of November till would be the first week in December.

Q. Some time during that period?

A. During that period, on several occasions during that period.

The Court: In other words, he had several conversations during that period.

Q. What was the conversation relating to the disposition of the second carload of whiskey?

A. Well, we wanted to know who to deliver it to. We wanted to close the entire deal and wanted to know whether he wanted some of his other friends to have some or wanted disposition made to Cal-Neva. Cal-Neva being closed at that time of the year may have hampered his decision in that respect. However, towards the end of the year, when I was unable to reach Mr. Remmer and I wanted to dispose of the whiskey and complete the deal, as I was entering the service in January, I directed my employees to transfer the 1194 cases of Gallagher & Burton over to the transfer company and put it in the name of Cal-Neva Lodge.

Q. And that delivery was made on December 30, 1943? [343] A. That is right.

Q. Do your records show the cost of that carload of whiskey which was delivered to the Nevada Transfer & Warehouse Company?

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(Testimony of Pierino C. Barengo.)

A. I have two invoices here covering each car. This invoice just showed the amount of the whiskey fob plant. There is attached to one of the invoices a freight bill covering that particular car. In addition to the freight, there is Nevada State tax, which was paid at that time, upon sale of merchandise I believe.

Q. Will you produce the charges relating to the carload which was delivered to the Nevada Transfer & Warehouse Company?

A. It consisted of freight and State tax and handling charges and receipt for 1194 cases.

Mr. Thompson: I ask that these documents be marked plaintiff's Exhibit 67, your Honor for identification.

The Court: They may be so marked.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [344]

Thursday, December 6, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury stipulated.)

MR. BARENGO

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Thompson: We offer Exhibit 67 in evidence, your Honor.

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(Testimony of Pierino C. Barengo.)

Mr. Gillen: No objection.

The Court: It may be admitted.

Q. To refresh your recollection a little bit, Mr. Barengo, as I recall it you, yesterday, testified that your company, the Sierra Wine & Liquor Company, had received two carloads of Gallagher & Burton whiskey and you had testified to the disposition of the first carload in November of 1943, and we were referring to the second carload of whiskey which you said the Sierra Wine & Liquor Company had delivered to the Nevada Transfer & Warehouse Company for storage at the end of December, 1943, is that correct? A. That is correct.

Q. And at the conclusion of the hearing, yesterday, I was questioning you regarding the costs in connection with the second carload of whiskey which was delivered to the Nevada Transfer & Warehouse Company. I now show you Plaintiff's Exhibit 67. By referring to that exhibit, will you itemize the costs [345] incurred and paid by the Sierra Wine & Liquor Company and charged to the Cal-Neva Lodge or Mr. Remmer, in connection with that second carload of whiskey?

A. Drayage on the above of 1,194 cases Gallagher & Burton whiskey, $50. That is drayage charges our warehouse to the Nevada Transfer Company, $50. State tax, $1,432.80; handling charges, $1,432.80; total of $2,915.60.

Q. Referring to the handling charges, does that represent the charge of Sierra Wine & Liquor Company at the rate of $1.20 per case which you testi-

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(Testimony of Pierino C. Barengo.)

fied to yesterday? A. That is correct.

Q. Did the Sierra Wine & Liquor Company incur any other charges in connection with that second carload of whiskey which was delivered to the Nevada Transfer & Warehouse Company that you know of? A. None that I recall.

Q. Do your records show what the purchase price was for that carload of whiskey?

A. I have invoices for the two cars of whiskey.

Q. Well, referring to the second carload of whiskey, the one that went to the Nevada Transfer & Warehouse Company, what was the purchase price for that carload?

A. F.O.B. costs was $24.44 a case.

Q. What is the total extension of the carload?

A. Total of $29,328.00. The freight charges on that car was [346] $1,002.09; demurrage, $4.53. I believe on a breakdown, including the $1.20 a case handling charge, $1.20 a case tax, the price comes to $27.73.

Q. Per case? A. Per case.

Q. By that last statement do you mean that if you multiply $27.73 by 1,200 you will arrive at the total charges, including the purchase price and all these other items that you have referred to?

A. That is correct.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Barengo, as I recall your testimony given yesterday, you said that in the month of

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(Testimony of Pierino C. Barengo.)

November, I believe it was, that Mr. Remmer talked to you about the fact that he was in a position to obtain some whiskey through some friends of his in the East, is that correct? A. That is correct.

Q. And that he was going to get a carload of whiskey and that he intended to see that his friends in and about Reno, who were in the retail liquor business, would share in whatever he was able to get, is that correct? A. That is correct.

Q. And that at a subsequent time, as I recall your testimony, he told you there was going to be a second carload, he would [347] get two carloads, is that correct? A. That is correct.

Q. Let me ask you, as one in the wholesale liquor business, is it unusual and was it unusual at that time, for anybody in the retail liquor business to get a carload of whiskey?

Mr. Thompson: Objected to as immaterial.

The Court: Objection overruled. Answer the question.

A. We have had other customers buy carloads of whiskey previous to shortage and I think with the shortage conditions, I think anyone that would be able to buy a carload of whiskey would take the opportunity at that time.

Q. So it wasn't an unusual thing?

A. It was an unusual thing to get two cars, but he was fortunate to get two cars.

Q. It wasn't an unheard of thing?

A. No.

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(Testimony of Pierino C. Barengo.)

Q. Then as I recall your testimony, you stated Mr. Remmer supplied you with a certain amount of money to handle the payment and charges for the whiskey, is that correct?

A. That is correct.

Q. Will you repeat to me again what was the sum of money that you received? There was a deposit of 34 thousand dollars, first——

A. Thirty-four thousand dollars first and 20 thousand dollars later.

Q. And that was after you were told there was a second carload [348] coming? A. Yes.

Q. And immediately upon the first car being received, which as I recall your recollection was about the 16th of November, you were directed to deliver to certain designated persons or concerns certain amounts of the first carload, is that correct?

A. That is correct.

Q. And those who participated, as I recall your testimony, were the Bank Club, the Palace Club, the Silver Dollar Club, and the 222 Club, all of Reno, is that true? A. That is correct.

Q. Then, as I recall your testimony, the Palace Club received 500 cases? A. Right.

Q. And the 222 Club, 50 cases? A. Right.

Q. The Bank Club, 300 cases? A. Right.

Q. And the Silver Dollar Club, 100 cases?

A. Right.

Q. And on November 17th, the Silver Club then received a second 100 cases?

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(Testimony of Pierino C. Barengo.)

A. That is right.

Q. As I recall your testimony, you collected for all of this whiskey which was delivered to these other concerns, with the [349] exception of one item on November 17th of the second 100 cases sent to the Silver Dollar Club, which you was—Mr. Remmer collected himself, so you were informed?

A. That is true.

Q. As to all the others, you collected the money?

A. Yes.

Q. And were those collections, or were the amounts charged, on the basis of $27.73 per case that you indicated? A. Yes.

Q. In other words, the people who benefited by the arrival of this first carload of whiskey, the Palace Club, the 222 Club and the Bank Club and Silver Dollar Club, paid exactly what Mr. Remmer paid for it? A. That is correct.

Q. Now you have broken down for us, Mr. Barengo, the exact cost of this whiskey as it passed through your hands, have you not? A. Yes.

Q. And you broke it down as to the second carload, is that true? A. That is true.

Q. And that second carload, as I recall, is the carload that you had nothing to do with the disposal of, with the exception that on December 30th of that your, Mr. Remmer being away and you not having had any specific instructions as to what to do with that second carload, and you being on the verge of entering the service, placed it in the ware-

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(Testimony of Pierino C. Barengo.)

house to the credit of the [350] Cal-Neva Lodge, is that correct? A. That is correct.

Q. Now that was the carload you broke down for us in the price. I believe you said the original price of the whiskey per case was $24.44, is that correct? A. That is correct.

Q. And then with the $1.20 state tax, the $1.20 handling charge that your firm charged and the other over-all expenses on the carload, increased the price from $24.44 to $27.73, is that true?

A. Eighty-nine cents a case freight and demurrage brings it to 89 cents, making a total of $27.73.

Q. Now let me ask you, Mr. Barengo, was that the actual financial set up or cost set up, insofar as the first carload was concerned; in other words, were the charges identical?

A. They were identical with the exception of $50 drayage charge that we charged.

Q. That was the charge for draying it from your establishment to the Nevada Transfer & Warehouse? A. That is correct.

Q. But I mean, counsel asked you with reference to the second carload which was turned over to the drayage company, the cost was $24.44 and showing an increase to $27.73, by reason of the charges, you recall that, do you?

A. Yes. [351]

Q. Now I am asking you did that hold as to the first carload also, the carload that was sold by you, namely, that each case cost $24.44, were the other charges identical with the exception there was that

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(Testimony of Pierino C. Barengo.)

additional $50 for transferring from your company to the warehouse?

A. We assume that the cost was identical, the bill went out at that price.

Q. You handled the money to buy that whiskey?

A. That is right.

Q. And paid the charges?

A. That is right.

Q. And did deduct your own handling charges?

A. That is right.

Q. And was identical up to that point, with the exception of the addition of $50 which you explained? A. That is correct.

Q. Now as to the first carload that arrived, Mr. Barengo, you having collected the money to purchase that whiskey and handle it, you know of your own knowledge that the whiskey was sold for exactly what it cost Mr. Remmer and there was no profit to Mr. Remmer, is that correct?

A. To my knowledge.

Q. I mean, you collected what was paid?

A. That is right. I billed it out.

Q. And as to the second carload, having turned it over to the [352] warehouse, you don't know what became of that? A. That is correct.

Q. You went into service the early part of the following year? A. That is correct.

Mr. Gillen: I think that is all, thank you.

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(Testimony of Pierino C. Barengo.)

Redirect Examination

By Mr. Thompson:

Q. Mr. Barengo, as I recall your testimony, the actual amount of money that you received for the two carloads of whiskey from Mr. Remmer, that is, the 54 thousand dollars he paid you, plus the amounts paid you by the Bank Club, the Silver Dollar Bar and the Palace Club, was $80,343.50, is that correct?

A. And the 222 Club. $80,343.50.

Q. And after computing your charges on the two carloads, you found that the total amount of your charges was $62,604, is that right?

A. $62,604.

Q. And you then remitted the balance to Mr. Remmer by check which is in evidence in the amount of $17,739.50? A. That is correct.

Mr. Thompson: That's all.

Recross-Examination

By Mr. Gillen:

Q. Mr. Barengo, the reason you remitted 17 thousand odd dollars to Mr. Remmer was that Mr. Remmer had deposited with you more than was necessary to cover the cost, isn't that correct?

A. That is correct. [353]

Q. And, by the way, I omitted asking you—I understood your testimony to be that you retained in your company 147 cases to secure you for

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(Testimony of Pierino C. Barengo.)

any additional charges, the balance of the charges that were due your firm, is that correct?

A. That is correct.

Q. And that was paid by the Bank Club when they took delivery of the 147 cases?

A. That is correct.

(Witness excused.)

PATRICK A. MOONEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Patrick Mooney.

Q. Where do you reside, Mr. Mooney?

A. 800 So. Seventh Street, Reno.

Q. How long have you been a resident of Nevada? A. Since 1906.

Q. What is your present occupation, Mr. Mooney? A. I am retired.

Q. And what was your former occupation?

A. With the Internal Revenue Department for 15 years.

Q. Over what period of time were you with the Department? A. 1933, to August 31, 1948.

Q. And at that time you retired? [354]

A. Yes.

Q. And with what office of the Bureau of Internal Revenue were you associated?

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(Testimony of Patrick A. Mooney.)

A. I was with the Internal Revenue Department.

Q. With what office were you, with the collector's office? A. With the collector's office.

Q. And what was your position in the collector's office?

A. I was deputy collector in Las Vegas from October, 1933, to January 1, 1946, deputy collector.

Q. Now are you acquainted with the defendant, Elmer Remmer? A. Yes.

Q. How long have you known him?

A. About '37.

Q. Since 1937? A. Yes.

Q. Are you acquainted with his wife, Helen Remmer? A. I met her once.

Q. Do you recall when that was?

A. That was about the year '45. I met her at one time, just introduced to her and that was all.

Q. That was the only time that you have ever met Mrs. Remmer? A. Right.

Q. Now in connection with your duties as a deputy collector, was it a part of your duties to make out income tax returns for those requesting that service? [355] A. Yes.

Q. Have you on any occasion made out any income tax returns for the defendant, Elmer Remmer? A. I have.

Q. Do you recall for what years?

A. In 1941, he came to me in front of the Golden Hotel in Reno and he——

Q. (Interrupting): I asked you for what years

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(Testimony of Patrick A. Mooney.)

you made out returns for him, if you recall, Mr. Mooney?

A. I think I made them out ever since, '41 to '47.

Q. Do you recall definitely that you made out a return for 1941? A. Yes.

Q. Was that return filed, if you know?

A. Yes.

Q. For the purpose of refreshing your recollection, I wish to state that a deputy collector has appeared here and stated that the first return filed since 1935, by Mr. Remmer, was filed for the calendar year 1942.

A. I don't know anything about the '35 return. I was in Las Vegas at that time.

Q. As I say, the first return since that time filed by Mr. Remmer was for the calendar year for 1942.

A. Well, it might have been '42. I will tell you the circumstances if it is permissible.

Q. We will come to that in just a moment. At any rate, after [356] you assisted in preparing the first return for him, you then continued to do so each year, is that correct?

A. Each year, right.

Q. And did you also assist in preparing the returns for his wife, Helen Remmer? A. No.

Q. Or in the name of Helen Remmer?

A. That is right.

Q. You did assist in preparing returns in the name of Helen Remmer, is that right?

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(Testimony of Patrick A. Mooney.)

A. They split returns on the community property basis.

Q. Mr. Mooney, I am going to show you Government's Exhibit 9, which purports to be the income tax return of Elmer F. Remmer for the year 1942, which bears a preparation date of March 13, 1943, and ask you if that is a return which you assisted in preparing?

A. That is in typing. There is no writing of mine on there.

Q. Are you able to state whether or not that was one of the returns that you prepared?

A. It was for ten thousand dollars or a like amount, very close to it.

Q. I call your attention to the fact that the net income shown here, before division with his wife, is the sum of $10,915. A. That's right.

Q. Would that refresh your recollection that this is a return [357] which you prepared?

A. Yes, sir.

Q. I have here a like return, being Government's Exhibit 10, return of his wife, Helen L. Remmer, for 1942, prepared on the same date and showing the same income before division of $10,915, and ask you if that also then was prepared by you, to the best of your recollection?

A. To the best of my recollection, yes.

Q. Now will you state, Mr. Mooney, the circumstances which you were about to relate, under which you prepared these returns?

Mr. Avakian: Just a moment. That question is

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(Testimony of Patrick A. Mooney.)

objected to as being based on facts which are not in evidence, because Mr. Mooney, in a prior explanation which he was about to make said he was referring to the first return he prepared and he thought it was for the year 1941, and there is no evidence in the record that this 1942 return is that first return. Mr. Mooney wasn't sure that it was 1942, or 1941, as the year for which he prepared a return.

The Court: Objection is overruled.

Q. Now will you proceed, Mr. Mooney?

A. He met me in front of the Golden Hotel.

Q. Are you referring to Mr. Remmer now?

A. Yes, sir.

Q. Proceed.

A. He met me in front of the Golden and he said, "I want to file [358] an income tax return." I says, I asked him what he wanted to put in as his occupation. He says, "Gaming," and I says, "How did you make this money?" He said, "I won it on the Kentucky Derby," and I says, "How much do you want to file?" He said, "I made $10,915," and he took no deductions of any kind, as I remember.

Q. Did he on that occasion show you any records of any kind? A. No records, not a thing.

Q. Was anything said on that occasion as to whether or not he had filed returns for previous years? A. Not a thing.

Q. What was that?

A. No reference to any previous years.

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(Testimony of Patrick A. Mooney.)

Q. Now did you then on that occasion prepare returns for Mr. Remmer and his wife based upon the figure which he gave you?

A. I don't quite get you.

Q. Did you fill in a return with the figure that he gave you? A. Yes.

Q. And did you prepare a return for his wife, showing that as community income? A. Yes.

Q. Were you present when Mr. Remmer signed his return? A. Yes.

Q. I call your attention to the fact that on Government's Exhibit 10 the return for Helen Remmer, the signature is Helen L. [359] Remmer by Elmer Remmer? A. That's right.

Q. Was that signed in your presence?

A. Yes.

Q. And by whom? A. By Mr. Remmer.

Q. At that time you had, I take it, never seen Mrs. Remmer? A. No.

Q. Now after having prepared that return, did you each year thereafter prepare returns for Mrs. Remmer? A. Yes, sir.

Q. And where were those returns prepared?

A. I think in 1943, I am not sure, I got the information from Mr. Simmons in El Cerrito.

Q. Where, physically, did you prepare the returns?

A. I got the figures and prepared them in Reno.

Q. Where did you get the figures?

A. From Mr. Simmons and Willie Kyne. I

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(Testimony of Patrick A. Mooney.)

think I got them in '43, from Mr. Simmons and Mr. Kyne. Mr. Kyne drove me over——

Q. (Interrupting): Just a minute. For '43, you mean for 1943 return or figures that you got during the year 1943?

A. The figures I got, yes.

Q. For 1943 return? A. Yes.

Q. Do you recall Mr. Simmons' first [360] name? A. I don't recall it, no.

Q. Was it George Simmons?

A. I don't think it was. I have some letters here.

Q. Was the name Lester Simmons?

A. I wouldn't be sure.

Q. Do you have something with you that would refresh your recollection?

A. I have some letters, I wrote them about tax matters.

Q. Would they assist you in recalling Mr. Simmons' first name? A. I think they would.

Q. Would you look at those then and tell us Mr. Simmons' first name?

A. It may be only the initials, I don't know. Mr. G. E. Simmons, San Pablo Avenue, El Cerrito.

Q. Mr. G. E. Simmons?

A. Yes. See if that is the correct initial.

Q. That is correct, sir. Now, Mr. Mooney, I am going to show you Government's Exhibit 7, the individual income tax return of Elmer F. Remmer for the year 1943, and I direct your attention specifically to the signature of the person preparing the

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(Testimony of Patrick A. Mooney.)

same, and ask you if you prepared that return?

A. This is my handwriting under Mr. Remmer's signature.

Q. Can you state that you prepared that return?

A. Yes, sir; that is my handwriting.

Q. And did you at the same time prepare a return in the name [361] of his wife for one-half interest in the income?

A. Yes, I believe that year I sent the return to Mrs. Remmer—I am not sure now—for signature. I think she may have signed it that particular year.

Q. Now what was the source of the figures which you placed in this 1943 return, Government's Exhibit 7?

A. It came from the 21 Club, as I remember it, in El Cerrito.

Q. Who gave you those figures?

A. Mr. Simmons, partnership return 1065.

Q. Did you, yourself, examine any books or records? A. None, whatsoever.

Q. Did you question any of the figures which were provided to you?

A. None at all. Didn't question anything.

Q. I observe, Mr. Mooney, that on this return, Government's Exhibit 7, you placed, I believe you say in your handwriting, the words, "Taxpayer's figures"? A. Yes, sir.

Q. By that are you referring to the fact that you saw no figures? A. Right.

Q. I show you Government's Exhibit 1, the individual income tax return of Elmer F. Remmer,

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(Testimony of Patrick A. Mooney.)

for the calendar year 1944, and ask you if you prepared this return? A. Yes, sir.

Q. Did you prepare a like return, dividing the income, in the [362] name of Helen L. Remmer? I show you Government's Exhibit 2, being the individual income tax return for the year 1944, of Helen L. Remmer. A. Yes.

Q. Those are both in your writing?

A. Yes, sir.

Q. Were they signed in your presence, Mr. Mooney?

A. Mr. Remmer signed them in my presence.

Q. Now as to Mrs. Remmer's return, by whom was that signed?

A. By Mr. Remmer, I believe. I don't believe she ever signed the returns.

Q. Do you have a recollection as to whether or not Mr. Remmer signed this return for her?

A. Yes, he signed all returns.

Q. Now what was the source of the figures which you placed in those 1944 returns?

A. I think Willie Kyne couldn't give me the figures, he was in the navy, and I filed 1040ES with no payment. That is an estimate of 30 thousand dollars. I went to Mr. Remmer and asked him if I could have some money on the estimate and he said he was short of funds and couldn't pay anything right now. I asked the chief of the income tax division what we would do about it——

Q. (Interrupting): No, I asked you, Mr. Mooney, where you got the figures that went into that final return?

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(Testimony of Patrick A. Mooney.)

A. On the estimate of 20 thousand dollars. [363]

Q. Whose estimate was it that the income was 20 thousand dollars?

A. Elmer F. Remmer and Helen L. Remmer.

Q. You didn't supply the figure? A. No.

Mr. Avakian: Your Honor, if I may be permitted to interrupt. I believe the prosecutor interrupted Mr. Mooney when he was giving an explanation as to when and how this estimate was filed and I think after Mr. Campbell interrupted him, he began from the 1040 estimate.

The Court: Will you ask the question again and if the witness desires to make an explanation, he may do so. Will you ask the question again?

Q. What was the source of the 20 thousand dollar income figure which is placed in that return?

A. The 21 Club at El Cerrito.

Q. Who supplied the figure of 20 thousand dollars?

A. I think Mr. Remmer and myself agreed on that figure.

Q. You say you agreed upon it together?

A. We agreed tentatively on that 1040ES, the estimate. I asked him how much he was going to make and he said around 20 thousand dollars, I think.

Mr. Avakian: Your Honor——

The Court (Interceding): Have you any further explanation you want to make, Mr. Mooney, on that question? [364] Have you answered it to your satisfaction, on this last question?

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(Testimony of Patrick A. Mooney.)

A. I can't hear.

The Court: I just want to know if you have completed the answer. Counsel has indicated that he feels that you wanted to make a further explanation, so have you answered it as fully as you desire?

A. The answer I made in full is all right. I believe the 1944 return was a 1040ES estimate. There is some correspondence, I believe, in the file some place that will show that I had some question. I went to Mr. Simmons that year to find the 1065, which is the partnership return, at El Cerrito and it was in the hands of Mr. Lewis and some other gentleman. Mr. Lewis was the former Collector of Internal Revenue in San Francisco and he had an office on Montgomery Street, and I couldn't get the return, so I had to file it before it was delinquent.

Q. Did you then discuss it with Mr. Remmer?

A. I don't believe I did.

Q. When did you first discuss that return with Mr. Remmer?

A. When he signed it. He paid the money. I believe he paid half the money.

Q. I call your attention to the fact that this return bears the stamp "Received with remittance, April 13, 1945."

A. I think he had an extension.

Q. Yes, but I call your attention to the remittance stamp, [365] "April 13, 1945, Collector of Internal Revenue, District of Nevada."

A. Is that the full amount of the tax?

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(Testimony of Patrick A. Mooney.)

Q. That would indicate that there still remained a balance due at that time? A. Yes, sir.

Q. But was that the date that you discussed with Mr. Remmer this 20 thousand dollar figure and he signed the return?

Mr. Gillen: Just a moment. I am becoming a little confused on this. I first understood that counsel was asking about the 1943 return which Mr. Mooney identified as an estimate.

Mr. Campbell: No, 1944.

Mr. Gillen: I should have said 1944 return, not 1943, that Mr. Mooney called an estimate and suddenly, apparently, the return itself has come into the picture and I am trying to follow it, whether the discussion about the 20 thousand dollars took place at the time the estimate was agreed upon or whether it was discussed at the time the actual estimate itself was filed and part payment paid on it.

Mr. Campbell: No, I think you misunderstood me, Mr. Gillen. He was shown Plaintiff's Exhibit 1, the return for 1944. It is 1944 return.

Mr. Gillen: That is the actual return?

Mr. Campbell: That is correct, which shows figure of 20 thousand dollars filed on a CP basis on the face of the [366] return.

(Discussion between counsel.)

Mr. Campbell: Possibly I can straighten it out by a question or two. It is a difficult situation.

Q. I will show you again, Mr. Mooney, this

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(Testimony of Patrick A. Mooney.)

Government's Exhibit 1 and ask you if that is the return that you referred to as having originally been prepared by you?

Mr. Gillen: That is 1944 return?

Mr. Campbell: That is the 1944 return.

A. This is my writing.

Q. Now is it your recollection that you prepared some document or estimate prior to preparing that?

A. I disremember.

Q. I beg your pardon?

A. I don't remember. I may have——

Q. You think you may have some memoranda on the subject?

A. I believe there is something here.

Mr. Campbell: May I suggest the morning recess? Will you examine your records for that while we have recess, Mr. Mooney?

(Jury and alternate jurors admonished and recess taken at 10:55 a.m.)

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [367]

MR. MOONEY

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Mooney, just before the recess I was showing you this 1944 return of Elmer Remmer, which is Government's Exhibit No. 1. This return, which is on a community property basis, shows under the item, "Your Income," "Various self-employed $20,000," then divides the income as between the husband and wife, $10,000 each shows a tax liability of $2,570, with a payment based on declaration of estimated tax of $1,500 and a balance due of $1,070, which was paid on April 13, 1945, whereupon interest was assessed. At that time you stated that an estimate had been filed and that you believed you had some information regarding it, that you would examine your files for that purpose. Have you done so? (Witness hands counsel paper.) The record will show that the witness has handed me what purports to be a carbon copy of a letter, which I will have marked for identification as 68 for identification.

Mr. Gillen: No objection to this being offered in evidence. I might state, however, that we do

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(Testimony of Patrick A. Mooney.)

have the original signed letter, of counsel would like to offer that instead, on the letterhead of the Treasury Department and signed by Mr. Mooney.

Mr. Campbell: Yes, under representation of counsel, we will accept the stipulation and let the record show that counsel has produced the original of the carbon copy which Mr. [368] Mooney has produced, which will be offered as government's Exhibit 68.

The Court: It may be admitted in evidence, Exhibit 68.

Q. Now, Mr. Mooney, I observed that on March 20, 1945—and I am reading from plaintiff's Exhibit 68—you wrote Mr. Remmer as follows: (Reads Exhibit 68.) Do you recall having written him that letter? A. Yes, sir.

Q. And showing you again plaintiff's Exhibit No. 1, the 1944 return, is that the 1040 that you sent him in the letter of March 20, which I have just read to you? A. I believe it is.

Q. Now did Mr. Remmer ever thereafter produce to you any data from his different places, so that a proper amended return might be filed?

A. To the best of my knowledge, no. 1946—we will come to that later.

Q. Yes, but so far as the year 1944 is concerned, you never received any additional information, is that correct? A. Yes.

Q. I have previously shown you the return of Helen Remmer for the year 1944 and ask you if

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(Testimony of Patrick A. Mooney.)

your testimony is the same with regard to that return? A. Absolutely.

The Court: That is Exhibit 2? [369]

Mr. Campbell: Exhibit 2, yes.

Q. Showing you government's Exhibit 3, the individual income tax return for the calendar year 1945 of Elmer F. Remmer, I will ask you if you prepared this return? A. Yes, sir.

Q. And referring to government's Exhibit 4, did you prepare a similar return in the name of Helen L. Remmer? A. Yes, sir.

Q. Were these returns signed in your presence?

A. Mr. Remmer signed them in my presence.

Q. You say Mr. Remmer signed them—do you refer to both returns?

A. I believe both—give me Helen's and I will tell you.

Q. I am handing the witness plaintiff's Exhibit 4.

Q. This is Mr. Remmer's writing?

Q. That is Mr. Remmer's writing?

A. Yes.

Q. Let me ask you this, what was the source of the figures which you placed in this return?

A. I got them from the 1065 partnership return.

Q. Partnership return of whom?

A. Of the Menlo Club and the various other clubs.

Q. I call your attention to the fact that there is attached a typewritten schedule reading as follows:

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(Testimony of Patrick A. Mooney.)

(Reads schedule.) Now who supplied you with those figures or that table? [370]

A. Mr. Maundrell, the bookkeeper in the partnership return. I never saw any books.

Q. Mr. Maundrell is the bookkeeper for whom?

A. For Mr. Remmer.

Q. Did you examine any books or records of any kind? A. Not a thing.

Q. Where was it that you secured these figures?

A. At 50 Mason Street, San Francisco.

Q. Did you go to San Francisco for that purpose? A. Yes, sir.

Q. And at whose expense?

A. At Mr. Remmer's. He gave me the actual expenses of my trip and I took my vacation time off to make the returns, not on government time.

Q. You did that on your own time, is that correct? A. On my own time.

Q. At this time I will show you government's Exhibit 5, the individual income tax return of Elmer F. Remmer for the year 1946 and ask you if you prepared this return as well as plaintiff's Exhibit 6, the return of Helen L. Remmer, for the year 1946? A. Yes, sir.

Q. Who supplied you with the figures which were placed in that return?

A. Mr. Maundrell. [371]

Q. Did you yourself examine any books or records in connection with the figures which went into that return?

A. Nothing but the partnership return, 1065.

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(Testimony of Patrick A. Mooney.)

Q. You accepted the figures which were given to you? A. Absolutely.

Q. And where were those returns prepared?

A. As far as I know, I prepared them in Reno. I got the figures in San Francisco.

Q. Under a similar circumstance to that of the preceding year? A. Yes, sir.

Q. Were those returns signed in your presence?

A. Mr. Remmer signed them, yes.

Q. Will you examine the return of Helen Remmer and state whether or not that was signed in your presence? A. Yes, sir.

Q. And by whom was it signed?

A. Mr. Remmer, both of them.

Q. Did you question any of the figures that were given to you in connection with these returns?

A. There were three or four purchases Mr. Remmer spoke to me about.

Q. Did you question any figures? A. No.

Q. You understood, did you not, Mr. Mooney, that when I refer to examining records, I refer to any books of account, [372] cancelled checks, bank statements, anything of that nature?

A. Not a thing. All the figures are derived from partnership returns. I never looked at the books.

Q. And those partnership returns were shown you by whom?

A. Mr. Maundrell and Mr. Simmons in El Cerrito on two occasions, I believe.

Q. On the first two occasions I believe Mr. Simmons and Mr. Kyne?

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(Testimony of Patrick A. Mooney.)

A. Mr. Kyne, he was in the navy, I don't know when. This one year, the 1944 year, is the one that Mr. Kyne wasn't there. He used to supply me with all the information.

Q. In 1945 and 1946 the figures were supplied to you by Mr. Maundrell, is that correct?

A. Mr. Maundrell, yes, and there was another—Mr. Maundrell only kept the accounts of the Menlo Club, I believe, and there was another accountant used to take care of the other places by the name of Atkin. I just met him once.

Q. Did he supply you with figures of the other places, or did Mr. Maundrell?

A. I disremember. I met him in the office just once, I believe. I understand he has since died.

Q. Now, Mr. Mooney, you have been subpoenaed as secretary and treasurer of the Mountain City Consolidated Copper Company, a corporation, to produce here certain stock transfer records relative to the issuance of certain shares of stock of [373] that corporation. Have you produced those records?

A. I think I have them.

Q. Will you produce those, please.

A. What do you want to find out from the records, Mr. Remmer's connection?

Q. As the question has been asked, yes, sir.

(Witness produces records.)

Mr. Campbell: May I inquire if counsel require that these be marked for identification or may

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(Testimony of Patrick A. Mooney.)

they be viewed and oral testimony given and the records returned to Mr. Mooney?

Mr. Gillen: We would be willing to stipulate that they may be viewed and orally testified from, and I think we would be willing to produce, if it is desired, the original stock certificates.

Mr. Campbell: I do not think it would be necessary to bring the original certificates so long as we have the testimony.

The Court: I understand it has been stipulated that oral testimony of the exhibit can be used in place of the record itself, and the exhibit will be marked for identification next in order.

Mr. Campbell: My understanding was, your Honor—well yes, it can be marked for identification and we ask it be withdrawn and returned.

The Court: Very well, 69, the stock book. [374]

Mr. Campbell: Which would be the stock book of the Mountain City Consolidated Copper Company.

Q. Mr. Mooney, were certain shares of stock of the Mountain City Consolidated Copper Company sold to the defendant, Elmer F. Remmer?

A. Six thousand shares.

Q. And upon what date were those shares of stock sold to him?

A. The 29th of August, 1946.

Q. And what amount of money did he pay for them? A. Forty cents a share, $2400.

Q. Did I understand $2400?

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(Testimony of Patrick A. Mooney.)

A. Right; 40 cents a share.

Q. And on what date did he make that payment?

A. I believe the same date.

Q. That is to say, August 29, 1946?

A. I believe it was the same day.

Q. And did you receive that money from him in your capacity as secretary and treasurer of the Mountain City Consolidated Copper Company?

A. Yes.

Q. Were shares of stock issued to Mr. Remmer in return for that $2400? A. Yes, sir.

Q. And are those shares of stock still outstanding in Mr. Remmer's name, according to the records of your corporation? [375]

A. On the 3rd of February, 1947, he became dissatisfied and he said, "You might sell them."

Q. That is not my question. Are they or are they not outstanding at this time?

A. They are outstanding in Mr. Remmer's name.

Q. And were they outstanding in his name as of the 30th day of December, 1946?

A. Yes, to the best of my knowledge.

Q. Or the 31st of December, 1946?

A. Yes.

Mr. Campbell: If the Court please, a subpoena has been issued to one Lawrence Semenza of Reno, Nevada, for the production of certain records, which I will ask to be produced at this time and deposited with the clerk of the court. Is Mr. Semenza present?

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(Testimony of Patrick A. Mooney.)

Mr. Avakian: May we inquire what the records are? Perhaps we can make them available.

Mr. Campbell: The subpoena calls for the following records of the B & R Smoke Shoppe; general ledger and general journal, receipts and disbursements record March 1, 1943, to January 31, 1946, and receipts and disbursements record January 1, 1946, to December 31, 1946. The following records of 110 Eddy Street: general ledger, cash receipts and disbursements November 1, 1942, to January 31, 1946, cash receipts and disbursements January 1, 1946, to December 31, 1946. The following records [376] of the Transit Smoke Shop, 85 First Street: November and December, 1946, cash receipts and disbursements. The following records from the Menlo Club: receipts and disbursements 1947 and general ledger, cash receipts and disbursements 1946, Tiny's Restaurant 1946 receipts and disbursements, 1945 receipts and disbursements bar and restaurant, and 1946 receipts and disbursements bar. File on inventory of the following: B & R Smoke Shoppe, daily diary 1942, daily diary 1943, daily diary 1945, daily diary 1946; (7) list of cashier checks bought by B & R Smoke Shoppe; following records of Cal-Neva Lodge: combined journal and ledger, 1937 to 1947, inclusive; pay roll records, 1937 to 1946, inclusive, and all invoices, check stubs, cancelled checks, bank statements and game sheets for the years 1937 and 1946, inclusive. Check in the amount of $7,724.11 dated August 28, 1946, drawn on the Collector of Internal Revenue,

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from which check signature has been torn; check No. 227, amount $2,400, dated August 31, 1946, drawn to Mountain City Consolidated Copper Company, signed by James B. Jeffers; check in amount of $5,324, dated August 21st, drawn to the order of Collector of Internal Revenue.

Mr. Avakian: May I inquire of counsel whether, in connection with cross-examination of Mr. Mooney, he wants all those documents or whether for the purpose of this direct examination he desires only the last three checks he mentioned at this moment? [377]

Mr. Campbell: Of course, I desire all the records subpoenaed of Mr. Semenza. For immediate purposes, however, I would be satisfied with the last three checks.

Mr. Avakian: May I suggest Mr. Semenza be sworn and questioned as to his knowledge of the whereabouts of those three checks?

Mr. Campbell: I think that should be done outside the presence of the jury.

Mr. Avakian: But if he is going to be questioned regarding this case, it should be in the presence of the jury.

The Court: I think when a subpoena has been served and it appears the subpoena is not complied with for some reason or other, I don't know, because Mr. Semenza announced he doesn't have the records, he has not produced them, that any investigation of the matter should be outside the presence of the jury, so we will excuse the jury.

Mr. Avakian: Before the jury is excused, may I first take exception to your Honor's ruling?

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The Court: It is not necessary. You can have exception to any ruling the court makes at any time and it is so understood.

Mr. Avakian: May we ask the Court to instruct the jury to disregard the comments made on this matter in their presence? [378]

The Court: I have already informed the jury, and I think it is not necessary to do it every time some remark is made by counsel and the Court, but I will do it again. Any exchanges that have taken place in this court room, from the very beginning of this trial all through to the end, between counsel, remarks by counsel, exchanges between the Court and counsel, remarks by the Court, are not evidence in this case and you will be finally instructed. You have already been informed, in your examination as to your qualifications to become jurors, that it is your duty, and will be your duty, to decide the case entirely upon the evidence and nothing else, so remarks by the court, remarks by counsel, are not evidence and the Court has not, and will not at any time indicate any idea as to how you should decide the case on any question. So the matter is entirely in your hands and to be decided only upon the evidence produced from the mouths of the witnesses and the documents which are admitted in evidence.

(Jury and alternate jurors admonished and excused at 11:45.) [379]

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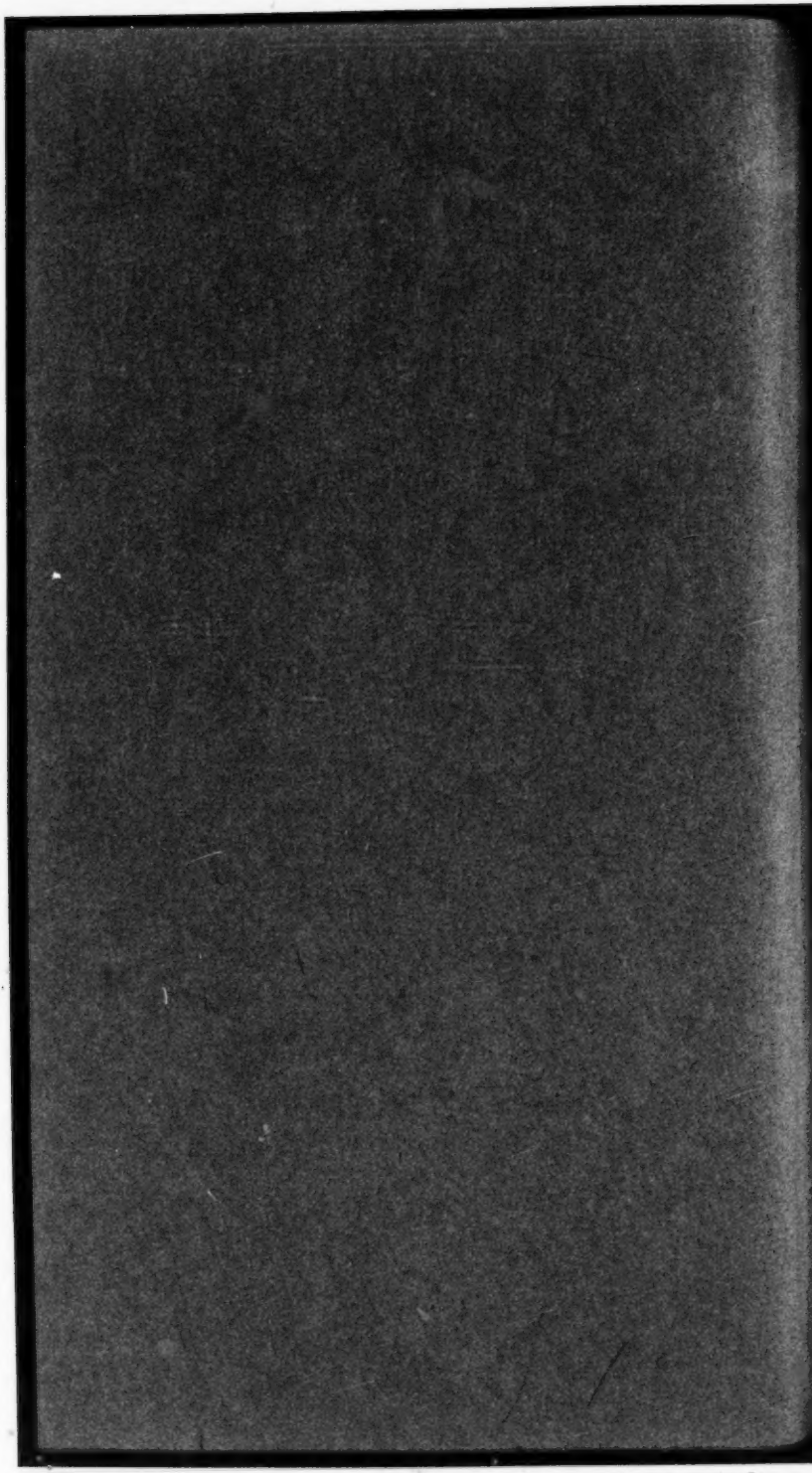

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes
Volume III
(Pages 901 to 1372)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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(In the absence of the jury.)

LAWRENCE J. SEMENZA

being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Lawrence J. Semenza.

Q. Mr. Semenza, what is your business or occupation? A. Certified public accountant.

Q. You are now, and have been for some time, employed by the defendant, Elmer F. Remmer?

A. I have.

Q. And you have also for some time been the accountant for Cal-Neva, Inc.? A. I have.

Q. And as such you have had in your possession at various times various of the records referred to in this subpoena, is that right? A. I have.

Q. Now, is it not a fact that on July 11, 1949, there were delivered to you, at your request and by representative of the Bureau of Internal Revenue and upon what purports to be a receipt listing certain of the records set forth in this subpoena?

A. Yes, sir.

Q. For this purpose I will show you the yellow paper headed, "Records given to Semenza & Kottinger"—is that your partner? [380]

A. Yes.

Q. "7-11-49," is that in your handwriting?

A. It is.

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(Testimony of Lawrence J. Semenza.)

Mr. Campbell: May this be marked for identification?

The Court: We will take a recess until 1:00 o'clock.

(Recess taken at 11:50.)

Afternoon Session, December 6, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Jury present, admonished and excused.)

(In the absence of the jury.)

Mr. Campbell: Now, if the Court please, I wish to state to the Court that apparently there is some misunderstanding, at least as to the location of three of the items called for in the subpoena issued to Mr. Semenza, and that is under subdivision (8), the three checks called for, check in the amount of $7,724.11, drawn on the Collector of Internal Revenue, from which the signature has been torn; check No. 227, in the amount of $2,400, drawn to the Mountain City Consolidated Copper Company and signed by Mr. Jeffers, and check for $5,324, dated August 1, 1946, drawn to the Collector of Internal Revenue. Mr. Semenza informs me that he still has in his possession receipt for a number of checks which were turned over by him to a Revenue agent. That Revenue agent was present and he has been interviewed as to the records in his letter of [381] transmittal, showing that the checks set forth on that list, as well as other matters with respect to Cal-Neva, transmitted to the Reno office of

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(Testimony of Lawrence J. Semenza.)

the Internal Revenue agent's office for him to use and then to be restored to Mr. Semenza. Apparently certain of the records involved were returned to Mr. Semenza. We are unable, however, to ascertain definitely that these checks were. Mr. Semenza says he has been unable to locate them in his possession and although a large box and records were given to him, that he had inspected them as late as last Saturday and that those checks were not among those transmittals. We have immediately set in motion investigation to determine if they are still within the possession somewhere of the Bureau of Internal Revenue. However, we have either interviewed or spoken by telephone to every one that we could consider would be concerned in the matter and have been unable to locate those three items, so that is the position in which we find ourselves and I wish to state that frankly to the Court. I think Mr. Semenza, as I say, has a receipt for certain checks which he states were not returned to him and I have no reason to doubt Mr. Semenza's statement in that regard.

Mr. Avakian: Now, if the Court please, we have in our possession a newspaper clipping, which purports to contain photostatic copies of these three checks, and subject to a proper explanation as to the inability to locate the actual checks themselves, we would be agreeable to the use of these [382] newspaper photostats in lieu of the originals. However, we do feel that these matters should be brought to the Court's attention. It is my understanding

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(Testimony of Lawrence J. Semenza.)

that approximately ten days before Mr. Semenza was served with the subpoena in this case, he had transferred the various documents, which are called for there, with the exception of these three checks, which he did not have, to Mr. Lohse, who had just come into the case and wanted to become familiar with this. In other words, shortly after the subpoena was served, and about one week before this trial commenced, Mr. Semenza informed Mr. Thompson of the prosecution that all records in his possession called for in the subpoena had been transferred to Mr. Lohse's possession ten days or so before and that he did not have possession of them and could not produce them in court. Now, in view of that, we would like to assign as wilfull conduct on the part of the prosecution to his action in requesting, in the presence of the jury, that Mr. Semenza, whom they knew to be the accountant of the defendant, to produce the records. We feel that was a matter that was improper conduct on the part of the prosecution, which could only have the effect of creating in the minds of the jury the impression that Mr. Semenza's inability to produce these records was the fault of the defense, when they knew in advance he did not have them when they subpoenaed them and when they did not choose to issue a subpoena to the man whom they knew did have possession. [383]

The Court: Wait a minute—let me see if I get this picture. Some one in the Internal Revenue gave Mr. Semenza the custody of the records.

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: Not these three checks, your Honor. We are talking about these three checks. Mr. Semenza, who had possession of them originally, several years ago, turned these checks over to the custody of the Internal Revenue and the Internal Revenue gave him a receipt and that is the last he has seen of them.

The Court: There is nothing for the Court to decide. You can assign any matter as misconduct, that is your privilege.

Mr. Avakian: That is a part of my statement to the Court. Secondly, this matter has been raised before the jury under circumstances which we believe the prosecution could have avoided. In other words, they knew that Mr. Semenza did not have these records when they, in the presence of the jury and knowing he was the defendant's accountant, called upon him to produce them. We therefore feel that the Court should permit the true facts as to these missing checks to be brought to the attention of the jury, to remove from the minds of the jury any implications as to the defense being responsible for the absence of the records and we, accordingly, request your Honor to permit that showing to be made in the presence of the jury to that purpose. [384]

Mr. Campbell: I might state, your Honor, we are discussing three checks out of a vast quantity of records. Mr. Thompson, I might state, informs me that he has no recollection of any such communication as counsel has referred to.

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: We would like to get Mr. Semenza's sworn testimony on that point, if there is any doubt about it.

The Court: I have no idea that counsel on either side of this case would be guilty of any such misconduct. Those gentlemen with whom I am personally acquainted I feel certain would not be wilfully guilty of any such conduct and I do not think any of those gentlemen with whom I am not well acquainted would be, even including those from San Francisco.

Mr. Avakian: Your Honor, the point is, for whatever purpose it may have been, the impression has been left with the jury.

The Court: I do not think counsel will have any objection, and I am sure you will have that opportunity, when Mr. Semenza appears before the jury, I will allow you to make such showing.

Mr. Avakian: We feel we would be deprived of the right to overcome that impression in the minds of the jury unless it is done immediately because the impression is there and we feel that impression should be overcome immediately. Mr. Semenza may not be on the stand for another month, we don't know. [385]

The Court: When the jury returns, if you want to call Mr. Semenza, you may do so.

Mr. Avakian: For the purpose of making that explanation.

The Court: There is no objection, Mr. Campbell?

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(Testimony of Lawrence J. Semenza.)

Mr. Campbell: I think the statement, however, should be made by the Court.

The Court: I think at this time you ought to make a statement so your statement will be in the record.

Mr. Campbell: I am willing to do it; however, as I said, I think it would be preferable that the Court make a statement rather than an advocate of either side make a statement, because there is apparently some feeling in the matter.

Mr. Avakian: Our position is based entirely upon fear of the impression that will be left with the jury, your Honor.

The Court: That could be done just by questioning Mr. Semenza.

Mr. Avakian: And I understand we will have the opportunity to do that?

The Court: Yes, you will.

Mr. Campbell: May I interrogate Mr. Semenza concerning these other records?

The Court: Yes, sir.

Mr. Avakian: Your Honor, if counsel is going to go into all other matters, which I understand are not needed now for Mr. Mooney's examination, it might be we will not be able to resume [386] with Mr. Mooney today, in view of his age and physical condition. I wonder if that part can be deferred?

The Court: We must try to cover some of this ground.

Q. (By Mr. Campbell): Mr. Semenza, in addition to the three checks you were requested to pro-

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(Testimony of Lawrence J. Semenza.)

duce here a vast number of other records. I believe items 1 to 5 consisted of records which has been placed in your possession by the Bureau of Internal Revenue and for which you gave the receipt or memoranda which have been marked for identification. Can you state, if you will, the course that those records took from your hands?

A. After I received them and brought them to Reno from my office——

Q. You received them when? When was it you received them?

A. In San Francisco—I don't know what the date was on the statement that you showed me.

Q. May I have that. I hand you this dated July 11, 1949, at which time, at your request, I believe you were given the financial records of the B & R Smoke Shoppe, general ledger and general journal, receipts and disbursements record March 1, 1943, to January 31, 1946, receipts and disbursements record January 1, 1946, to December 31, 1946, the following records of 110 Eddy Street: general ledger, cash receipts and disbursements, November 1, 1942, to January 31, 1946, and cash receipts and disbursements January 1, 1946, to December 31, 1946; following records of Transit Smoke Shop: November and December, 1946, [387] cash receipts and disbursements; following records of the Menlo Club: receipts and disbursements, 1947, and general ledger, including only a few recap sheets, cash receipts and disbursements, 1946; Tiny's Restaurant 1946 receipts and disbursements, 1945 receipts and disburse-

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(Testimony of Lawrence J. Semenza.)

ments bar and restaurant and 1946 receipts and disbursements bar, file on inventory. Is that all the records that were given to you at that time?

A. No, I also received the B & R Smoke Shoppe.

Q. Those were daily diaries for 1942, 1943, 1945 and 1946, that is correct? A. That is right.

Q. At the time you received those from the Bureau of Internal Revenue, you left that memorandum and agreed to restore them to the Bureau of Internal Revenue whenever they were required, is that correct?

A. I agreed to return them to the Bureau of Internal Revenue. Subsequently Mr. Weaver made up a list of cashier checks listed under Item 7 to me, so I received Item 7 as well.

Q. And your agreement with Mr. Weaver was that you would return them to him, is that correct?

A. When my purpose was served.

Q. When your purpose was served, you would return them? A. That is right.

Q. And you stated your purpose was to prepare returns? A. No. [388]

Q. Or to make certain audits with respect to your employment?

A. It is my recollection that in December and November, prior to my receiving these records, I was employed, along with the firm of Thatcher, Woodburn and Forman, to prepare computation in tax in answer to matter issued by the Treasury Department.

Q. And you were using them for that purpose?

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(Testimony of Lawrence J. Semenza.)

A. No. Subsequently to the filing, negotiations were carried on with your office, as I recall, to come to a conclusion on the actual amount of tax owed by Mr. Remmer. In connection with those negotiations it was necessary to obtain the records from the government and we began examination of the records in order to determine what liability Mr. Remmer might have. Subsequently, other attorneys entered the case that were employed by Mr. Remmer and it was understood that another accountant in San Francisco named Nathan J. Friedman was to be employed to assist in it because the attorneys decided that, in view of the fact Mr. Friedman was in San Francisco and would be able to work directly with their office, the records would be sent to him and he would take care of all matters in California and I would retain the records on Cal-Neva and take care of the Cal-Nevada matters. I sent the records on to Mr. Friedman and——

Q. (Interrupting): May I ask you, at all times that you have related, and up until the present time, you have had on file with the Bureau of Internal Revenue a power of attorney as Mr. Remmer's representative, have you not? [389]

A. I have.

Q. All right, proceed.

A. Subsequently Mr. Friedman withdrew from the case and turned the records over to Mr. Golden and Mr. Gillen in San Francisco.

Q. You are referring to the attorneys?

A. Attorneys for the defendant. I was sub-

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(Testimony of Lawrence J. Semenza.)

poenaed to appear before the grand jury in Carson City——

Q. Pardon me just a minute. Prior to that, Mr. Semenza, is it not a fact that Mr. Weaver visited your office in Reno for the purpose of obtaining the return of the records, spoke to your partner, ascertained that you were in San Francisco and talked to you by telephone there relative to the return of the records, in order that they might be used before the grand jury?

A. That is true. In fact, Mr. Weaver spoke to me over the telephone.

Q. Yes, that is what I said.

A. That is right, and I informed him that I did not have the records, the records were in San Francisco, but I would attempt to obtain them and appear with them at the grand jury hearing.

Q. You were subsequently subpoenaed to appear with those records, were you not?

A. That is true. I contacted Mr. Golden's office and was advised [390] that Mr. Golden was absent and was in the service at the moment, so I called Mr. Avakian in Oakland and told him that I desired to have the records, as I had been requested to return them by Mr. Weaver. Furthermore, I had been subpoenaed to appear before the grand jury with the records and that I did not have them in my possession, I would like to get them in order to appear. Mr. Avakian informed me that he had not discussed the matter with Mr. Golden and would advise me later on whether they would be returned

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(Testimony of Lawrence J. Semenza.)

to me or not. I was subsequently advised that they could not return them to me, so I appeared before the grand jury and made that statement.

Q. Now, have they been in your possession since that time? A. At intervals they have.

Q. And upon what date was this subpoena served upon you? A. The 16th of November.

Q. Were they in your possession at that time?

A. They were not.

Q. In whose possession were they at that time?

A. They were delivered to Mr. Lohse's office approximately a week before that.

Q. And were they subsequently returned from Mr. Lohse's office to your office?

A. They have never been.

Q. Have you had them in your possession since that time?

A. No. I have had occasion to look at them in Mr. Lohse's [391] office.

Q. So far as you know then at all times since that time they have been in Mr. Lohse's office?

A. Yes.

Q. And your examination has taken place there?

A. It has.

Q. Does that also include the records of the Cal-Neva, Inc., other than the three checks involved here, that is to say, the combined ledger and journal 1937 and 1947, inclusive, pay roll records 1937 and 1946, inclusive, and all invoices, check stubs, cancelled checks, bank statements, gaming sheets for the years 1937 to 1946, inclusive, with the exception

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(Testimony of Lawrence J. Semenza.)

of the 35 or 40 which you state have never been returned to you? A. That is true.

Q. And they were all turned over to Mr. Lohse about a week, you say, prior to the service of this subpoena upon you? A. They were.

Mr. Campbell: I think that is all, your Honor. I wanted your Honor to have the entire picture, inasmuch as the controversy which has come up, to which reference has been made by Mr. Avakian, concerns at this time only some three checks.

The Court: All of the records and items, except these three checks, have been accounted for and are available now?

Mr. Campbell: Well, they are not available to us, [392] apparently, your Honor, if they are in the possession of Mr. Lohse, having been put out of Mr. Semenza's possession about a week prior to the service of this subpoena, although they were in his possession both before and after his appearance before the grand jury.

The Court: Those records were turned over to Mr. Semenza by Mr. Weaver of the Internal Revenue Department and you turned them over to Mr. Friedman?

Mr. Semenza: Yes.

The Court: Did you have any authority from Mr. Weaver to turn those documents over to any one else, to let them out of your custody?

Mr. Semenza: I have no authority from Mr. Weaver.

The Court: Did you have any authority from

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(Testimony of Lawrence J. Semenza.)

any one connected with the Internal Revenue Department?

Mr. Semenza: No.

The Court: Well, you ask that those records be produced to you, Mr. Campbell?

Mr. Campbell: Yes, your Honor.

The Court: Will you produce them, Mr. Lohse?

Mr. Avakian: We would want to make the record in the presence of the jury.

The Court: Well, we will make the record right now. You may produce the records, Mr. Lohse.

Mr. Lohse: May I confer with counsel, your Honor? [393]

The Court: Yes.

Mr. Lohse: If your Honor please, may I ask Mr. Gillen, who is one of associate counsel, to respond to the Court's inquiry, whether I will produce the records?

The Court: No, I will ask you to produce the records, Mr. Lohse.

Mr. Gillen: I just——

The Court: I am asking him and in a moment I am going to order him. I am just asking Mr. Lohse to produce the records and if he does not, I am going to order him to.

Mr. Lohse: Your Honor please, may I have your indulgence?

The Court: Yes, very well.

Mr. Avakian: Your Honor——

The Court: I am not going to listen to anything.

Mr. Avakian: I just want to make an inquiry.

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(Testimony of Lawrence J. Semenza.)

The Court: There is no need for an inquiry. It is plain. Certain records are missing and I order Mr. Lohse to produce them.

Mr. Avakian: They were defendant's records that were turned over voluntarily by Mr. Kyne to the Internal Revenue. They are personal records, is your Honor demanding to produce personal records of this witness?

The Court: I am going to demand any records that were in this subpoena to be turned over by Mr. Lohse to [394] the government.

Mr. Gillen: You are ordering Mr. Lohse to turn over to the government the defendant's records?

The Court: I have not gotten to that point, counsel.

Mr. Gillen: You are requesting Mr. Lohse to turn over defendant's records to the government?

The Court: I don't know whose records they are.

Mr. Gillen: I am telling whose they are.

The Court: I understand they are records that were obtained from the Bureau of Internal Revenue from Mr. Weaver by Mr. Semenza.

Mr. Gillen: Mr. Weaver who originally obtained them voluntarily from——

The Court: I don't know, but they were turned over to the Bureau of Internal Revenue and given to Mr. Semenza on receipt. Here we have a subpoena duces tecum and it is met by a statement that the witness, in whose custody the exhibits were placed by Mr. Weaver, tells us that they were turned over to one of the attorneys for the defendant.

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(Testimony of Lawrence J. Semenza.)

Mr. Gillen: May I respectfully suggest to your Honor, has your Honor the entire story?

The Court: I would like to have the story.

Mr. Gillen: Which we are trying to give your Honor. We believe you would see the entire picture in a different [395] light. That is what we are trying to enlighten your Honor now. Would your Honor like to hear it?

The Court: Yes, I will be glad to.

Mr. Avakian: I would like to make a statement.

The Court: Well, I would like to hear from you, Mr. Campbell, on the question.

Mr. Campbell: To be perfectly fair about the situation, it is the contention of the government that all of these various enterprises which, with the exception of Cal-Neva, Inc., which is a corporation, were partnerships, in which the defendant here, Elmer Remmer, was a partner, and in that respect they are the personal records of the defendant, Elmer Remmer. They were not originally obtained by the special agent from the defendant, Elmer Remmer, but were obtained from third parties. I feel it is only fair that that statement be made to the Court.

Mr. Avakian: Thank you, Mr. Campbell, and I am sure the Court is aware of the constitutional rights involved in a situation of this type, and it is in a desire to make all these facts available to the Court, so the Court will understand the legal and constitutional rights of the defendant that we desire to explore this fully and we appreciate Mr.

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(Testimony of Lawrence J. Semenza.)

Campbell's statement of their position with respect to it. I am sure Mr. Campbell was aware of the danger of the prosecution's case in the event he would require by compulsion to produce these records. If I may make just one brief statement [396] before questioning Mr. Semenza, I would like to do that, your Honor, is that permissible?

The Court: Yes.

Mr. Avakian: The whole situation with respect to these records is this: the government obtained from parties other than Mr. Remmer records of the various businesses in which the prosecution now says Mr. Remmer was either sole owner or partner. A question may develop during the course of the trial as to whether there was unlawful search and seizure. That is not before us now. A portion of these documents—not all, only a portion—mentioned in the subpoena were subsequently made available by the Bureau after they were taken, to Mr. Semenza for the purpose of enabling him to advise the attorneys with whom he was working as to the accounting features of this case. The balance of those records are still in the possession of the government, as your Honor knows from the motions that were made prior to trial here, in which we were denied opportunity to examine our own records still in the possession of the government. We are in the position then of the government still refusing to make available to us the balance of our records, which are our property, asking us to make available to them the portion which we do have and which

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(Testimony of Lawrence J. Semenza.)

we desperately need every night for the preparation of this case.

With respect to the Cal-Neva corporate records, we will be very happy to make those available to the prosecution, in [397] view of the fact there are no constitutional problems involved with respect to corporate records. Those records are partly in the court room and partly in Mr. Lohse's office. They are very bulky, contain several boxes, we need to refer to them during the course of this trial. We have no objection to the prosecution likewise referring to those corporate Cal-Neva records, subject to our having equal opportunity with them and if they would like to examine them in Mr. Lohse's office during the day while we are in court, we will be glad to do that, but we would like to have them available to us at night, which is the only time we have for working. Inasmuch as we do not have the three checks that are missing, on proper explanation to the jury as to what happened to the originals, we are agreeable to the use of the photostat in lieu of the originals. I would now like, with that brief statement, to question Mr. Semenza as to matters Mr. Campbell questioned him during his examination.

Cross-Examination

By Mr. Avakian:

Q. Mr. Semenza, at the time arrangements were made with you between you and Mr. Weaver, on or about July 11, 1949, for the return to you at that

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(Testimony of Lawrence J. Semenza.)

time of a portion of these records listed on the subpoena, did Mr. Weaver and the other representatives of the Bureau also have in their possession other records of these same businesses that are listed in the subpoena? A. They did. [398]

Q. Can you give us an idea as to the volume of those records, in size, were they in various boxes, cartons?

A. I can't tell you how many. There were a number of boxes in the room and I went through them with Mr. Weaver and selected these items which are listed here.

Q. And the items which remained with Mr. Weaver, were they sufficient in volume to fill a number of boxes and cartons?

A. Well, I assume they would fill three or four boxes or more. I can't recall exactly.

Q. Now, your purpose at that time in selecting these particular records to bring back to Reno with you was to enable you to consult with Thatcher, Woodburn & Forman regarding negotiations for possible settlement in the case, is that right?

A. That is true.

Q. At that time there was no indictment of Mr. Remmer? A. No.

Q. And at that time the case had not, so far as you know, been referred to the Department of Justice to consider prosecution, is that correct?

A. Well, I wasn't aware of it.

Q. And your purpose then was simply to try to

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(Testimony of Lawrence J. Semenza.)

arrive at a settlement of the case without litigation, is that right? A. That's true.

Q. Now, you stated that shortly before the grand jury met in connection with this case, you contacted Mr. Golden and me. [399] Was that approximately in April of 1951, late March or early April?

A. I don't recall when the grand jury met.

Q. It was a few days before the indictment was returned? A. That is right.

Q. When you learned Mr. Golden was in the service, you contacted me?

A. That is correct.

Q. And I told you I was newly associated with the case? A. That is right.

Q. And I told you I didn't know the circumstances under which these records had been obtained by the Bureau? A. That is right.

Q. And I also told you I didn't know at that time whether or not they had been obtained in legal and lawful manner? A. That is right.

Q. And did I also tell you to refer the representatives of the government either to me or to some other legal representative of the taxpayer in connection with them? A. That is true.

Q. Now then, you were served with subpoena in this case approximately what date?

A. It is my recollection the grand jury met on Monday——

Q. I mean for this case for today?

A. Oh, the 16th of November. [400]

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(Testimony of Lawrence J. Semenza.)

Q. Do you know approximately how long before that Mr. Lohse had come into the case?

A. Well, it was all of ten days or two weeks.

Q. And was it shortly after his coming into the case that he asked you to make the records available to him in his office? A. He did.

Q. And he stated that was so he could become familiar with the case? A. That is true.

Q. After you were served with this subpoena, did you have a conversation regarding the subpoena with Mr. Bruce Thompson, assistant United States attorney?

A. Well, at lunch one day Mr. Thompson asked me if I was going to hire a truck to bring the records over. I replied I didn't have the records and the subpoena reached me approximately ten days after the records had been transferred to the attorneys.

Q. Where did that conversation take place?

A. At the Elks Club.

Q. That is in Reno? A. That is right.

Q. Do you know approximately how long prior to July 11, 1949, Mr. Weaver, or other representatives of the government, had had possession of the records described on your subpoena?

A. No, I don't know how long.

Q. Did Mr. Weaver, or any other government representative, make [401] any statement to you as to approximately how long they had had them?

A. No, there wasn't any reason for Mr. Weaver and myself to discuss that.

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(Testimony of Lawrence J. Semenza.)

Q. Did they state to you whether or not any of them had examined the records?

Mr. Campbell: I submit this is all immaterial.

The Court: We are not concerned with that, are we?

Mr. Avakian: Well, it is the question of the government's opportunity to examine these records at one time.

Mr. Campbell: We intend to offer secondary evidence.

Mr. Avakian: I take it you had these records long enough to have made secondary evidence of them. If you do not want to stipulate, that is all right. That is all, subject to permission to explain in the presence of the jury.

Redirect Examination

By Mr. Campbell:

Q. At the time you obtained these records, isn't it a fact you were taken into a room where the records were and told you could have anything you wanted? A. That is true.

Q. And you were the one who selected these particular records as they were the pertinent records having to do with the matter which you were then investigating, which was the liability of Mr. Remmer? A. That is right. [402]

Q. They were the only records you considered of any use to you in that connection?

A. That's right.

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(Testimony of Lawrence J. Semenza.)

Recross-Examination

By Mr. Avakian:

Q. Mr. Semenza, you stated at that time you were simply attempting to assist attorneys in connection with settlement. Have you since been attempting to prepare this case from an accounting point of view for possible trial?

Mr. Campbell: Objected to as immaterial.

The Court: How are we interested in that?

Mr. Avakian: It goes into the matter of adequacy of opportunity, because the purpose then is different.

The Court: The thought I have here is a witness entrusted with records by the Internal Revenue and he turned them over without any authority to some other accountant. They found their way back in his possession and after he was served with subpoena it developed he had turned the records over to one of the attorneys for the defendant. That is the way it appears to me.

Mr. Avakian: Yes, before the subpoena had been served.

The Court: Yes.

Mr. Avakian: I think the important point is this, that the government, under the law, is not entitled to possession of any individual records unless it is done under court process. [403]

The Court: How could the government acquire these records?

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: That is one thing we would like to know.

The Court: Suppose it developed they were given over voluntarily, what is the situation?

Mr. Avakian: It is still the government's right to inspect and not possess. The owner of the records remains the owner, they are still his property. The government, under the statute, has only the right of inspection.

Mr. Campbell: This is the first time this matter has been raised in any court proceeding. Apparently it is the contention of counsel these records were in the government's possession for a long time. If they had been improperly seized or obtained through improper search or seizure, it is their obligation to immediately proceed, through court proceeding to obtain their return. Further, if the Court feels this matter is warranted to go before the jury here, then I think the entire picture should be given to the jury. However, I think in the interests of justice that whatever statement is to be made to the jury should be made by the Court and not by counsel or not through the lips of the witness, unless this whole matter is developed before the jury.

Mr. Avakian: Well, your Honor, if your Honor desires to find out how these records were obtained, Mr. Weaver is present in court. Your Honor could determine from him just how they [404] were obtained.

The Court: If the situation is as it first appeared to me, if these records were records properly

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(Testimony of Lawrence J. Semenza.)

in the custody of the Internal Revenue Department——

Mr. Avakian: That is not so.

The Court (Continuing): ——and entrusted to this witness, found their way into the hands of one of the attorneys for the defendant and subpoena duces tecum was not complied with, then I would order their production.

Mr. Avakian: Well, I think your Honor is satisfied that that is not the situation. And if there is any doubt about it in your Honor's mind, we would be glad to have Mr. Weaver put on the stand.

The Court: I think we will proceed with the trial now and we will not have any examination of this witness before the jury at this time. What kind of statement do you think the Court should make?

Mr. Avakian: Your Honor, I understand you ruled earlier we could develop this in the presence of the jury.

The Court: Let us get along with this trial.

Mr. Avakian: We don't want an unfair impression left with the jury.

The Court: What is your fear?

Mr. Avakian: The impression I fear that has been left [405] with the jury that the defense has in its custody records that from remarks of Mr. Campbell in the presence of the jury, the defense has not made available.

The Court: I will state to the jury that they must not infer from anything they have heard here this morning that any records are being withheld

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(Testimony of Lawrence J. Semenza.)

by the defendant from the government or from the jury.

Mr. Avakian: May we make an offer of what we would like to present to the jury?

The Court: Yes.

Mr. Avakian: We would like the opportunity, your Honor, to prove through this witness, in the presence of the jury, that insofar as the three checks of Cal-Neva, which have been mentioned by Mr. Campbell in the presence of the jury, are concerned, Mr. Semenza voluntarily turned those three checks over to Mr. Weaver—I am not sure of the date, I would like to get it from Mr. Semenza—what is the date of your receipt?

Mr. Semenza: From Mr. Harkness on April 15, 1948.

Mr. Avakian: On April 15, 1948, Mr. Semenza turned these checks over to revenue agent Harkness and he has in his possession a receipt for those checks signed by revenue agent Harkness and those checks have not been returned to him and he has no knowledge of what has happened to them since that time.

The Court: If we allow that, will you confine yourself to that? [406]

Mr. Avakian: Yes, I will.

Mr. Campbell: Do I understand our request for production of these records is then without validity?

The Court: No. I have no thought of taking any such point.

Mr. Campbell: Then will the Court request the production of the balance of these records?

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(Testimony of Lawrence J. Semenza.)

The Court: I have requested them from Mr. Lohse.

Mr. Lohse: If your Honor please, may I then, on behalf of Mr. Remmer, state the constitutional——

The Court: I would like to hear the argument on the constitutional question.

Mr. Golden: The situation is simply this—at the time Mr. Semenza was served with subpoena to produce certain documents which he did not have at the time he was served with the subpoena. Now, if the prosecution feels they have a right, they now know where they are and they should serve subpoena on the person who has them and then we will comply. There is nothing before the court. He said he didn't have the documents.

The Court: The prosecution could very well expect to find those records in the hands of the individual to whom they were delivered by the representative of the Internal Revenue Department.

Mr. Golden: No, your Honor, the attorneys are entitled to use them as well as the accountant. Your Honor, it was only [407] yesterday that we asked the government to produce something and your Honor wouldn't even let us get the name of the man having charge of the material. This goes both ways. I will say that although the records are not physically in my custody, I am defendant's attorney and if they want to serve subpoena on me, when they issue that subpoena we will be glad to comply with it.

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(Testimony of Lawrence J. Semenza.)

Mr. Campbell: Mr. Golden knows it would be highly improper to serve subpoena on him as the attorney.

Mr. Avakian: Mr. Lohse is in the same position.

The Court: What do you request the Court to do?

Mr. Campbell: I request the Court, under the circumstances, to instruct that the records called for at least be delivered to the clerk of this court.

Mr. Golden: Just for clarity, if your Honor has in mind as to corporate records, we have offered to make them available under reasonable conditions.

The Court: I have in mind the records mentioned in the subpoena. What do you have in mind, Mr. Campbell? Do you just confine your request to the Cal-Neva records or others?

Mr. Campbell: No, I include all of them, your Honor, with the exception of this check list, but particularly I have in mind those set forth on the memorandum or receipt given by counsel and, of course, there are the corporate records, which [408] as Mr. Golden properly says, do not come within the same circumstances.

Mr. Golden: At the same time, so your Honor may consider both matters at once, we respectfully request the Court to order the government to produce such records belonging to this defendant as it has in its possession, on our demand previously made under Rules 16 and 17 and previously denied by the Court.

The Court: I now order defendant's counsel,

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(Testimony of Lawrence J. Semenza.)

who has custody of the records mentioned in the subpoena duces tecum, to produce them and deliver them to the clerk. That is the order of the Court and the records are in Reno, I understand?

Mr. Golden: That is correct.

The Court: It will take a little time to produce them. I will allow reasonable time, tomorrow afternoon at two o'clock.

Mr. Golden: I say this respectfully—your Honor understands, in addition to the legal aspects of the matter, as a practical matter, it is then impossible for us to make any adequate use of that material during the course of this trial. The clerk's office, your Honor, is open from 8:30 to 5:00 and we are in court from 10:00 through 12, and from one to four, or 1:30 to 4:30.

The Court: I wonder if counsel could work out some way [409] of getting around this problem so defendant would have an opportunity to use some of those records or all of them in the preparation of his case.

Mr. Campbell: I think that could be worked out.

Mr. Golden: What order is your Honor going to make to material of the same character in the hands of the government?

The Court: I ruled on that a few days ago.

Mr. Golden: In other words, it is a one-way proposition. I made that request, your Honor, and I renew it.

The Court: I know you did. We will take a recess for five minutes.

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2:08 P.M.

(Defendant present with counsel.)

The Court: Are we ready to proceed with the jury now?

Mr. Campbell: Yes, your Honor.

The Court: It is understood you can make that showing you stated in your offer.

Mr. Avakian: Yes, I will limit it to that, your Honor.

(Jury returned into court at 2:10. Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand.

Direct Examination

By Mr. Avakian:

Mr. Avakian: I believe Mr. Semenza has been sworn but I do not believe his name or position was given.

Q. Will you state your full name, please? [410]

A. Lawrence J. Semenza.

Q. And where do you reside?

A. 1113 Greenridge Drive, Reno.

Q. What is your occupation?

A. Certified public accountant.

Q. And you have been engaged in your occupation in Reno for a number of years?

A. I have.

Q. And for a number of years have you been acting for the Cal-Neva, Inc., a corporation?

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(Testimony of Lawrence J. Semenza.)

A. I have been.

Q. And also for the defendant in this case?

A. I have.

Q. Before the noon recess, Mr. Semenza, the prosecution requested you to produce, in response to subpoena, three checks drawn on the account of Cal-Neva, Inc., which were identified as checks—the numbers appear to be indistinct so I will describe them, Mr. Semenza—a check dated August 28, 1946, payable to the Collector of Internal Revenue, in amount of $7,724.11, with the signature torn off; another check dated August 31, 1946, payable to the Collector of Internal Revenue in the amount of $5,324.11, signed Cal-Neva Lodge by James B. Jeffers; and a third check dated August 31, 1946, payable to Mountain City Consolidated Copper Company in the amount of $2,400, signed Cal-Neva Lodge, by James B. Jeffers, and I [411] believe you responded that you did not have those records in your possession, is that correct?

A. That is correct.

Q. When is the last time that you recall having had these checks, Mr. Semenza?

A. On April 15, 1948.

Q. And on that date did you turn the originals of those checks over to Internal Revenue Agent Harkness? A. I did.

Q. Do you have in your possession a receipt signed by him, acknowledging that you delivered those checks to him at that time? A. I do.

Q. Have you seen those checks since then?

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(Testimony of Lawrence J. Semenza.)

A. I have not.

Q. So far as you know, have they been returned to you?

A. So far as I know they have not been.

Mr. Avakian: I would like to have the receipt received from Mr. Harkness marked for identification. I would like to offer defendant's C for identification in evidence, your Honor.

Mr. Campbell: I have no objection.

The Court: It may be admitted in evidence, defendant's Exhibit C.

Mr. Avakian: Now, your Honor, we have available a newspaper [412] clipping, which purports to be a photostatic copy produced in the San Francisco Examiner on November 15, 1950, of the faces of these three checks, plus the reverse side of the check payable to the Mountain City Consolidated Copper Company, and in order that the examination of Mr. Mooney may continue, we will be happy to offer this in evidence as defendant's Exhibit D.

Mr. Campbell: To which we have no objection.

The Court: Exhibit D is admitted in evidence.

Mr. Avakian: No further questions of Mr. Semenza.

The Court: Have you any further questions?

Mr. Campbell: Not at this time.

(Witness excused temporarily.)

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MR. PATRICK MOONEY

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Just before the recess, Mr. Mooney, you had testified concerning the sale on or about August 29th or August 31st of 1946, of certain shares of stock of the Mountain City Consolidated Copper Company to Mr. Remmer in consideration of $2,400? A. Right.

Q. Will you relate the circumstances under which that sale was made?

A. I had been after Mr. Remmer for two years previous to buy some stock. He said, "I will take some some day." Cal-Neva was about to close after Labor Day, which was on the 2nd of [413] September. I had a bill against him for the balance of his 1945 tax. He signed the return and I said, "How about the stock?" He says, "I can't take the stock today unless you take it off the revenue bill." He says, "I haven't got enough money in the bank, but I will send you the money from San Francisco." The balance owed to take up the $2,400. He said, "I will give you a check for the stock and you can turn the income tax in and I will send you the balance." He had until the 15th of September to pay it. I turned the 1040 in and I found out he had a credit on the books. He never did send me the money. To the best of my knowledge no notice or demand was sent to him. No form 469 was ever issued against him and I figured that everything was all right.

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(Testimony of Patrick Mooney.)

Q. In other words, as I understand you, that in lieu of paying to the Collector of Internal Revenue all that was due on that day, you arranged with him to subtract the sum of $2,400 from that amount for the purpose of buying stock in your company, is that right? Is that correct?

Mr. Gillen: I think counsel's question contains matter which is not a fact and not in evidence. He says the money that was due that day, to wit, September 2nd.

Mr. Campbell: I will amend the question.

Mr. Gillen: Just a moment. I am addressing the Court on my objection—when the witness' answer contained the fact that payment wasn't due until September 15th. [414]

Mr. Campbell: I will amend the question.

Q. In other words, as I understand you, Mr. Mooney, you arranged with him on August 31st to deduct $2,400 from a payment which he was otherwise making to the Collector of Internal Revenue, in order that that $2,400 might be used to purchase stock in your corporation?

Mr. Gillen: We offer the objection it is leading and suggestive, a compound and complex question. This is his witness, your Honor.

The Court: I will sustain the objection.

Q. Will you relate the conversation which you had with Mr. Remmer on that occasion?

Mr. Gillen: Objected to as having been asked and answered.

The Court: Objection will be overruled.

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(Testimony of Patrick Mooney.)

A. I related the entire conversation I had with him I thought. He said he didn't have enough money in the bank. I will start over again. I wanted him to take ten thousand shares, four thousand dollars. He said, "I can't do it." He said, "We will cut it down to five thousand." I said, "You better make it six. I need it for pay roll and expenses for the mine." He made it six thousand shares at 40 cents a share, $2,400. That is about all the conversation had. He told James Jeffers to give me a check for $2,400 and give the balance for the Internal Revenue Department. [415]

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Mooney, who was it that first organized this mining corporation?

Mr. Campbell: Objected to as immaterial.

The Court: Objection will be overruled. You may answer the question.

Q. Do you have the question, Mr. Mooney? Who was it that first organized the Mountain City Copper Mining corporation?

A. There were several, George B. Thatcher and myself.

Q. George B. Thatcher?

A. Yes, he died in 1945.

Q. That was Mr. Thatcher, attorney, member of the firm of Thatcher & Woodburn in Reno, is that correct? A. That is correct.

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(Testimony of Patrick Mooney.)

Q. And yourself, were the principal organizers?

A. Yes.

Q. Where was the mine located, Mr. Mooney?

A. In Mountain City, Nevada.

Q. How much did you personally invest in that mine, of your own personal money, over the years?

A. Oh, about 8 or 10 thousand dollars, I advanced to make up the pay roll and one thing or another. It broke me.

Q. And where is the mine located?

A. About 15 miles from the Idaho line. [416]

Q. Is that near any other mining property, your mine?

A. Our mine adjoins the Mountain City Company controlled by Anaconda.

Q. Your mine is adjacent to that?

A. It joins it right on the end of it.

Q. Could you tell me what year it was that this was organized? A. 1937.

Q. Was there any work done on that mine?

A. About 130 thousand dollars worth.

Q. Do you have books and records to show how much money was put into that mine, how much money was expended in the development and working of that mine?

Mr. Campbell: Objected to as immaterial to the issues of this case, if the Court please.

The Court: Objection overruled.

Q. Do you have the question in mind? I will repeat the question, with the Court's permission.

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(Testimony of Patrick Mooney.)

Do you have books and records to show the expenditure of approximately 130 thousand dollars?

A. I wouldn't be sure about the amount, but approximately that much.

Q. Approximately 130 thousand dollars since 1937 for development and working of that mine, is that correct? A. Yes.

Q. Now, I take it that Mr. Remmer was not the only one to whom you sold stock in that mine? [417]

A. Oh, no; there were 600 stockholders. That is what the intelligence agents told me. They worked on it—they were all entire strangers to me.

Q. They worked on your matter for three weeks? A. For three weeks.

Q. Did they inspect the mine?

A. Yes, sir, and the stockholders, went to all the stockholders. There was four intelligence agents and a reporter and it covers about 80 pages testimony and I was exonerated by the Internal Revenue Department on their report.

Q. I see. Now, Mr. Mooney, I understood your testimony to be that you had been after Mr. Remmer for a couple of years to invest in the mine?

A. Yes.

Q. And that he had promised that he would get around to doing that, is that correct? A. Yes.

Q. And you asked him more than once to buy some stock?

A. Oh yes, every time I met him.

Q. And finally, on the occasion that you had his 1945 return for him to sign and you were desirous

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(Testimony of Patrick Mooney.)

of collecting from him a balance due thereon of some $7,700, you broached the subject again, is that correct? A. Yes.

Q. Now, at the time you appeared at Cal-Neva, I believe you [418] said it was? A. Yes.

Q. To have him sign the return of 1945 individual tax return? A. Right.

Q. Did he have it prepared and ready for you at that time, a check to cover the amount due?

A. Yes.

Q. And was that check shown to you?

A. I believe it was already made out.

Q. Now, I am going to show you the first photographic reproduction of the check appearing in defendant's Exhibit D. You will find it to be the one at the top of those figures—let me withdraw that question and ask you this question.

Q. Do you recall in what manner the $7,700 check that was made payable to the Collector of Internal Revenue was cancelled?

A. Well, he would have to cancel it in order to give me the $2,400. He didn't have money enough in the bank to take care of more checks.

Q. I didn't make myself clear. Do you recall in what manner the cancellation was made of the check, or how it was made effective as a negotiable instrument?

A. I don't know how it was made or anything how it was treated on the stub of the check book or anything.

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(Testimony of Patrick Mooney.)

Q. I don't mean that. Did you see anything done to the check? [419] A. No.

Q. Did you see the signature torn off the check?

A. No.

Q. Did you see the check when it was ready?

A. I did not. I don't believe I did.

Q. Let me show the first picture appearing on this Exhibit D of the defendant's and ask you to look at the top portion and see whether or not this refreshes your recollection as to whether or not you have ever seen the check. The top one, Mr. Mooney, the top check that is reproduced.

A. $7,724, is that right? I don't believe I ever saw it.

Q. You note, do you not, that signature is torn off that check? A. Yes.

Q. Who was that check made payable to?

A. The Collector of Internal Revenue; the cancelled check?

Q. No, the first top check you are looking at now, who was that made payable to?

A. Collector of Internal Revenue.

Q. And for what amount?

A. It was in the full amount of the tax due.

Q. Will you read us the amount there on that check? A. I can't read it.

Q. I am sorry. Do you recall the amount that was due on that return?

A. It was seven thousand dollars. [420]

Q. By the way, that 1945 return—I think that I misunderstand your testimony—that 1945 return

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(Testimony of Patrick Mooney.)

had been prepared and signed and returned and filed prior to the occasion when you appeared there to collect what was due on it, isn't that correct?

A. I believe so.

Q. I will show you plaintiff's Exhibits 3 and 4, which have been identified as the 1945 returns prepared by you for Elmer Remmer and for Helen Remmer, his wife, and I will ask you to look at those two exhibits, which I will hand you with the Court's permission, and tell us whether or not that refreshes your recollection that those two returns were prepared by you and filed on June 14th of that year? A. Is the collector's stamp on here?

Q. Yes. With the Court's permission, Mr. Mooney, I will read it.

A. I said is the collector's stamp there?

Q. There is with purple ink, Mr. Mooney, a stamp impression which reads as follows: "Received" and then a large "88" and alongside of that the abbreviation for June, "Jun. 14, 1946, Coll. Int. Rev. Dist. Nev." Do you see that, sir?

A. Yes, sir.

Q. Is that the so-called collector's stamp, showing when the return was received by the Collector of Internal Revenue for the District of Nevada?

A. It showed on the right-hand corner on the face of the return, [421] received on such and such date.

Q. That is correct.

A. I don't know what the others mean.

Mr. Gillen: Well, perhaps we can be assigned in

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(Testimony of Patrick Mooney.)

this I believe Mr. Campbell will stipulate that both of these returns, (3) the 1945 Elmer Remmer return, and (4), the Helen L. Remmer return, both bear collector's stamp, showing that they were filed in the collector's office in this District of Nevada, on June 14, 1946.

Mr. Campbell: So stipulated.

Q. So then your purpose on the occasion you sold Mr. Remmer the stock was to collect from him something in excess of seven thousand dollars due on these two returns due September 15th, is that correct? A. Yes, sir, that is correct.

Q. And this was just before the closing of Cal-Neva for the summer season, that year the closing date being Labor Day? A. 1946?

Q. 1946.

A. He closed it, I think, right after Labor Day, which was the 2nd of September.

Q. And I believe this exhibit, these checks, bear the date, the first check made payable to the Collector of Internal Revenue, bears date of August 28, 1946, and the two additional checks appearing on there bear date of August 31, 1946. The collector's [422] check which was prepared for you, which you said had to be cancelled, bore date of August 28, 1946, and the other two checks, one of which was to the Mountain City Copper Company, bore date of August 31, 1946. Now, were those two checks prepared in your presence on the same day that you were there?

A. James Jeffers gave me the check on that day.

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(Testimony of Patrick Mooney.)

Q. On the 31st of August?

A. If that is the date.

Q. Were they prepared there in your presence?

A. Yes.

Q. Now is this your testimony, that on this occasion you again then approached Mr. Remmer and spoke of purchasing some stock, is that correct? A. Yes.

Q. And he told you that he didn't have enough money available in the bank in Nevada to be able to pay his full balance on his return and in addition to that buy some stock, is that correct?

A. Correct.

Q. Now you say you had wanted him to buy ten thousand shares of stock?

A. I talked to him about it.

Q. Which would have been an amount of four thousand dollars, is that correct?

A. Four thousand dollars, correct.

Q. And he told you he couldn't purchase that much but he would [423] purchase a lesser amount, he would purchase five thousand, or half that much, is that correct?

A. Right. I pressed him to buy it, I needed it for the pay roll.

Q. Had it been the practice and policy of the company not to run into debt, but only operate and work the mine so long as you had money to work the mine and meet the pay roll?

A. Correct. In 12 years we never passed a payday.

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(Testimony of Patrick Mooney.)

Q. And Mr. Remmer agreed then to buy six thousand shares? A. Six thousand shares.

Q. And that incurred the obligation of $2400?

A. Yes.

Q. And is it my understanding of your testimony that he told you if you wanted him to pay you for the stock then, that he would give you the $2400 in the form of a check, but that he would only be able to pay a portion of the amount that was due on his income tax return for 1946 and that he would send you the balance from San Francisco?

A. Right.

Q. And he still had better than 15 days before he became delinquent, is that correct?

A. Correct.

Q. So at that time, Mr. Mooney, he gave you two checks instead of one? A. Yes. [424]

Q. One of which was for $2400, payable to the Mountain City Copper Company, and the other of which was for $5324.11, payable to the Collector of Internal Revenue, is that correct?

A. As far as I remember. I know about the $2400.

Q. And he gave you also a check for the Collector of Internal Revenue? A. Yes.

Q. Would you look at the two additional checks that appear, the two checks that are reproduced in this newspaper clipping, defendant's Exhibit D, and tell us, if you can, whether or not you recognize those checks as checks given you that day by Mr. Jeffers?

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(Testimony of Patrick Mooney.)

A. That is $5324 for the Revenue Department. I can't make it out exactly. The $2400 I can read.

Q. The original check on this exhibit shows check payable to the Collector of Internal Revenue in the sum of $7724.11.

A. Deduct $2400 and you have the answer.

Q. $2400 deducted from it left check which he gave you for the Collector of Internal Revenue for $5324.11, is that correct? A. Yes.

Q. Upon leaving Mr. Remmer on that occasion you expected, did you not, Mr. Mooney, that in due course, either by his personal appearance in Reno or through the mail, you would receive the balance due on the $7724.11, is that correct?

A. Yes. [425]

Q. That you would receive the difference yourself? A. Yes.

Q. Now as a matter of fact, it came to your attention, did it not, that there was a refund, or notice of a refund, due to Mr. Remmer?

A. No notice. It was on the books in the revenue office.

Q. It was reflected on the books of the revenue office that Mr. Remmer was entitled to a refund?

A. Yes.

Q. Which would have more than covered the amount of $2400, is that correct?

A. I believe it was around $2600.

Q. So therefore Mr. Remmer was not required to pay the additional $2400, is that correct?

A. Yes.

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(Testimony of Patrick Mooney.)

Q. Was that amount that was due to Mr. Remmer as a refund applied to the balance of his tax owed in 1946?

Mr. Campbell: Objected to as not the best evidence.

The Court: He may answer the question.

Q. Do you have the question in mind or would you rather I repeat it?

A. There was somebody told me in the office——

Mr. Campbell: Now——

Mr. Gillen: You have to testify to your own knowledge.

Mr. Campbell: That is why I am objecting, as not the [426] best evidence.

Q. Do you have any personal knowledge of how that refund was handled by way of any credit to Mr. Remmer and Mrs. Remmer?

A. How it was handled? It was credited on his 1945 tax.

Q. And was that within the right of the Collector of Internal Revenue to apply a credit on any balance due on a tax?

A. Certainly, a taxpayer is entitled to have a credit if it exists on the books.

Q. Now, Mr. Mooney, the returns that you have stated that you made out for Mr. Remmer and for Mrs. Remmer through the several years that you recounted, they were for individual returns, is that correct? A. Correct.

Q. You had nothing to do with any partnership or corporate returns? A. Nothing.

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(Testimony of Patrick Mooney.)

Q. You had nothing to do with returns of Cal-Neva, Inc., corporation? A. Oh, no.

Q. You had nothing to do with the returns that were made out for any enterprises in any of the other partnerships? A. No.

Q. The only thing that you had to do with this, is this not a fact, was to find out what financial benefit or profits or earnings Mr. Remmer derived from any of those enterprises, is that [427] correct?

A. The distributed share to each partner.

Q. And the only reason you did that was to be able to make out a true and accurate report of his individual income?

A. Right. I never saw a book.

Q. Now the individual returns that you made out usually bore a notation on the face, "Taxpayer's figures without audit," is that correct?

A. That is correct. I think that is on all my returns.

Q. And that is a very common thing where any accountant or a deputy collector, or any other person other than the actual taxpayer, accepts figures given to him as the income of the taxpayer without making a personal audit, to put that notation on it?

A. The only figure a deputy collector could put down is the figure given by the taxpayer or the accountant.

Q. Now, when you have stated or placed on the returns, individual returns, of Mr. Remmer and Mrs. Remmer "Taxpayer's figures," you didn't

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(Testimony of Patrick Mooney.)

mean by that, did you, Mr. Mooney, that you received those figures actually and personally from the taxpayer? Do you understand my question?

A. I understand your question. I received them from Mr. Remmer's bookkeeper.

Q. In other words, you mean by that, not that you received these figures actually and personally from the taxpayer himself, Mr. or Mrs. Remmer, but rather from somebody representing [428] them?

A. Oh, no, he never looked at a figure.

Q. He never looked at a figure? A. No.

Q. Now, as I recall your testimony—and correct me if I am wrong, Mr. Mooney—in the earlier returns that you made for Mr. Remmer, you got your information from Mr. George L. Simmons, a public accountant in El Cerrito, California?

A. Yes, sir.

Q. And then later on you got some figures from Mr. Kyne, Willie Kyne? A. Yes.

Q. And also some figures from a public accountant by the name of Ayton?

A. I think that is his name.

Q. And then subsequently that Mr. Harold Maundrell took over the management of the books and you got your figures from Mr. Maundrell?

A. Right.

Q. And those figures were figures referring to the distributive shares to Mr. Remmer and also to Mrs. Remmer from profits of partnership enterprises, is that correct?

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(Testimony of Patrick Mooney.)

A. Yes, partnership or joint venture, which you wish to call it.

Q. And of course that included all of those things, included initially the 21 Club and the San Diego Social Club in El [429] Cerrito, and still later on included the Menlo Club and the 186 Eddy Club, the 110 Eddy Club and the other enterprises that have been mentioned here, is that correct?

A. Right.

Q. Other than the occasion that you testified to here earlier this morning, when you stated that there was an occasion when Mr. Remmer told you he had won some money on the Kentucky Derby and sought your assistance in making out the tax return—— A. Yes.

Q. ——other than that occasion, did you, on any other occasion throughout the years that you made out Helen Remmer's and Elmer Remmer's individual income tax returns, ever get any figures from Mr. Remmer?

A. Except on three or four occasions.

Q. Now, the three or four occasions were occasions when Mr. Remmer spoke to you concerning some charitable donations he had made, is that correct? A. Right.

Q. And if I remember correctly, that was with relation to the 1946 return, is that true?

A. '45.

Q. 1945 return, and do you recall what his inquiries were at that time, what information he sought from you?

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(Testimony of Patrick Mooney.)

A. He says, I gave $7500 to purchase the Catholic playground at St. Thomas Aquinas Church for the church; that is, he contracted— [430] he paid five thousand in 1945 and 2500 in 1946.

Q. That is, he signed a commitment to pay and paid down five thousand and agreed to pay an additional 2500 toward this playground of St. Thomas Aquinas Church?

A. Yes, St. Thomas Aquinas purchased that property for $7,500 and he and three or four of his associates paid off the full amount of the money. The Masons had allowed the children the use of the ground for 20 years. Property had advanced and they were going to sell it and Mr. Biltz had it under option and he knocked off his commission, since the church was going to buy it.

Q. Now Mr. Remmer asked for some opinion or advice of yours regarding that?

A. No advice, only he had given the money to Mr. Graham.

Q. What was the question he put to you?

A. He said, "Don't forget that; I don't know whether there is a record in the partnership return or not." It had no relation to the partnership because it was individual contribution.

Q. It was his individual contribution?

A. So far as I know.

Q. And you told him that you had that information, is that correct, that charitable contribution, in mind? A. Yes.

Q. Now, did Mr. Remmer at that time, or at

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(Testimony of Patrick Mooney.)

any other time, speak to you about another contribution that he had made, charitable? [431]

A. Yes, on the 1947 return he made a contribution of a Chrysler station wagon to the crippled children in Carson Valley.

Q. Do you know the amount of that?

A. $2700. That was the valuation of the Chrysler Town and Country wagon.

Q. In other words, he purchased an automobile, station wagon?

A. It might have been used a couple of hundred miles before they got it.

Q. He purchased that for the crippled children of what valley? A. Of Carson Valley.

Mr. Campbell: What year was that for?

A. 1947.

Q. Was that purchase made in 1947 or 1946, as you recall?

A. I think it is on the 1947 tax return as deduction. I had to cut it down. He was over-contributed. I had to cut it down on the 15 per cent contributions.

Q. Now, Mr. Mooney, do you recall testifying this morning regarding the occasion when you were compelled, by reason of the shortness of time, to use the figure that had been given to you earlier that year as an estimate for the initial return, with a view to making an amended return? Do you recall that?

A. What year are you speaking of?

Q. Well, I will get that for you. Do you recall

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(Testimony of Patrick Mooney.)

testifying this morning with regard to plaintiff's Exhibit 1, the 1944 return of Elmer Remmer and Helen Remmer? [432] A. Yes.

Q. Which you stated was based upon an estimate given to you in the summer of 1943?

A. Yes. If it was an estimate it is 2650.

Q. Now, you stated this morning, if I recall your testimony this morning, that you had obtained from Mr. Remmer an estimate of 20 thousand dollars for his income for a year?

A. I think one day at Reno he figured that would be about right.

Mr. Campbell: I suggest, if the Court please, the witness be shown the exhibit. It is difficult to hear and I am afraid he misunderstands some of the things.

Mr. Gillen: I wonder if counsel has the 1040 estimate? It is not in evidence—the original estimate.

Mr. Campbell: No, I do not. I will ascertain if one has been filed. If it has been, I will have it produced.

Mr. Gillen: I think we had testimony there had been an estimate of 20 thousand dollars made.

Q. He made an estimate of 20 thousand dollars?

A. A rough guess.

Q. And then when the time came to make the return, you testified this morning something regarding the information or data being in the hands of a Mr. Lewis, do you recall that, a former Collector of Internal Revenue?

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(Testimony of Patrick Mooney.)

A. Mr. Lewis was connected with the Internal Revenue at San [433] Francisco in 1944 or 1945. He opened an office in Montgomery Street.

Q. You stated this morning in your testimony that because of the shortness of time and because if you waited to get the information, Mr. and Mrs. Remmer would have been delinquent, that you made a return based on 20 thousand dollar estimate, is that correct? A. Correct.

Q. And you said you advised Mr. Remmer at that time by letter on March 20, 1945, the letter being plaintiff's Exhibit 68, which was provided by the plaintiff, that you were returning them the two forms, that they must sign immediately and that they owed you $1070 each; do you recall that?

A. Yes.

Q. And do you recall in that letter you said: "I took it off your estimate for last summer. If there is any change to be made, we will make it at our first trip to Reno, as you may want to raise the amount. Bring all the data from the different places, so that we may file a proper amended return"; do you recall that? A. Yes.

Q. And do you recall you mentioned not only was this return necessary to be filed by March 15th, but also there should be a declaration of expected income for the year 1945 filed by March 15th? [434]

A. Yes.

Q. Now, do you recall that your letter was not written until March 20th? Your letter bears date of March 20th.

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(Testimony of Patrick Mooney.)

A. He had an extension, as far as I know.

Q. Now, when the returns are made on March 15th, what is the policy of the Internal Revenue Department for the District of Nevada, in regard to length of time it takes them to open mail and whether or not mail coming before it is completely open goes in without question?

Mr. Campbell: I don't understand that question. I object on the ground it is unintelligible.

Mr. Gillen: I think Mr. Mooney understands it.

The Court: Let us have the question read.

(Question read.)

Mr. Gillen: I don't understand the question myself.

Q. Mr. Mooney, was it the policy of the Collector of Internal Revenue of the District of Nevada to allow mail coming in, returns coming in through the mail after March 15th of each year, or being dropped into the office, to be considered as having been filed on time, provided it arrived before you finished opening all the mail?

Mr. Campbell: That is objected to, if the Court please, on the grounds it is immaterial, that the witness obviously doesn't know what the present custom or method is; he has been retired, he says, a number of years. [435]

The Court: He might have known at that time.

Mr. Campbell: That wasn't the question.

Q. What was the custom at that time?

A. It took two weeks to open mail.

Q. And anything that got in before all the mail

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(Testimony of Patrick Mooney.)

was opened was considered in the entire mail, is that correct? A. I guess that is right.

Q. Well, was that the policy? A. Yes.

Q. Now, you testified this morning that although you so admonished Mr. and Mrs. Remmer in your letter that they, Mr. Remmer, might want to increase the amount that was shown in the return, that he never did increase the amount that was shown in the return or gave you any other papers; is that correct?

A. I will bring that up now. Mr. Campbell has a pencilled return made in 1946 on 1944 return. He showed it to me at the time of the meeting of the grand jury.

Mr. Gillen: Do you have that with you?

Mr. Campbell: I don't know to what he refers.

A. 1944 amended return.

Mr. Campbell: Isn't that attached to the original exhibit? I think the 1944 return, plaintiff's Exhibit 1, is a pencilled return.

Mr. Gillen: It is not an amended return here, counsel. [436] It should be amended return.

A. It is marked amended on top.

Q. You have handed me a pencilled 1944 return marked amended return, for Helen L. Remmer. Was there one similarly for Elmer Remmer?

A. Exactly.

Mr. Campbell: I will have to look it up.

Mr. Gillen: May it please the Court, Mr. Mooturn for Helen L. Remmer, increasing the amount

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(Testimony of Patrick Mooney.)

of return and tax due. I should like to have this marked as defendant's next in order for identification.

The Court: E for identification.

Mr. Gillen: So we may understand, it is my understanding that Mr. Campbell is seeking to find the amended return for Elmer Remmer.

Mr. Campbell: That is presuming there is such a thing.

Q. Well, Mr. Mooney, Mr. Campbell showed you, at the time the indictment was returned in this case, in this city at the grand jury, a pencilled amended return for Elmer Remmer, is that correct?

A. Yes, it was made in my handwriting. I identified the handwriting. I don't know whether it was signed or not.

Q. Now, Mr. Mooney, after writing the letter of March 20th of the year 1945, to Mr. and Mrs. Remmer, advising them that you were making the return based on the estimate that they had [437] given you, or Elmer Remmer had given you, the previous summer, and that he might want to increase the figures, did you talk to Mr. Remmer at any later time subsequent to the writing of that letter concerning that matter?

A. I don't think so.

Q. Let me ask you if it isn't a fact that you talked to Mr. Remmer in Reno and Mr. Remmer told you as to any other partnership enterprises or anything, he knew nothing about them personally, and you could get all the information from the bookkeepers?

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(Testimony of Patrick Mooney.)

A. He always referred me to the bookkeeper.

Q. And didn't he do that in regard to the 1944 return?

A. I have forgotten whether he did or not.

Q. You don't recall whether he did or not?

A. I don't recall.

Q. Let me ask you, Mr. Mooney, if you have any recollection of having gone to Mr. Willie Kyne and receiving additional information from which you made the amended 1944 return? A. Yes.

Q. And where did you see Mr. Willie Kyne?

A. In San Francisco.

Q. Now, you mentioned here, Mr. Mooney, that you obtained your information concerning the partnership enterprises from various bookkeepers in San Francisco? A. Yes. [438]

Q. And you stated that you did that on your own time and not on government time?

A. Exactly.

Q. And that you received from Mr. Remmer your exact expenses? A. That's all.

Q. It is true, is it not, in the United States government, employees of the government have two types of leave each year, one known as sick leave and one known as annual leave or vacation leave, is that right? A. That is right.

Q. And the sick leave you can take off any time you are sick up to a given point, is that correct?

A. Any time you are sick, if you are not faking.

Q. And your annual leave you can take a day or two at any time up to the amount of leave you are allowed for each per annum?

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(Testimony of Patrick Mooney.)

A. Deducted off your total.

Q. Total annual or vacation leave, is that correct? A. Yes.

Q. And those trips to San Francisco, did you make any on week ends? A. Sometimes.

Q. They were off your annual leave?

A. All of them. I never did anything on government time.

Q. Now, Mr. Mooney, I hold in my hand defendant's Exhibit E, [439] which I will identify for you as amended return for 1944 for Helen Remmer, made out in pencil, in your handwriting, which you said was a counterpart of identical one for Elmer Remmer. It is true, is it not, that you filed both of these amended returns and that you collected what was due, the additional money that was due, and turned it in on those amended returns and that that created the credit?

A. Yes, there is a book charge, interest, probably two years in there, 1944.

Q. And there was interest due?

A. $160 there is marked up.

Q. $166.60 interest? A. For each one.

Q. For each one?

A. It must have been two years, at the amount of 15%.

Q. These were filed and collected?

A. So far as I know. They might have got lost. The money was paid.

Q. But the money was paid?

A. Yes, I think I turned the money in on two

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(Testimony of Patrick Mooney.)

slips, two credit slips, and the returns were filed two weeks afterwards or maybe a month.

Q. Now, did you, during the years that you were making out these individual returns, did you correspond with any representatives of Mr. Remmer concerning his distributive shares out of [440] any of the business enterprises in which he was interested?

A. With Mr. Simmons and Mr. Kyne.

Q. Do you have any copies of those letters in your possession?

A. There are some there to Mr. Kyne and Mr. Simmons, if Mr. Pratt will give me the file.

Mr. Gillen: May we have the Court's permission for Mr. Mooney, Jr., to pick the documents out of his father's file?

The Court: Yes.

Mr. Gillen: Mr. Mooney hands me, may it please the Court, what purports to be——

Mr. Campbell: It might be marked for identification before any description is made, if the Court please.

Mr. Campbell: All right. I was just going to identify them as being carbon copies of letters, without going any farther. Three carbon copies of purported letters have been marked for identification, may it please the Court, and I will hand them to counsel now. They are defendant's F, G, and H.

Q. Mr. Mooney, the three single sheets that you have handed me, which appear to be carbon copies of letters written by yourself to other persons, let

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(Testimony of Patrick Mooney.)

me ask you whether or not all three of them represent inquiries made by you of bookkeepers familiar with the partnership enterprises in which Mr. Remmer had an interest, inquiring concerning certain data to enable you to make an authentic and correct individual return for Mr. Remmer and Mrs. [441] Remmer?

A. Yes, to Mr. Kyne and Mr. Simmons and Mr. Maundrell.

Q. Mr. Kyne and Mr. Simmons?

A. Mr. Kyne and Mr. Simmons.

Mr. Gillen: If there is no objection, I will offer them in evidence.

Mr. Campbell: We object to them until further foundation is laid.

Mr. Gillen: Very well.

Q. In regard to letter written by you May 23, 1945, to Mr. Frank E. Simmons, 313 San Pablo Avenue, El Cerrito, did you receive in response any information you sought in this letter, from this letter?

A. I believe I did. Mr. Simmons was very prompt.

Q. And the information that you received did you utilize in preparing 1040 indivdual income tax form for Mr. and Mrs. Elmer Remmer?

A. Yes, if there was any income for that year.

Mr. Gillen: I offer the May 23, 1945, letter as Defendant's Exhibit F in evidence.

The Court: It may be admitted.

Q. Now, Mr. Mooney, with regard to what appears to be a carbon copy of letter written by your-

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(Testimony of Patrick Mooney.)

self to Mr. Frank E. Simmons, 313 San Pablo Avenue, El Cerrito, California, dated May 10, 1946, do you recall whether or not you received any response in any form from Mr. Simmons regarding the information you [442] desired and requested in that letter, to enable you to make individual income tax returns for Elmer Remmer and Helen Remmer?

A. If I didn't get a response, I called on him probably. I notice one occasion where partnership returns is in the hands of Mr. Lewis. He was former Collector of Internal Revenue, Northern California Division.

Mr. Gillen: We offer in evidence Exhibit G.

Mr. Campbell: I think it is immaterial here. I have no objection.

The Court: It may be admitted.

Q. And finally there is what appears to be carbon copy of letter written by yourself to Willie Kyne, 50 Mason Street, San Francisco, re: Elmer Remmer, under date of March 7, 1947. Do you have any recollection whether or not you received a response in any form regarding the information and matters that you desired to obtain in that letter?

A. Some time afterward Mr. Kyne and I talked the matter over.

Mr. Campbell: Objected to as not having been shown it was brought to the knowledge of the defendant or that any information or any other of the information elicited therefrom.

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(Testimony of Patrick Mooney.)

The Court: Objection overruled. Admitted in evidence, Exhibit H.

Q. Mr. Mooney, you have handed me carbon copy of a letter which you wrote on May 23, 1945, to Mr. Frank E. Simmons, 313 San Pablo Avenue, El Cerrito, California, which reads as [443] follows: (Reads Exhibit F.)

Q. You recall writing that letter, do you?

A. I do.

Q. And did you receive some information, whether it affected the return that you were making for Mr. Remmer or not, did you receive some information or response from Mr. Simmons?

A. Yes, that's the time, I believe, that he informed me that the partnership was all in the hands of Mr. Lewis and I couldn't get it and never did get that return.

Q. Let me ask you this, Mr. Mooney, now calling your attention to Defendant's Exhibit G, I will ask you if you recall writing this letter, May 10, 1946? (Reads Exhibit G.) Undoubtedly signed by yourself in the original, because it bears the stenographic notation at the bottom, "PM/M." Do you recall what was the occasion of writing the letter?

A. Well, the partnership return, I don't believe I ever saw it.

Q. And that was the same Mr. Lewis you referred to was at one time Internal Revenue Collector at San Francisco? A. That is right.

Q. And then went into private practice as a lawyer and accountant?

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(Testimony of Patrick Mooney.)

A. He was an attorney.

Q. Now finally, Mr. Mooney, do you recall that you wrote a letter on March 7, 1947, addressed to Willie Kyne, 50 Mason [444] Street? (Reads Exhibit H.) Now you recall writing that letter?

A. Yes.

Q. Now will you tell us what you had in mind when you made the proposal in the letter to Willie Kyne on March 7, 1947, that Mr. Remmer might be able to deduct the costs or his investment in the Menlo Club over the period of time on his lease and save himself some money?

Mr. Campbell: Objected to as immaterial what Mr. Mooney had in his mind.

The Court: Objection will be overruled. You may answer the question.

Mr. Campbell: Further, it is not within the scope of direct examination.

The Court: You may answer the question.

Q. Mr. Mooney, his Honor says you may answer that question. Would you care to have the question read?

A. No. I was thinking of amortizing over the period of his lease the amount for 1945 for 8 months, or 18 thousand some odd dollars and for the full year it was 28 thousand and some dollars, 700 dollars, I think, and he took it over a three-year period.

Q. You had in mind to have him spread that out over the period of time of his lease?

A. Yes. [445]

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(Testimony of Patrick Mooney.)

Q. And his lease was for how long?

A. Five years Mr. Maundrell told me. I understood afterwards it was ten.

Q. Mr. Maundrell was under the impression it was five years but it was ten?

Mr. Campbell: Objected to Mr. Maundrell's impression.

The Court: Yes, that may go out.

Q. Well, in all events, from the information you had in your hands at that time, you had the impression it was a five-year lease?

Mr. Campbell: Object to this, what is his impression.

The Court: I think we have gone far enough on that question. Objection will be sustained.

Q. Well, it was your plan to suggest an amortization of his lease over the period of five years?

Mr. Campbell: Same objection. If the Court please, it is immaterial what this man's plan was.

The Court: It is practically the same as he already answered. He may answer the question.

A. He had to recover an investment of over 140 thousand dollars.

Q. Now, Mr. Mooney, do you have any recollection of having discussed with Mr. Maundrell the matter of amending a partnership return in connection with the Menlo Club for 1945?

A. Yes. [446]

Mr. Campbell: Just a minute—I am going to object as to third parties.

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(Testimony of Patrick Mooney.)

The Court: Objection sustained. All right, answer this yes or no.

A. Yes.

Q. As a result of such a discussion, did you prepare a proposed amended or addenda to the amendment of partnership return for the Menlo Club for that year?

Mr. Campbell: Objected to as not within the scope of direct examination. If counsel desires to make him his own witness, that is a different matter.

The Court: Objection sustained.

Mr. Gillen: Of course, may it please the Court, the theory that it appears the government is pursuing here——

The Court (Interceding): The reason I did not permit testimony in regard to amended returns it came out through Mr. Mooney's presentation of that pencilled copy of 1944 return. If you desire to bring anything further out on these matters, you may do so by making Mr. Mooney your own witness.

Mr. Gillen: Of course, I have no fear of making Mr. Mooney my witness. I may make him my witness at some later time, but since there is involved in this case the question of fraudulent intent upon the part of the defendant, I think [447] cross-examination——

The Court: Let me have the question.

(Question read.)

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(Testimony of Patrick Mooney.)

Mr. Campbell: I suggest this was result of discussion with a Mr. Maundrell; further it is not within the scope of direct examination; further it is incompetent and immaterial.

The Court: It is not proper cross-examination. Objection sustained.

Mr. Gillen: In connection with Mr. Maundrell, he will be a witness for the government. He has been here from Honolulu, I don't know how long, waiting to appear.

Mr. Campbell: We ask that the jury be instructed to disregard the remarks of counsel.

The Court: The ruling will stand.

Mr. Gillen: Without disregarding, of course, your Honor's ruling, I would like to obtain from Mr. Mooney, and have marked for identification, the particular document I asked for.

The Court: You may do so.

Q. Do you have, Mr. Mooney, a copy of the proposed statement to go with an amended partnership return for the Menlo Club for the year 1945?

A. I believe I have it in the files.

Q. May I show him a photostat—the original of that, Mr. Mooney? While we are looking for that, Mr. Mooney, do you mind if I ask you what is your age, please?

A. I was 81 the 17th of March, 1951. I was born in 1870. [448]

Mr. Gillen: I will ask that this be marked for identification. I take it your Honor is directing

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(Testimony of Patrick Mooney.)

me not to pursue the examination on that point any farther?

The Court: Yes.

Mr. Gillen: Very well.

Q. Mr. Mooney, it was part of the duties of every member of the collector's office, not only for the District of Nevada, but everywhere in the United States, to assist any taxpayer who appealed to them in making out, or to make out with them, their returns?

A. Assistance—it is called assisting the taxpayer.

Mr. Gillen: I am going to ask Mr. Campbell, through the Court, your Honor, whether or not he will stipulate he now recalls there was an amended return for the year 1944 made out in pencil in Mr. Mooney's handwriting for Elmer Remmer, as well as the pencilled return that we filed, or copy which we filed as exhibit for the defense.

Mr. Campbell: I ask an opportunity to check that over the evening recess to make sure such a return was filed.

Mr. Gillen: I understood you to say that you did recollect it.

Mr. Campbell: I have some recollection of an amended return, but I want to make sure that is correct. I will be prepared the first thing in the morning.

Mr. Gillen: With regard to Defendant's Exhibit I for [449] identification, may it please the Court,

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(Testimony of Patrick Mooney.)

I would like to ask one question to lay a foundation for introduction of this exhibit at some later time in evidence.

Mr. Campbell: Is this as Mr. Gillen's witness?

The Court: He is going to ask a question for the purpose of identification is all and we will hear the question.

Q. My question is, Mr. Mooney, referring to Defendant's Exhibit I for identification, a communication or statement you prepared for Mr. Maundrell to be attached to amended return of the Menlo Club, did you deliver or mail this to Mr. Maundrell?

Mr. Campbell: May that be answered yes or no?

The Court: Yes.

A. I may have delivered it to him.

Q. I am not seeking necessarily the form in which it came to his attention, but to your knowledge did this proposed statement ever come to his attention, was it brought to his attention by you or in any other manner?

A. Yes, it was brought to his attention.

Mr. Gillen: I think that is all. We are happy to excuse Mr. Mooney, with the understanding he may be on call.

The Court: Counsel may have some more questions.

Mr. Campbell: No, that is all.

(Witness excused.) [450]

Mr. Campbell: I wonder if the defense is ready

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to proceed with completing cross-examination of Mr. Billington that the government is keeping here at their request?

The Court: How about that, Mr. Gillen? Have you any more cross-examination of Mr. Billington?

Mr. Avakian: Your Honor, in regard to the cross-examination of Mr. Billington, the defense is unable to complete that cross-examination without having access to the records of the prosecution. May we suggest he be excused and go back to his business, subject to recall on reasonable notice?

The Court: Is that satisfactory?

Mr. Campbell: Yes.

The Court: Mr. Billington, you may be excused, subject to call on a few days' notice.

(Jury and alternate jurors admonished and recess taken at 3:50 p.m.) [451]

Friday, December 7, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

HOMER H. FORRESTER

having been previously sworn, was recalled on behalf of the plaintiff and testified as follows:

Direct Examination

By Mr. Thompson:

Q. Mr. Forrester, you have already testified to your position with the Collector's office with the District of Nevada, have you not? A. I have.

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(Testimony of Homer H. Forrester.)

Q. And since your appearance in court to testify in this trial some few days ago, have you personally examined the records of the office of the Collector of Internal Revenue for the District of Nevada for the purpose of determining what income tax returns have been filed since the year 1934 for and on behalf of Elmer Remmer and his wife, Helen L. Remmer? A. I have.

Mr. Gillen: Objected to as asked and answered, was gone into both on direct and cross-examination.

The Court: Objection overruled. The answer may stand.

Q. And as a result of that search, Mr. Forrester, what did you discover in the way of a record of any return having been filed by Elmer L. Remmer, that is, a federal income tax return for the years from 1934 to 1942, inclusive? [452]

Mr. Gillen: Objected to as asked and answered, gone into both on direct and cross-examination previously.

The Court: Read the question.

(Question read.)

Mr. Thompson: My first question referred to search the witness personally made since his first appearance.

The Court: Of course, it assumes that he did discover something. The form of the question might be objectionable.

Q. According to the records and entries in the office of the Internal Revenue for the District of

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(Testimony of Homer H. Forrester.)

Nevada, what federal income tax returns have been filed by Elmer Remmer since 1934 to and including 1946?

Mr. Gillen: Objected to as calling for opinion and conclusion. Income tax returns can be filed in any collector's office in the United States. I think he can say what he personally found or did not find.

The Court: I thought that was the purpose of this examination, to determine whether or not he found some returns since the last time he was on the stand, so you may answer the question.

(Question read.)

A. A delinquent 1934 return was filed during the calendar year 1937. I could find no returns for the period 1935 through 1941. Returns were filed for the period 1942 through 1946. [453]

Q. And what is the situation with regard to record or entry of any returns for Helen L. Remmer during the same period?

Mr. Gillen: Objected to as leading and suggestive, assuming something not in evidence.

The Court: Objection overruled. You may answer the question.

A. Returns were also filed for Helen L. Remmer for the same years that returns for Elmer Remmer were filed.

Q. And have you found any returns for either Helen Remmer or Elmer Remmer other than those that you have heretofore produced before this court?

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(Testimony of Homer H. Forrester.)

Mr. Gillen: Same objection, asked and answered, gone into on direct and cross-examination on the first appearance of this witness. He is asking these questions just to impress——

The Court: Objection overruled. Read the question.

(Question read.)

A. No, except for the years that I have mentioned.

The Court: I don't understand the answer.

(Question and answer read.)

The Court: That doesn't mean much to me.

Q. What do you mean, "except for the years that have been mentioned"?

A. Well, I have found returns subsequent to 1946.

Q. But referring to the period of 1934 to 1946, the ones you have produced are the only ones you have found? [454] A. That's right.

Q. Now, Mr. Forrester, I would like to show you Defendant's E for identification, which has written at the top "Amended Return" on form 1040, for the calendar year 1944, in the name of Helen L. Remmer, and ask you whether an amended return for the year 1944 in that form, or in any form, was filed with the Collector of Internal Revenue for the District of Nevada?

A. No, it wasn't.

Mr. Gillen: I move that the question and answer be stricken, may it please the Court, assuming

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(Testimony of Homer H. Forrester.)

something not in evidence and calling for conclusion. I think the proper form of the question would be if he found any record of such a record.

The Court: Read the question.

(Question read.)

The Court: Objection will be overruled. The answer may stand.

Q. And Mr. Forrester, was any return filed in form similar to Defendant's Exhibit E for identification, that is an amended return, for the calendar year 1944 for Elmer Remmer?

Mr. Gillen: Objected to as calling for opinion and conclusion of the witness and I suggest again the proper form of the question would be, did he find any.

The Court: You referred to the District of Nevada in that question?

Mr. Thompson: Yes, your Honor. [455]

The Court: Objection will be overruled. You may answer the question.

A. No.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Forrester, it is true, is it not, that a taxpayer might file a return in any collector's office in the United States, is that correct?

A. It is, with the exception that the law provides it should be filed in the district in which the

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(Testimony of Homer H. Forrester.)

taxpayer maintains his residence or personal place of business.

Q. Well, as a matter of fact, the form itself asks what collector's office you filed your last return, isn't that so, in the lower left-hand corner of the form? A. That's right, yes.

Q. Now, when a tax return is made, what is the machinery for keeping track of what return has been made on that tax return, that is, what credit should be given and what delinquency, if any, should be noted?

A. You are talking about what years?

Q. I am talking about any year of any taxpayer. What is the machinery of your office?

A. Well, we set up an assessment list, showing the tax assessed and the payments made thereon.

Q. And the tax assessed, of course, noted as an assessment, is [456] from the return as made by the taxpayer, is that correct? A. That is correct.

Q. And so if the taxpayer said, for example, the tax was fourteen thousand dollars for he and his wife, it would be assessed at that on your assessment roll? A. Yes.

Q. Then there would be some note made as to what payment was made on the 14 thousand dollars assessment? A. That is right.

Q. And if the taxpayer made his complete payment, it would be a washout item, he would be given full credit for the assessment, there would be nothing against him? A. Correct.

Q. On the other hand, if he did not make full

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(Testimony of Homer H. Forrester.)

payment, it would be noted what he still owed as the balance on that assessment? A. Correct.

Q. Then if he made a payment at some later time on that delinquency, of course that would be noted, he would be given credit for whatever payment he made? A. Yes.

Q. Now, I will ask you to look at the prosecution's Exhibits 3 and 4—and with the permission of the Court I will hand these exhibits to the witness—and tell us what tax return was made by Elmer Remmer and Helen Remmer for that year, which I believe [457] is for the year 1945.

A. That is the total tax shown on the return?

Q. Yes.

A. The 1945 return for Helen L. Remmer shows tax of $14,074.29.

Q. That is what Helen L. Remmer owed?

A. Correct; and Elmer Remmer owed $13,072.02.

Q. That is what Elmer Remmer owed?

A. Correct.

Q. The difference in the figures of those might be difference in the deductions, is that correct?

A. It could have, yes.

Q. Now, I will ask you to look at plaintiff's Exhibits 13 and 14, which I will remind you are certificate of assessment and payments which you introduced on your last appearance here, according to the district attorney what the books of your office show against Helen Remmer and Elmer Remmer, and ask you what was paid by the two taxpay-

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(Testimony of Homer H. Forrester.)

ers on that 1945 return, as reflected on your transcript there?

A. Helen L. Remmer made a payment of $7724.11 on August 1, 1946. On September 3, 1946, a payment of $2,662.02 was made. During the year 1945 she paid $2500 on her declaration of estimated tax.

Q. That was for the next year?

A. No, it was for that year, 1945.

Q. I see, all right. Now, what was the total amount that Helen [458] Remmer paid on that 1945 return? A. Total $12,886.13.

Q. And she owed 14 thousand how much?

A. $14,074.29.

Q. Would you be kind enough to give us the differential? A. $1,188.16.

Q. Now, would you be kind enough to give us what was paid on Elmer Remmer's tax for that year and give us the difference, if the full amount was not paid?

A. A payment on April 4, 1946, in the amount of $7,000. A payment was made on September 3, 1946, in amount of $2,662.05. A payment had been made on August 19, 1945, of $2500 on declaration of estimated tax. The total payments made were $12,162.05. The tax shown on the return, $13,072.02, would leave a difference of $909.97.

Q. So, on Mrs. Remmer's tax, there was something in excess of a thousand dollars owing, that is, $1,188.16 due on Mrs. Remmer's tax for that year, and $909.97 on Mr. Remmer's tax, is that cor-

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(Testimony of Homer H. Forrester.)

rect? A. Did you say due?

Q. Unpaid, according to the figures that you gave us there.

A. No, it would show that they were overpaid by that amount.

Q. That they were overpaid by that amount? I thought you said Mrs. Remmer owed a tax of $14,074.29 and had only paid a total, including the estimate, of $12,886.13, leaving an unpaid balance [459] of $1,188.16, isn't that correct?

Mr. Campbell: That is objected to as stating something not in evidence. The question of the witness was what was shown on the face of the return.

Mr. Gillen: All right; he said it was so placed on the assessment roll, as I understood, the return was accepted and placed on the assessment roll and that is the amount that was collected on.

The Court: That is what I thought.

Mr. Campbell: That is not my understanding, your Honor.

The Court: Objection will be overruled. You may answer the question.

Q. Do you have the question in mind, Mr. Forrester?

A. I am sorry; it would show that amount due.

Q. And for Mr. Remmer your figures that you gave us was a return which was placed on the assessment roll, I presume, showing that Mr. Remmer owed $13,072.02 and that he paid a total of $12,162.05, leaving a balance due of $909.97, is that correct? A. That is correct.

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(Testimony of Homer H. Forrester.)

Q. When there is a blance due on a tax such as indicated here, what is the machinery of your office with regard to collecting that balance due? What do you do about it?

A. Well, we send the taxpayer's notice and demand for the payment of the tax.

Q. Do your office records reflect that such was done here? [460] A. I couldn't say.

Q. Now, another thing can happen, can it not, with regard to a balance reflected on the books. For example, an amended return can be made, showing that there was a full payment or an overpayment, isn't that true?

A. I don't exactly get the question.

Q. Perhaps I am not making myself clear. For example, one of the things that could happen on your books would be the filing, for example, in Mr. Remmer's case, of an amended return, showing that the tax originally figured was too high and that he may have overpaid and had a credit due him; that could happen, isn't that so? A. That is true.

Q. And it could be also that a credit could be reflected for a prior year, isn't that true, by reason of an overpayment of a prior year?

A. By filing an amended return.

Q. Yes, or an audit, showing there had been overpayment for the prior year, is that correct?

A. Yes.

Q. Now, if an overpayment for a prior year were revealed and for a subsequent year there was a balance due your office, would you offset that, that

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(Testimony of Homer H. Forrester.)

is, give the taxpayer the credit for any overpayment, is that true? A. That is right. [461]

Q. What occurred in this case, with reference to the reflected payments here showing a $909.97 balance due from Mr. Remmer and $1188.16 due from Mrs. Remmer? Was there ever a notice sent to these taxpayers on that?

A. I couldn't state whether there was or not.

Q. Was the money ever collected, those balances?

A. It appears not from the certification.

Q. Was there ever a credit given which offset those balances?

A. I couldn't state without the assessment list just what was done with the balance.

Q. Well, somebody looked at the assessment list and you prepared these documents that form the prosecution's Exhibits 13 and 14, isn't that true?

A. Correct.

Q. And according to your assessment list those balances were just left up in the air, nothing ever done about them, isn't that true? I say according to the list. A. According to the list, yes.

Q. And you wouldn't say, as a deputy collector, that that was the fact, that nobody ever did anything about sending out any notices trying to collect that money, would you? A. No.

Q. So there is something wrong about that, isn't there? A. Yes.

Q. And you are not prepared now to say what the assessment [462] list reflects with regard to any

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(Testimony of Homer H. Forrester.)

credits and payments, except what you have shown us here and what was prepared and brought in here as an exhibit? A. Right.

Q. Are returns ever misplaced or lost in your office? A. Not to my knowledge.

Q. Has there ever been an instance of a return or an amended return going astray in your office?

A. Not to my knowledge.

Q. How many of these returns do you handle in this District of Nevada?

A. Amended returns or regular returns?

Q. All kinds of returns, all income tax returns, what is the approximate total?

A. Well, during 1945 I would say roughly forty to fifty thousand.

Q. And has that number increased since that time?

A. It has increased since that time.

Q. So it was between forty to fifty thousand in 1945, is that correct?

A. That would be my guess, yes.

Q. And it is your testimony that to your knowledge nothing ever went astray out of 40 to 50 thousand returns that were made?

A. To my knowledge. [463]

Q. But you do observe, from the exhibits and from the returns that you hold in your hand, all of which are prosecution's exhibits, that there is something that went astray in regard to the balance that is shown on those two returns?

A. Yes. I notice this claim six thousand dol-

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(Testimony of Homer H. Forrester.)

lars; both claim six thousand dollars payment on their estimated tax, whereas they only paid $2500.

Q. So something is astray right at that point?

A. That has been adjusted though.

Q. How has it been adjusted?

A. By an additional assessment of $3500.

Q. Where does that show?

A. On the upper left-hand corner of the return.

Q. Well, if that was done, it would put us in the position we were before, isn't that correct, that there is still something wrong about the balance?

A. It would be.

Q. Now, I am going to show you, with the Court's permission, Mr. Forrester, defendant's Exhibit E for identification, which I believe has been mentioned as a purported amended return for Helen Remmer for the year 1944. Mr. Forrester, if a return was made with a remittance by check or cash, if the return went astray, would the remittance be reflected as a credit on your assessment?

A. It would. [464]

Q. So that it is possible that an amended return could go astray but still since the money to take up the balance did come into your hands, it would be properly deposited and noted and reflected as a credit for the benefit of the taxpayer on your assessment roll, is that correct? A. Correct.

Q. How long are returns kept in your office, Mr. Forrester?

A. Well, there are two classifications of returns. The collector's returns are retained for a period of

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(Testimony of Homer H. Forrester.)

six years from the date they are filed. The agent's or Bureau's returns are retained for a longer period of time.

Q. So that anything that was filed before the year 1942 in the way of a return would no doubt have been destroyed by your office, is that correct?

A. That is correct.

Q. And so, when you stated that you found no returns between 1934 and 1941, where did you get that information?

A. From the assessment list.

Q. The assessment list doesn't show a return; it shows only what is chargeable to the taxpayer and what credit is given, is that so?

A. Correct.

Q. And so, whether or not a return ever existed for those years, you are unable to say now?

A. I can say, return was not and income tax due was not filed. [465] If a non-taxable return was filed, it wouldn't show on our assessment list.

Q. So the fact of the matter is this, that if I, prior to those years manifested, had filed with your office—this is by way of illustration—had filed with your office a tax return, showing no tax due by reason of lack of income or by reason of proper deductions, it would not show on your assessment roll, is that correct? A. Correct.

Q. And at this date the actual return showing no tax due from me would have been destroyed, is that correct? A. If it was a collector's return.

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(Testimony of Homer H. Forrester.)

Q. Collector's return prior to six years to this date, or April, 1942? A. Correct.

Q. And so there would be no record of whether I ever filed a return that year or not?

A. Ordinarily there would be an index record. In other words, we prepare index cards when the return is filed, which we file in alphabetical order, of all returns filed, including the taxable and the non-taxable.

Q. You say ordinarily; what do you mean by ordinarily?

A. I say we do prepare those index cards.

Q. You used the term "ordinarily"; do you mean sometimes it is not done? [466]

A. No, it is always done.

Q. Now, if you had income tax return for the year 1934, showing taxable return filed, and then in the intervening years there was no tax due, what would be the situation in that instance?

Q. There would be index cards for all the returns for those years.

Q. Now, did you search those index cards?

A. No.

Q. You did not?

A. They were destroyed in the flood we had in 1950. We had the prior index cards stored in our basement. That was the reason that search was made through the assessment list.

Q. So that whatever records you may have had of any taxpayer's returns, whether taxable or non-

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(Testimony of Homer H. Forrester.)

taxable, for a period of time prior to 1942 have been destroyed?

A. No, the assessment lists are still in our possession.

Q. I mean with reference to the indexes.

A. The index cards for those years——

Q. What years were covered——

Mr. Campbell: He hadn't finished his answer.

Mr. Gillen: I am sorry.

(Question and answer read.)

Mr. Gillen: Maybe I can reframe the question.

Q. It is my understanding of your testimony, Mr. Forrester, that between the years 1934 and 1942 that you still have a [467] record in your office of any taxable returns that were made, is that correct? A. Correct.

Q. As to non-taxable returns, you have no record, by reason of the fact, first of all, that non-taxable returns do not appear on the assessment roll, and by reason of the fact that, due to this act of God that you mentioned, your index cards were destroyed? A. Correct.

Q. The cards were destroyed for what period of time, Mr. Forrester?

A. The index cards prior to 1942, including 1942 and prior.

Q. Were destroyed? A. Right.

Q. In your storage room in the basement of the building, is that correct? A. Yes.

Q. So that at this moment you can not say now

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(Testimony of Homer H. Forrester.)

whether or not there was any record, by way of index card, showing the filing of non-taxable returns by Elmer Remmer and his wife, Helen Remmer? A. That's right.

Mr. Gillen: I think that is all.

(Witness excused.) [468]

WILLIAM GREENHOUSE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. William Greenhouse.

Q. Where do you live?

A. Lawrence, Long Island.

Q. That is in New York State? A. Yes.

Q. What is your business?

A. Custom tailors; 18 East 53rd Street, New York.

Q. What is the name of your firm?

A. Corrado-Greenhouse, Inc.

Q. What is your position with that company?

A. I am president of the company.

Q. How long have you been an officer of Corrado-Greenhouse?

A. Since its inception, about 17 years ago.

Q. You have been president of the company continuously through that time? A. Yes.

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(Testimony of William Greenhouse.)

Q. What is the nature of your business?

A. Men's custom tailors; everything made to measure. The price today is $235 a suit.

Q. Have you brought with you the original ledgers of Corrado-Greenhouse relating to account of Elmer Remmer? [469]

A. I brought the original cash books and have made a record from them.

Mr. Thompson: Your Honor, I have a record here covering the years 1944, 1945 and 1946 for account of Elmer Remmer with Corrado-Greenhouse, which has been marked plaintiff's Exhibit 71 for identification.

Mr. Gillen: The defense is prepared to stipulate that this may be offered in evidence, subject to whatever explanation we may require in the way of cross-examination.

The Court: Very well.

Mr. Thompson: We offer it in evidence, your Honor, Exhibit 71.

The Court: They are understood to be records kept in the regular course of business?

Mr. Thompson: Yes, your Honor, the witness has produced his original ledger books. He has made a transcript of them.

The Court: I didn't hear any testimony in regard to it. I just want to know if counsel will stipulate that?

Mr. Gillen: Yes, your Honor.

Q. Mr. Greenhouse, I show you plaintiff's Exhibit 71. Will you state the total of the payments

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(Testimony of William Greenhouse.)

which were made Carrado-Greenhouse by Mr. Elmer Remmer during the year 1944? A. $1542.00.

Q. And what were those payments for? [470]

A. Those payments were for clothes.

Q. Do you know Mr. Remmer personally?

A. Yes, sir.

Q. And have you personally waited on him?

A. Yes, sir.

Q. Fitted him?

A. Well, I don't do the fitting. Mr. Carrodo does the fitting and I wouldn't be the only one who sold. There are others besides, but I sold him on several occasions.

Q. Referring to the year 1945, what is the total amount which Mr. Elmer Remmer paid Carrodo-Greenhouse during that year?

A. Five hundred dollars.

Q. What were those payments for?

A. Also for clothes.

Q. During the year 1946 what is the total amount of payments made by Mr. Elmer Remmer to Carrodo-Greenhouse?

A. Six hundred three dollars.

Q. What were those payments for?

A. For clothes.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Greenhouse, in the transcript that you prepared for the accommodation of the prosecu-

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(Testimony of William Greenhouse.)

tion here, there is a third sheet there that appears to be a duplicate of one of the other sheets, is that so? [471] A. Yes, sir.

Mr. Campbell: That is the one with the clerk's stamp on it.

Mr. Gillen: I think the sheet in duplication should be withdrawn.

Mr. Campbell: Then why not substitute this for the other?

Mr. Gillen: Whatever way, as long as it is not a duplication. I think we should remove the third sheet, may it please the Court, and leave the transcript showing the other two sheets for each year.

Mr. Thompson: We have no objections, your Honor, if the clerk's stamp may be placed on the exhibit as Exhibit 71.

The Court: Very well.

Mr. Gillen: No cross-examination.

Witness excused.

CHRIS R. WEISZ

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Chris R. Weisz.

Q. Where do you reside?

A. 1614 30th Avenue, San Francisco.

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(Testimony of Chris R. Weisz.)

Q. What is your business? [472]

A. Deputy collector in the San Francisco office of the Internal Revenue.

Q. How long have you been a deputy collector in the San Francisco office?

A. Since December 7, 1942.

Q. In other words, for a period of nine years, is that correct? A. Nine years.

Q. And to what particular part of the collector's office are you assigned?

A. Well, the regular duties of a deputy collector.

Q. No, are you attached to any particular division of the collector's office?

A. At the present time with the cabaret and admissions tax division.

Q. As a deputy collector, do you have access to the official files and records of the collector of internal revenue for the First Collection District of California? A. Yes.

Q. And as a deputy collector, have you been designated as the official to produce here certain records of the collector's office? A. I have.

Q. And did you personally secure those records?

A. I did.

Q. You have been asked to produce here certain returns, (1) [473] relative to a partnership known as the 21 Club. I will ask you if you have the partnership return for 1944 of the 21 Club?

A. I do.

Q. Will you produce that?

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(Testimony of Chris R. Weisz.)

Mr. Campbell: May this be marked for identification?

The Court: No. 72.

Mr. Campbell: May I state, your Honor, this witness will produce a number of returns, so for the sake of time, and if counsel will agree, may I have him produce them seriatum and they can be examined all at one time.

The Court: I think so.

Q. Have you also produced the partnership return, also for the year 1944, of that same 21 Club?

A. I have.

Mr. Campbell: I will ask to have this marked plaintiff's 72A for identification.

The Court: What was 72?

Mr. Campbell: No. 72 is partnership return of the 21 Club for a portion of the period 1944, while 72A purports to be of the entire year 1944.

Q. Have you also produced here a partnership return purporting to be a combined return for the 21 Club and the San Diego Social Club for the year 1946? A. I have.

Q. Will you produce that? [474]

Mr. Campbell: May this be marked 73 for identification?

Q. Now, have you also produced here the 1944 partnership return of the 311 Club? A. Yes.

Q. And do you have the 1945 partnership return for that organization? A. Yes.

Q. And the 1946 return for the 311 Club?

A. I do.

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(Testimony of Chris R. Weisz.)

Mr. Campbell: I will ask that the 1944 return be marked 74 for identification, the 1945 return be marked 75 for identification, and the 1946 return be marked 76 for identification.

Q. Mr. Weisz, in regard to the B & R Smoke Shoppe, have you produced here the 1943 partnership return? A. I have.

Q. Have you also produced the 1944 partnership return? A. I have.

Mr. Campbell: The 1943 partnership return I will ask to have marked 77 for identification and the 1944 return 78 for identification.

Q. Mr. Weisz, did you personally make an examination and search for the purpose of determining whether or not a 1945 partnership return was filed for the B & R Smoke Shoppe?

A. I did.

Q. What did such search disclose? [475]

A. No record.

Q. No record of any being filed?

A. No record of any being filed.

Q. Have you produced here the 1946 partnership return of the B & R Smoke Shoppe?

A. I have.

Mr. Campbell: I will ask to have this marked 79 for identification.

Q. Mr. Weisz, in regard to a partnership known as the 110 Eddy Street, I will ask if you have produced here the 1943, 1944, 1945 and 1946 partnership returns? A. I have.

Q. May I have them?

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(Testimony of Chris R. Weisz.)

Mr. Campbell: I will ask the 1943 partnership return of 110 Eddy Street be marked 80 for identification, the 1944 be marked 81 for identification, the 1945 be marked 82 for identification, and 1946 be marked 83 for identification.

Q. Mr. Weisz, with regard to the partnership known as Day-Night Cigar Store, I will ask you if you have produced here the 1944, 1945, and 1946 partnership returns? A. I have.

Q. Will you produce those?

Mr. Campbell: I ask the 1944 partnership return of the Day-Night Cigar Store be marked 84 for identification, the 1945 return be marked 85 for identification, and the 1946 return be [476] marked 86 for identification.

The Court: Counsel requested a conference. Would it be as well to have it at this time?

Mr. Gillen: May I suggest, unless there is a great many more, if we got all these before recess we could examine them.

The Court: Very well, go ahead.

Q. With regard to 186 Club, a corporation, I will ask you if you have produced here, with regard to the fiscal year 1944, the tentative and original returns for that year? A. I have.

Q. And have you also produced the tentative and original returns for the fiscal year 1945?

A. I have.

Mr. Campbell: I will ask that the tentative return of the 186 Club for the fiscal year ending June 30, 1944, be marked 87 for identification and that the original return of the 186 Club for the

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(Testimony of Chris R. Weisz.)

same period be marked 87A, final return, I should say. I will ask that the tentative return for the period ending June 30, 1945, of the 186 Club be marked 88 for identification and that the final return be marked 88A for identification.

Q. Mr. Weisz, did you personally make a search to determine whether or not an income and excess profits tax return, or either, were filed for the 186 Club for the fiscal year ending June 30, 1946? [477]

A. Yes.

Q. And what did such search disclose?

A. No record.

Q. With regard to the Menlo Club, a partnership, I will ask you if you have produced here the 1945 partnership return, the 1946 partnership return, and the 1946 amended partnership return of the Menlo Club? A. I have.

Q. Will you produce them?

Mr. Campbell: I will ask that the 1945 partnership return of the Menlo Club be marked government's 89 for identification, that the 1946 return be marked government's exhibit 90 for identification, and that the 1946 amended return be marked 91 for identification.

Q. Mr. Weisz, I will ask you also if you have produced here the 1946 partnership return of the Transit Smoke Shop, a partnership?

A. I have.

Q. Will you produce that?

Mr. Campbell: I will ask that this partnership return for 1946 for the period November 1st to De-

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(Testimony of Chris R. Weisz.)

cember 31st, 1946, be marked government's 92 for identification. That is the final one to be marked, your Honor.

(Jury and alternate jurors admonished and excused at 11:10 a.m.) [478]

In Chambers—11:15 A.M.

(Defendant not present.)

(All attorneys present.)

Mr. Golden: I would like the record to show that all counsel are here in chambers and we waive the presence of the defendant.

Mr. Pike: May I say this, there is a provision in one of the federal rules that the defendant shall be present at all proceedings of the trial. Now, if this is something that requires the attendance of the defendant, I do not want any error in the record for non-compliance with that rule, and I would like to refer to Federal Rules of Criminal Procedure——

The Court: If this is part of our regular court procedure, a matter which belongs to and is a part of the trial of this case, it is going to be in open court and the public invited. I have just this thought, I do not see why we should have to have part of court sessions in chambers and the public barred. These trials are supposed to be public.

Mr. Golden: That is all right, let us have the jury there then.

The Court: If you want them there. It all de-

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pends. I want to see what the statement is for before it goes to the jury.

Mr. Golden: Well, as to the matter of the defendant, I [479] said I would waive the presence of the defendant.

Mr. Gillen: Our only thought is, if the matter is taken up in the presence of the jury, they will hear actually what takes place; if it is taken up out of their hearing, they get a garbled account of what occurred if they happen to read the papers and that is what we want to guard against. Sometimes you read these reports in the paper and wonder if they are reporting the same trial you are conducting.

The Court: I want to let in the light of day on all our affairs. I do not mean to say counsel does not feel the same way, but I do not want to put myself in any case in a position for criticism that we have star chamber sessions in our court trials.

Mr. Golden: It would not be star chamber session if counsel on both sides were present.

Mr. Gillen: It will be in the record.

The Court: So if there is any statement made, we will have it in open court in the absence of the jury. I thought it was to be a conference for something but if it is going to constitute a part of the procedure in this trial and be something going into the record, constituting a portion of the record of the trial, we can not have it here.

Mr. Golden: When we shall have it?

The Court: We can have it right now in open court. [480]

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11:20 A.M.

(In the absence of the jury.)

The Court: Court will be in session. Let the record show the presence of the defendant with counsel.

Mr. Golden: If the Court please, the defense requests permission to advise your Honor of its position in regard to the matters yesterday in connection with the subpoena served upon Mr. Semenza for the production of certain material.

There are three different categories, your Honor, into which the material called for by that subpoena falls. The first category is the matter of the three checks in connection with the testimony of Mr. Mooney which, as your Honor will recall, are apparently somewhere that neither side knows, and the photostats from the Examiner newspaper were produced by us and accepted by everybody as substitutes, so we can consider that that part of the subpoena is finished. That is correct, is it not?

Mr. Campbell: That is correct.

Mr. Golden: Now, the other two remaining groups consist, in the first place, of the books of account and other records pertaining to the Cal-Neva corporation. As to that group of records and material, we do not claim any legal privileges, that is to say, we agree that when properly subpoenaed they are available to the party issuing the subpoena, and although they were not in the possession of Mr. Semenza at the time that they were subpoenaed, we are willing to produce them at the [481]

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request of the prosecution. We urgently and sincerely suggest, however, that they be produced in such a way that we will have equal access to them and convenient access to them during the course of this trial, and your Honor, of course, is aware of the physical difficulties—most of counsel on both sides are living in Reno and I do not think it is necessary to go into detail of the physical difficulties there at the moment.

The Court: That is a matter I wish you would take up with Congress, so we can have a courthouse built in Reno.

Mr. Golden: In connection with those records, the Cal-Neva corporate records, your Honor, we are today, the defendant's staff are today, going through the material and getting those out and we can make them available by Monday, providing we can work out some way that they don't have to be taken back and forth every day and some way that both sides can look at them when court is not in session.

Now, the remaining group consists of records which Mr. Campbell himself has stated yesterday in court, are the property of the defendant, in that the government contends that he was a partner or part owner, or perhaps in some cases sole owner, of the enterprises of which they are records. As to those, if the Court please, Mr. Campbell himself stated yesterday—this is on page 408 of the transcript—that it would be highly improper to subpoena them in the hands of the defendant's attorneys. [482] Without going into detail, we submit

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that the Court's order to us to produce the same is not sanctioned by law, is contrary to the law and is unfair and unjust to the defendant and deprives him of the rights guaranteed him by law and the Constitution. We, of course, have no intention of defying the Court and if the Court, notwithstanding our position, wants their production, that production will be made. At the same time today people are going through the records over there to get out what was called for by the subpoena, which is in this last group of material, namely, concerning the enterprises in which the government says the defendant is part or sole owner. All the material over there is mixed up with our own work sheets and our own memoranda and it is going to take a little time to get things separated. There is, I might say, in volume a considerable mass of material, probably fill a couple of large packing cases.

Now, in connection with that material also, we would like the record to show that it is necessary for us to refer to it daily and that it will hamper us if the material remains on deposit here with the clerk, whose official offices are such and whose location, compared with the temporary residences of counsel is such, that it makes it very difficult to get at the material.

Furthermore, if the Court please, while we are not prepared today to go into detail as to the legal reasons why it [483] would be error—and I say that respectfully—error and prejudicial error to enforce the Court's order of yesterday, we do feel that there are authorities as to court decisions on the subject

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and would like permission to present the same on Monday, in other words, giving us the week end as opportunity to assemble.

So I say we make this statement for the purpose of clarifying the record and we want the record to be very clear, your Honor, that as to the non-corporate records covered by the subpoena which was served on Mr. Semenza, if we produce them in accordance with the Court's order, which we will do if that order stands, that we are producing them only in accordance with the Court's order and under respectful protest and only because of the Court's order and insisting all along that not only would we be deprived practically of the means of preparing our defense, that is, for the purpose of consulting those matters during the trial, but also legally the Court's order is entirely without due sanction of law.

The Court: Well, we may have some interesting legal questions raised here and questions which should be carefully considered by the Court and will be carefully considered by the Court.

Getting back to the situation yesterday, we had Mr. Semenza testify here he received these records which we have in mind here now, from a Mr. [484] Weaver and there was a receipt or something to the effect that would indicate that the records were to be returned to Mr. Weaver, isn't that so?

Mr. Golden: That is correct, your Honor; yes.

The Court: So the agent, you might say, of this defendant, Mr. Semenza, obtained these records from the Internal Revenue Department on a prom-

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ise to return to the Internal Revenue Department.

Mr. Golden: Your Honor starts in the middle, if I may say so respectfully.

The Court: That is the part I first heard and that is a good place to start from. Now that is it. Mr. Semenza received these from Mr. Weaver of the Internal Revenue Department on promise to return them. What did he do? Turned them over to some other agent of the defendant, a Mr. Friedman, and then to counsel, and they are still in the hands of counsel. They have never been returned to the Internal Revenue office, which is where they belong. I made that order yesterday and you have two hours to comply with it, I think—2½ hours—and I want those records here or at this clerk's office at two o'clock. Then when we get the records over here, we will come to your legal points on the question of whether or not they should be admitted in evidence. [485]

Mr. Golden: Now, your Honor, we have no objection——

The Court (Interceding): Now, when this came up yesterday I wondered if my order was a little bit out of line, but after being informed of these matters, the questions of law in regard to these partnership records, they go to the question of whether or not any of these records are admissible in evidence, but still the situation appears to me to be this, that the defendant obtained the records for inspection purposes on a promise to return them and did not return them. Now I want them returned.

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Mr. Golden: So did the government, your Honor; they obtained them——

The Court (Interceding): I am talking about the defendant.

Mr. Golden: We are talking about the government. There are two parties here.

The Court: Then after this situation was opened up and we found there was a question as to whether or not they would be legally admissible, Mr. Campbell stated yesterday that this order be made, isn't that correct?

Mr. Campbell: Yes, your Honor; that they be delivered to the clerk. [486]

The Court: There is no chance for the defendant being deprived of any constitutional privilege by having those records deposited with the clerk.

Mr. Golden: Well, your Honor, we have no objection to deferring the legal argument as to what is to happen to them until they are deposited here, if that is the Court's order.

The Court: I made the order and from your remarks here I took it that you did not intend to comply with it. You were talking about somebody going through the records and examining them. I want that order complied with. At two o'clock I want these records here.

Mr. Golden: Your Honor, as a practical matter I stated yesterday, and I am going to state today under oath that those records are physically mixed up with other matter not called for by the subpoena, not admissible in evidence, our own memoranda and so on, and it may take a little further time——

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The Court (Interceding): Yesterday I let you fix your own time. I suggested 10:00 o'clock and then on the suggestion of counsel made it two o'clock. Here is my position. I don't want to appear to be severe. I am not severe, I do not think I am, but I just don't want to be pushed around by any one, in court or out. Now, I made an order and I expect it to be complied with. [487]

Mr. Golden: Of course, your Honor, we couldn't get there and back.

The Court: Well, you had all night to get them and all day yesterday.

Mr. Golden: I would like——

The Court (Interceding): What do you think I meant when I said two o'clock yesterday afternoon? What did you think I meant?

Mr. Golden: I thought when I told your Honor——

The Court: Why didn't you tell me at that time?

Mr. Golden: Because I didn't know, your Honor. I thought when we explained the practical difficulties, it wouldn't be a matter and that order of two o'clock wouldn't be any particular significance and we could have, if your Honor will put it that way, an extension.

The Court: Well, we have to get an understanding some time or other. It could very well happen what I said yesterday had no significance and what I say today would likewise have no significance.

Mr. Golden: I think your Honor is——

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The Court (Interceding): I just don't like the idea of any one obtaining records from any person or governmental agency or from an individual on a promise to return and then have them scattered around the country and not returned. [488]

Mr. Golden: I say this respectfully, I think your Honor is unduly apprehensive about pushing the Court around.

The Court: Let us not go into any outside matters. I want the records here at two o'clock.

Mr. Golden: Will it be understood they will remain sealed until such time——

The Court (Interceding): They will be brought and left in the custody of the clerk and they will not be sealed. They were not sealed when taken out by Mr. Semenza.

Mr. Golden: You see what is happening. The prosecution, over the week end, is going through them before we have a chance.

The Court: I don't know whether they will or not.

Mr. Golden: They will.

The Court: They would have had opportunity to look through them if Mr. Semenza had returned them to the revenue office.

Mr. Glidden: Of course, as Mr. Golden says, your Honor is starting in the middle. Because something comes up, your Honor immediately seizes upon as a piece of——

The Court (Interceding): I don't think it is unfair, in view of the record here and the situation, I don't think it is proper to take those records and

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not return them to the Internal Revenue. [489]

Mr. Gillen: Your Honor understands what the law is, the Internal Revenue only has the right to inspect records of a defendant and not to have possession of them. I think that was pointed out by Mr. Avakian.

While we are talking, I would like to say this—I am afraid your Honor mistakes vehement and earnest advocacy from the floor of the court room for personal affront on the Court.

The Court: No, I do not.

Mr. Gillen: It has never been intended as such. It is strong advocacy—perhaps we are a little more vehement than your Honor is used to encountering, but it is done in the nature of sincere realization of our duty as advocates for the defendant whom we represent.

The Court: Do not think I have any feeling at all. I am not going to pursue that any more. I have no feeling. What I hear from you has just as much consideration as coming from any gentleman in this room. Now don't think there is any feeling at all. I have not any. I am trying to be, and will continue to try to be, fair but when we make an order, we are going to have that order obeyed.

Mr. Golden: Your Honor, I want the record to show that this material was originally taken upon promise of Mr. Weaver to return it to us——

The Court: I only go this far back and no farther—Mr. [490] Semenza obtained those records with the understanding he was to return them.

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Mr. Golden: The government never got title to them and it is our property.

The Court: Well, we will call in the jury.

Mr. Golden: And to deliver these to the court and leave open to inspection of the prosecution is unfair and unjust and prejudicial error and not the American idea.

The Court: Let us not have any trouble and I do not want to punish you, but I am not going to let you fill this record with that kind of remarks. Now please stop; no more. Call in the jury.

(Jury returned into court at 11:40.)

(Defendant present with counsel. Presence of the jury and alternate jurors stipulated.)

(Jury and alternate jurors admonished and recess taken at 12:50.)

Afternoon Session, December 7, 1951—2:15 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEISZ

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Gillen: With regard, may it please the Court, to the exhibits which were offered this morning, that would be [491] prosecution's 72 to 92,

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(Testimony of Chris R. Weisz.)

inclusive, and included among those are several bearing additional "A" designations, such as 72A, 87A and 88A, the defense is willing to stipulate that they may be offered in evidence if the prosecution so desires, subject, of course, to motion to strike in the event there is any need for it.

Mr. Campbell: Then they will be offered with that agreement.

The Court: Very well, exhibits numbered 72 to 92, inclusive, including 72A, 87A, and 88A, are admitted in evidence.

Q. Mr. Weisz, did you also personally make a search of the files and records of the Collector of Internal Revenue for the Northern District of California, for the purpose of ascertaining whether or not any income tax returns were filed in that office for or on behalf of Elmer or Helen Remmer for the years 1935 to 1941, inclusive? A. I did.

Q. And what did such search disclose?

A. No record.

Q. Incidentally, in connection with the records which are kept there and the method which is followed when an income tax return is filed by an individual, what record is made of it?

A. A 3 by 5 card is made of every income tax return that is filed. [492]

Q. Is that made whether or not the return shows a taxable income? A. Yes.

Q. And for what period of time is that record maintained?

A. Well, they are there from the beginning of the income tax period, 1913.

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(Testimony of Chris R. Weisz.)

Q. And in what form are they kept?

A. The 3 by 5 cards, I believe, up to 1944;—I am not quite sure—are kept on microfilms.

Q. That is for the purpose of compressing the record, saving space, is that correct?

A. Saving storage space.

Q. And did you examine the microfilms for the years 1935 and 1941 inclusive, that is, for the purpose of determining whether or not any returns had been filed by those individuals for any of these years? A. I did.

Q. And you state you found no record, is that correct? A. No record.

Q. Incidentally, what territorial limits does the collector in San Francisco cover?

A. Well, I don't know what the south boundary is.

Q. It does, however, cover all of northern California?

Mr. Gillen: I don't think counsel should lead. If the witness doesn't know, he doesn't know. I offer the objection. [493]

Mr. Campbell: That is a matter of law, of course. I think that is all. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Weisz, any index card records that are kept in your office are kept only for the Northern District of California, is that correct?

A. Yes.

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(Testimony of Chris R. Weisz.)

Q. So it wouldn't reflect what had been filed for any other district? A. No, sir.

Q. When did you change from the card system to the microphoto system?

A. Well, they done that possibly about two years ago, they came in and microfilmed the cards.

Q. How long have you been up here under direction to be in this court?

Mr. Campbell: Objected to as immaterial.

Mr. Gillen: It is preliminary to asking another question regarding his personal services.

The Court: Objection sustained.

Q. When did you make this search of the index cards?

A. Well, within a few days before coming up here.

Q. When was that, can you fix the time better?

A. I made this search during the week of the 19th of November, 19, 20, 21, 22, and 23 I worked on these returns. [494]

Q. Who was it that told you to search and see if there was any index card for Elmer Remmer or Helen Remmer in San Francisco?

A. Well, I got my first orders from Mr. McCall, the assistant collector, to see——

Mr. Campbell: I think that answers the question, what instructions he got. He was asked from whom he got the instructions.

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(Testimony of Chris R. Weisz.)

The Court: I don't think he answered the question. He said he got his first orders—he may go ahead.

(Question and answer read.)

A. (Continuing): ——to see Mr. Campbell, the attorney, and I saw Mr. Weaver and Mr. Shelton and they gave me the data that was required.

Q. And included in your instructions was the request made to you, were you specifically told, to see if there was any index card for Elmer Remmer or Helen Remmer, or either of them, between 1935 and 1941? A. Yes.

Q. And that was some time prior to the 19th of October? A. No, that was during that week.

Q. During the week, as I understand, you made your search, you got your instructions prior to the 19th, did you not, or at least on the 19th?

A. Yes, probably on the 19th. [495]

Q. Was that October or November, did you say?

A. November.

Q. November, I beg your pardon. Now I understood you to say that you had made a personal search of the records and had obtained and produced the various returns for various partnerships which have been mentioned here and which are now admitted under designations of prosecution's Exhibits 72 to 92 inclusive, including several others that have a special designation of the number with an "A" attached. Is that correct? A. Yes.

Q. And I understood you to say that you found,

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(Testimony of Chris R. Weisz.)

with regard to the 186 Club, that you found returns for 1944 and 1945, but not return for 1946, is that correct? A. That's right.

Q. Then with regard to that same enterprise, 186 Club, were you requested to obtain, or did you look for a return for 1943? A. Yes.

Q. Were you able to find any?

A. We have a return for the fiscal year 1943.

Q. We are talking about the 186 Club?

A. Yes.

Q. Did you find any returns for the year 1943?

Mr. Campbell: I submit he just answered he found return for the fiscal year '43.

Q. Did you find any return for the fiscal year 1943? [496]

Mr. Campbell: Objected to as asked and answered.

The Court: Well, you may proceed.

A. I found a partnership return.

Q. Did you find any other returns for that year for the 186 Club?

A. I have a note here, says 6-30-42 on form 1121.

Q. Do you have that return?

A. Well, that was one of those that was introduced in evidence.

Q. No, on the 1943 return. Do you have that with you?

Mr. Campbell: According to our records that is introduced, for the fiscal year beginning July 1,

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(Testimony of Chris R. Weisz.)

1943, and ending June 30, 1944, being plaintiff's Exhibit 87.

A. That is what I refer to, 6-30-43.

Q. You say that you found 6-30-43, is that correct?

A. Well, for the fiscal year beginning 6-30-43.

Q. Now counsel stated a moment ago that that return I am referring to is now prosecution's exhibit 87. I think if counsel will look at it, he will find out it is for the next fiscal year, 6-30-44.

Mr. Campbell: Fiscal year beginning July 1, 1943, and ending June 30, 1944.

Mr. Gillen: That is not what you said.

Mr. Campbell: The exhibit speaks for itself, if the Court please.

Mr. Gillen: I think we are talking at cross purposes. [497]

Q. Do you have a return with you for the fiscal year ending June 30, 1943? A. Yes.

Q. May I see it please?

(Defendant's Exhibit J.)

Q. How many returns are handled by the Collector for the Northern District of California, on an average, do you know?

A. Approximately two million.

Mr. Campbell: That is per annum?

A. That is for the year.

Q. What was the situation with regard to the number of returns handled in the years between 1942 and 1946? Was it about the same, if you are familiar with it?

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(Testimony of Chris R. Weisz.)

A. Well, I wouldn't put any figure on what they were in 1942. They were somewhat less, of course, more taxpayers now than there were then. During the present time they are handling approximately two million returns.

Q. In the Northern District of California you say there were somewhat less taxpayers in 1942? Do you have any information on the intervening years, or any knowledge? A. No.

Q. In the office of the Collector of the Northern District of California have you any knowledge of whether or not returns are ever mislaid or lost?

Mr. Campbell: Objected to. He can question if some particular [498] returns have been mislaid or lost.

The Court: He may answer the question.

A. Well, not to my knowledge.

Q. You never heard of a case?

Mr. Campbell: As to hearsay, I object.

The Court: That may be.

Mr. Gillen: I will reframe the question.

Q. Has it ever come to your attention or knowledge that any return was mislaid or lost out of two million returns handled?

Mr. Campbell: Objected to as hearsay.

The Court: Overruled. You may answer the question.

(Question read.)

Q. In any year? A. Well, not officially.

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(Testimony of Chris R. Weisz.)

Q. What do you mean by that, "not officially." Do things get lost officially and unofficially in your office?

Mr. Campbell: If the Court please, if it hasn't come to his knowledge officially——

The Court: I think we are dealing in things not so important right now. You may proceed.

A. Well, you might hear of some return being missing, but you might not be officially connected with that return; therefore, so far as I am concerned, I don't recall any return I have searched for or had anything to do with as being mislaid, that I recall. [499]

Q. Now you personally searched for the 1946 return of the 186 Club, did you not? A. Yes.

Q. You made that search personally?

A. Yes.

Q. And you found no record of any return for 1946 for the 186 Club? A. That's right.

Q. And that is the reason that you testified here today that there was no 1946 return for the 186 Club, is that correct?

A. As far as my search went, I couldn't find anything.

Q. And of course I am referring to the 1946 return, I am referring to the fiscal year ending in June of 1946. A. Yes, I understand that.

Q. You could find none and there is none brought with you that is any such return?

A. There was no record of it that I could find.

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(Testimony of Chris R. Weisz.)

Q. I will show you here a letter on a letterhead, and I will ask you if you recognize the letterhead and the signature? You may answer that yes or no.

A. Yes.

Mr. Gillen: I would like this marked for identification, may it please the Court.

The Court: K.

Q. I am going to show you the exhibit again—counsel has seen [500] it—can you tell us whose letterhead that is and whose signature is attached thereto?

Mr. Campbell: That is objected to unless it is shown that this witness has any familiarity with the contents of the letter.

The Court: I think the witness has identified the letter. Do you want to offer it?

Mr. Gillen: Yes, I will offer it in evidence.

Mr. Campbell: Objected to, no proper foundation laid.

The Court: Overruled. Proceed with your questions.

(Question read.)

A. That is the letterhead of the Treasury Department, Internal Revenue Services, on the office of Internal Revenue agent Harliss.

Q. At what place? A. San Francisco.

Q. Are you familiar with the signature appearing on that letter? A. No.

Q. Do you know a man by the name of Harliss in the Internal Revenue Service?

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(Testimony of Chris R. Weisz.)

A. I know of him.

Q. What is this man's position in the Internal Revenue?

A. He was Internal Revenue Agent in charge, which is a separate department. [501]

Q. Do you know his full name?

A. No, I do not.

Q. Have you never seen his name on any correspondence?

A. Oh yes, I have seen his name.

Q. Don't you recognize his signature there on that letter I showed you that you hold in your hand? A. No, I don't.

Q. Doesn't it look like the signature you have seen of Frank Harliss, the Internal Revenue Agent in charge, and other documents that have come to your attention?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Well, does it look like the signature of Frank Harliss you have seen on other official documents?

Mr. Campbell: Same objection.

Mr. Gillen: This is cross-examination.

The Court: Objection sustained.

Mr. Gillen: On the ground it is argumentative?

The Court: Yes.

Mr. Gillen: Well, I don't know how to put it. I asked if it appears to be the same signature he had seen on other official documents.

Mr. Campbell: He stated he didn't recognize the signature.

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(Testimony of Chris R. Weisz.)

Mr. Gillen: He said he had seen the signature of Mr. Harliss [502] on other documents.

The Court: What is your question now?

Mr. Campbell: The question is, the witness having answered that he knows who Mr. Harliss is and knows his official position and that he has seen Mr. Harliss' signature on other documents, I am asking him to look at that letter he holds in his hand and tell me whether or not he recognizes that as the same signature he has seen on other official documents.

The Court: You may answer the question.

A. I have seen very few signatures of Mr. Harliss and to the best of my recollection the documents of Mr. Harliss that I have seen were signed by a rubber stamp and I do not believe this was a rubber stamp.

Q. Well, the general framing of the letter, the appearance of the signature, does it appear to you to be the same as other signatures, either original or rubber stamp signatures, you have seen?

Mr. Campbell: I am going to make my objection again——

The Court: Objection sustained.

Mr. Gillen: I will now, with the Court's permission, ask Mr. Campbell, who is familiar with the signature of Mr. Frank M. Harliss, I am sure, if he will stipulate that this is an official letter signed by Mr. Harliss?

Mr. Campbell: I will state on its face, it is not signed by Mr. Harliss. [503]

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(Testimony of Chris R. Weisz.)

Mr. Gillen: Does it look like Mr. Harliss' signature and official piece of stationery?

Mr. Campbell: If Mr. Gillen wants to call me as his witness.

Mr. Gillen: I take it counsel is not sporting enough to stipulate.

Mr. Campbell: I resent that remark.

The Court: We will have the remarks stricken from the record.

Mr. Gillen: We have made every endeavor to stipulate and facilitate——

The Court: We will deal with what we have here.

Mr. Gillen: I will offer this exhibit as the proper foundation is laid.

Mr. Campbell: To which I object; no proper foundation has been laid.

The Court: Objection sustained.

Q. Let me ask you if you were familiar, Mr. Weisz, with this form letter as an official form of the Internal Revenue Service? A. Yes.

Q. Is that an official form of the Internal Revenue Service covering the subject matter contained in that letter?

Mr. Campbell: Objected to as calling for conclusion of the witness.

Mr. Gillen: He says he is familiar with it. [504]

The Court: Objection overruled. It may be admitted in evidence.

Mr. Gillen: Thank you, your Honor. With the Court's permission, I desire to read this letter to the jury at this time. The letterhead, in printing,

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(Testimony of Chris R. Weisz.)

is the Treasury Department, Internal Revenue Service, San Francisco 5, California. It bears the coat of arms of the Revenue Service and in printing, "Office of Internal Revenue Agent in Charge, San Francisco."

(Reads Exhibit K.)

Q. Now I am going to show you some other documents, Mr. Weisz, and ask you whether or not you are familiar with this document, and incidentally, while counsel is looking at them, let me ask you this, this letter is no more than the government asking the taxpayer to waive statute of limitations and give the government more time to look into the books?

Mr. Campbell: Objected to as calling for conclusion of the witness. The letter speaks for itself.

The Court: Objection overruled.

A. Yes.

Q. And that form 872, which is referred to and notes as an enclosure here, is the form wherein the taxpayer gives the government more time to examine his books, isn't that so? A. Yes.

Q. And the taxpayer doesn't have to, if he doesn't want to, isn't that true? [505]

Mr. Campbell: That is objected to. Well, that is all right.

Q. I will show you some sheets on salmon paper form in printing and ask you to look at those and

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(Testimony of Chris R. Weisz.)

tell us whether or not you are familiar with those forms? A. Yes.

Mr. Gillen: I would like to have these marked.

The Court: Exhibits L-1, L-2, L-3, L-4.

Q. What are those forms that are now marked defendant's Exhibits L-1, 2, 3, and 4?

Mr. Campbell: I am going to make an objection as not being within the scope of direct examination. I think we are getting extraneous matters into the record.

Mr. Gillen: May I be heard?

The Court: Objection will be overruled, consent forms.

Q. They are forms of consent, that is, form where the taxpayers gives the government more time to look into his books? A. That's right.

Q. The reason the government asks for more time is so they won't be barred from the statute of limitations from looking into a man's books to determine whether or not he should be prosecuted?

Mr. Campbell: Same objection.

The Court: I am going to ask, Mr. Gillen, I just don't see what this has to do with any subject matter [506] brought out on direct.

Mr. Gillen: He says there was no return for 1946. We not only find there was a return, but there was considerable correspondence, that the government had asked for more time.

The Court: Do these documents here——

Mr. Gillen: Include 1946, yes, your Honor. The

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(Testimony of Chris R. Weisz.)

letter referred, your Honor, to the returns that were in the hands of the government.

The Court: Very well, you may proceed.

(Question read.)

Mr. Campbell: We object——

The Court: Objection is sustained to that question.

Q. What is the reason the government asks for the taxpayer to extend time to the government to prevent statute of limitations running against the government?

Mr. Campbell: Same objection.

The Court: Objection will be sustained.

(Recess taken at 3:00. Jury and alternate juror admonished.)

3:15 P. M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEISZ

resumes the witness stand on

Cross-Examination

By Mr. Gillen:

Mr. Gillen: I was just showing counsel what appeared to [507] be three original letters. With the Court's permission, I will hand them to you and ask you whether or not you recognize the letterheads? A. Yes.

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(Testimony of Chris R. Weisz.)

Mr. Gillen: I would like to have these marked as either one or three exhibits.

The Court: M-1, 2, and 3.

Q. What are those three letterheads, Mr. Weisz?

Mr. Campbell: Objected to. They speak for themselves, if the Court please.

The Court: He may answer the question. Don't state the contents, just the general nature.

A. They are official government letterheads.

Q. Did you observe the signature on those letters? A. No, I did not.

Q. I ask you to look at the signature on those three letters and tell us if you recognize it?

A. I recognize the name, of course.

Q. Do you recognize the official designation under the name? A. Yes.

Q. The name is that of F. M. Harliss, is that right? A. Yes.

Q. And the official designation is Agent in Charge of Internal Revenue Service?

A. Internal Revenue Agent in Charge. [508]

Mr. Gillen: I offer them.

Mr. Campbell: May I ask a question on voir dire?

The Court: You may do so.

Q. (By Mr. Campbell): Did any of these letters originate from your office? A. No.

Q. Or from the office to which you are attached?

A. No.

Q. Those letters, judging from their letterhead, originated from the office of the Internal Revenue

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(Testimony of Chris R. Weisz.)

Agent in Charge, did they not? A. Yes.

Q. Where is his office located, if you know?

A. 74 New Montgomery.

Q. Where is your office located?

A. 100 McAllister Street.

Q. Do you have anything to do with the activities of his office? A. No.

Q. Of any kind whatever? A. No.

Mr. Campbell: I am going to object to their reception in evidence, if the Court please, no proper foundation laid.

The Court: I would like to hear from you on the question. First let me see the exhibit.

Mr. Gillen: I was going to suggest I would like to have [509] your Honor look at it.

Mr. Campbell: Well, while your Honor is examining them, may I point this out, that there is no way in this method for us testing the authenticity of these letters. If I may be heard a moment further. In that record, if the Court please, if this method of producing evidence is to be followed, we are deprived of an opportunity to examine either the writer of the letter, assuming that they are authentic, to obtain the surrounding circumstances of the correspondence, if there was such correspondence, relating to the subject matter to which those letters refer. In other words, under Mr. Gillen's theory, anything which was written on a piece of government stationery would be admissible through this witness because he can recognize the government letter and because he can recognize that

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(Testimony of Chris R. Weisz.)

there is an official designation after the signature, with which he is not familiar, at the bottom of the letter.

Mr. Gillen: May I be heard on that?

The Court: May I make this remark first. It seems to me that the only interest we possibly could have in any of the subject matter contained in any or all of these letters would be the question as to whether or not there was a return filed for the year ending June 30, 1946.

Mr. Campbell: That is correct, your Honor.

Mr. Gillen: This witness has testified, your Honor, [510] that he has examined the records of the government to determine whether or not there had been a return filed for this corporation, 186 Club, for the fiscal year June 30, 1946. He said there was not, so the impression is left with the jury that there was no return filed. Now we have the right to determine whether he only looked in his own office and did not go to the office of the man across the street or did not make a complete search of anywhere where these records would be handled in the course of official business, and we are offering correspondence pertaining to the very exhibit he said he couldn't find.

Mr. Campbell: I make the objection no proper foundation has been laid for the introduction.

Mr. Gillen: I don't think Mr. Campbell seriously contends those are spurious letters on the letterhead of the Treasury Department of the Internal Revenue Service.

The Court: They may be admitted for that purpose.

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(Testimony of Chris R. Weisz.)

Mr. Gillen: If there is any question, I would be happy to offer in evidence letters that brought the response by way of those official letters, I would be happy to show Mr. Campbell. If counsel would be willing to stipulate or would offer no objection, I would like to offer in evidence for the defendant the balance of the correspondence, which would make it clearer to the jury.

The Court: Does counsel desire to accept such a statement? [511]

Mr. Campbell: No, I do not.

The Court: Then they will not be admitted.

Mr. Gillen: Then, of course, it would be a little silly because we only have the answers of the government. We have to do the best we can.

Mr. Campbell: I object to counsel making that statement.

The Court: We will try to avoid making these statements.

Mr. Gillen: With the Court's permission, I would like to read these letters to the jury, Exhibits M-1, M-2, and M-3.

The Court: Yes.

Mr. Gillen: I will read them in accordance with their date. (Reads Exhibit M-1). I wonder if counsel will be willing to stipulate Mr. John R. Golden is one of the attorneys of record in this case and associate?

Mr. Campbell: So stipulated.

Mr. Gillen: Thank you.

Mr. Campbell: You're welcome.

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(Testimony of Chris R. Weisz.)

Mr. Gillen: Bearing signature in ink, F. M. Harliss and in typewriting below, "Internal Revenue Agent in Chief" and to the left, "RLS:GY" and the word "Enclosure" in typewriting. The second letter is on different letterhead: (Reads Exhibit M-2. The third letter is on the letterhead of the United States Treasury Office: (Reads Exhibit M-3.)

Q. Now, Mr. Weisz, did you in your search find any other returns [512] for the years 1943, 1944, 1945 and 1946 for any of the following enterprises: the 21 Club——

Mr. Campbell: Will you go one by one because there are certain amended returns which have been filed which he is prepared to produce. I think if you ask a blanket question you will be lost in a maze of papers.

Mr. Gillen: I am lost in a maze of papers right now.

Mr. Campbell: May I make this suggestion—he has a number of amended returns which were filed which can be produced at this time, marked with one number and left for your examination over the week end. Will that be satisfactory?

Mr. Gillen: I think that would be the most practical thing to do to save time.

Mr. Campbell: May he withdraw from the stand and he can assemble those and leave with the clerk for your examination.

Mr. Gillen: Surely.

Mr. Campbell: I have one question, if the Court please.

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(Testimony of Chris R. Weisz.)

Mr. Gillen: Only if it is understood my cross-examination is not completed.

The Court: Very well.

Q. (By Mr. Campbell): Mr. Weisz, how are income tax returns, whether they are individual or corporation, filed in the Northern District of California? Are they all filed with the collector of the Internal Revenue at San Francisco, California?

A. Yes. [513]

Mr. Campbell: That's all.

The Court: You may be excused for the time being.

DAVID N. KESSEL,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. My name is David N. Kessel.

Q. Where do you reside?

A. 283 St. James Drive, Piedmont, California.

Q. What is your business or occupation?

A. I have no occupation.

Q. Are you acquainted with the defendant, Elmer Remmer?

A. Judge, may I read a statement?

The Court: Just answer the question yes or no.

A. I refuse to answer the question on the ground it will tend to incriminate me.

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(Testimony of David N. Kessel.)

The Court: We had better excuse the jury.

(Jury and alternate jurors admonished and excused at 3:34 p.m.)

(In the absence of the jury.)

The Court: I can't see any reason why the Court should not on Monday morning at 10:00 o'clock, in the presence of the jury, order this witness to answer that question, and that is what I propose to do. I thought perhaps, if we were going to be confronted [514] with questions of this nature, it might be beneficial to have a little argument or discussion of the subject matter.

Mr. Gillen: May I make our position clear, may it please the Court. This witness is a government witness. We have nothing to do with this witness. It is immaterial to us whether he testifies or not and I want it clearly understood that we are not participating in whatever procedure is taken between the Court and the prosecution and this witness.

The Court: I see; thank you.

Mr. Campbell: So far as the government is concerned, the evidence has shown here that this man was associated with the defendant in various business enterprises. We intend to interrogate him to the extent of our ability as to the extent of that association and as to the monetary rewards which resulted from that association. That is the government's position.

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(Testimony of David N. Kessel.)

The Court: I take it that he is going to raise the question as to whether or not such answers would incriminate him.

Mr. Campbell: Apparently he is equipped with some statement which he has brought with him in that regard. I understand he is also accompanied by counsel. However, the government desires to press this question and the succeeding questions along the line which I have indicated to your Honor.

The Court: Well, he will be ordered to answer this [515] question that is propounded to him. Perhaps I was too hasty in dismissing the jury. I thought we might accomplish something by discussion of some legal point that might be involved in this general subject. If that isn't the idea, we might as well adjourn now and go home. This particular question the witness is ordered to answer at the beginning of court and that order will be repeated in the presence of the jury.

Mr. Campbell: Of course, the question of incrimination would have to be put up as to each question put to the witness, but certainly this type of question can not be incriminating.

The Court: No. I am sorry I did excuse the jury under the circumstances. We will be in recess until Monday morning at 10:00 o'clock. This witness, and all other witnesses under subpoena and not excused are ordered to be here Monday morning.

(Court adjourned at 3:40 p.m.) [516]

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State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced and the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the trial starting November 28, 1951, at Carson City, Nevada, and that the foregoing pages, numbered 1 to 516, inclusive, comprising Volume 1 of said transcript, dated November 28, 1951, to December 7, 1951, inclusive, is a true and correct transcript of my said shorthand notes taken for those dates, to the best of my knowledge and ability.

Dated at Carson City, Nevada, January 28, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed January 28, 1952. [516-A]

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December 10, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

DAVID N. KESSEL

resumes the witness stand on

Direct Examination

By Mr. Campbell:

Q. You were sworn Friday, Mr. Kessel. Are you acquainted with the defendant, Elmer Remmer?

A. I declined to answer Friday, didn't I, your Honor?

The Court: I will have the question read to the witness.

(Last question and answer of Friday read.)

"Q. Are you acquainted with the defendant, Elmer Remmer?

"A. I refuse to answer the question the ground it will tend to incriminate me."

Mr. Campbell: At this time I wish to press the question.

The Court: That is your answer now, you refuse to answer on the grounds it will tend to incriminate you?

A. Yes.

The Court: Well, the matter was before the Court Friday and the same response was given and I have been informed, and is it true, that you are represented by counsel?

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(Testimony of David N. Kessel.)

A. Yes, sir.

The Court: And you have consulted counsel before you came to the witness stand Friday and you have consulted [517] with counsel since on this very matter?

A. Yes.

The Court: Well, it is the finding of the Court that the question, "Are you acquainted with Mr. Remmer," response to that question, in the opinion of the Court, does not present a reasonable danger or real danger of incrimination and you are ordered to answer the question.

A. I do know Mr. Remmer.

Q. How long have you known Mr. Remmer?

A. I have known him about 10 or 15 years.

Q. Have you ever visited in his home?

A. Oh, yes, a few times.

Q. And did you visit in his home during the years 1944 to 1946 inclusive? A. A few times.

Q. Where did he reside at that time?

A. Well, he lived on Panhandle Blvd., but I don't know the address.

Q. Panhandle Boulevard in what city?

A. El Cerrito.

Q. Does he still live there, if you know?

A. I wouldn't know.

Q. Do you know Mr. Remmer's occupation?

A. I refuse to answer the question. [518]

Q. Upon what ground?

A. Tend to incriminate me.

Mr. Campbell: I press the question.

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The Court: Well, you will be detained until tomorrow morning at 10:00 o'clock. You are committed to the custody of the marshal and you have counsel and in the meantime you may consult counsel. You will have a hearing tomorrow morning at 10:00 o'clock on your refusal to answer. You are now committed to the custody of the marshal.

Mr. Haller: Your Honor, may I be heard?

The Court: No, sir. You may consult with Mr. Kessel and I am sure the marshal will give you opportunity to consult with the witness on this question. The witness is committed to the custody of the marshal, to be here tomorrow morning at 10:00 o'clock.

WALTER M. PECHART

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name please?

A. Walter M. Pechart.

Q. Where do you reside?

A. 311 San Pablo Avenue, El Cerrito.

Q. What is your occupation?

A. At present I am not in business. [519]

Q. What is your former occupation?

A. Gambling business.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, I am.

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(Testimony of Walter M. Pechart.)

Q. How long have you known him?

A. About thirty years.

Q. Have you ever visited in his home?

A. Yes, I have.

Q. And did you visit in his home during the years 1944 to 1946 inclusive? A. Yes, I did.

Q. And where did he reside at that time?

A. El Cerrito, California.

Q. Does he reside there now, to your knowledge?

A. That I can't answer.

Q. Do you know Mr. Remmer's occupation?

A. That I can't answer.

Q. You say you can't answer, is that because you do not know?

A. Well, I knew at one time but at present I don't know.

Q. Did you know his occupation during the years 1944 to 1946, inclusive? A. Yes, I did.

Q. What was his occupation?

A. Gambling business.

Q. Do you know one George Simmons? [520]

A. Yes, I do.

Q. Who is George Simmons?

A. He is my accountant.

Q. Does he have associated with him one Lester Simmons? A. Yes, he does.

Q. And was George Simmons your accountant during the years 1944 to 1946 inclusive?

A. That I can't answer. There are two brothers, they are both accountants. They were both in my employ, but the exact years I can't state.

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(Testimony of Walter M. Pechart.)

Q. By two brothers you refer to George and Lester Simmons? A. Yes, I do.

Q. Have you ever rented any real property from Mr. Remmer? A. Yes, I did.

Q. What property?

A. I rented a portion of the 21 Club for two months or three, I am not sure.

Q. Is that the real property sometimes referred to as 90 San Diego Street, El Cerrito?

A. That I am not sure.

Q. You say that you rented a portion of the 21 Club from him? A. Yes, I did.

Q. Where is the 21 Club located?

A. El Cerrito, California.

Q. Do you recall the street address? [521]

A. No, I do not.

Q. Do you recall whether or not it is 90 San Diego Street? A. No, I do not.

Q. And in what years did you rent a portion of those premises? A. That I couldn't state.

Q. You say you cannot state, is that because you do not remember? A. That's right.

Q. What portions of the premises of the 21 Club did you rent from him?

A. The back room.

Q. Did that back room have any particular name? A. San Diego Social Club.

Q. With regard to a portion of the premises which you rented from Mr. Remmer, known as the San Diego Social Club, did you operate any business on those premises?

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(Testimony of Walter M. Pechart.)

A. I refuse to answer on the grounds it will tend to incriminate me.

Mr. Campbell: I will press the question.

The Court: You will be detained until tomorrow morning at 10:00 o'clock. You are committed to the custody of the marshal until 10:00 o'clock tomorrow morning.

Have you counsel and have you consulted counsel on the subject matter of your presence here as a witness and the questions which might be required of you? [522]

A. Yes, I have.

The Court: You have counsel now?

A. Yes, I have.

The Court: So the marshal will give counsel an opportunity to confer with Mr. Pechart and you will have a hearing tomorrow morning at 10:00 o'clock on the matter concerning your refusal to answer the question.

Read the question so we will have it in mind.

(Question read.)

The Court: The witness is committed to the custody of the marshal, to be here tomorrow morning at 10:00 o'clock.

Mr. Haller: If the Court please, for the sake of the record——

The Court (Interceding): The witness will be given an opportunity to be heard tomorrow at 10:00 o'clock.

Mr. Gillen: May it please the Court, I was going

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to suggest that we haven't concluded our cross-examination of Mr. Weisz.

MR. WEISZ

having been previously sworn, resumed the witness stand on further

Cross-Examination

By Mr. Gillen:

Mr. Campbell: I provided counsel with certain additional returns which they could take over the week end for the purpose of examination. You have them with you, have you, Mr. [523]

Mr. Gillen: Yes, these are the ones.

The Court: I have forgotten—you have entered on your cross-examination before, this is just resuming?

Mr. Gillen: Yes, your Honor. The cross-examination was ended with the examination of certain documents to be produced in court.

Mr. Campbell: As I recall, it reached the point where Mr. Gillen had asked if there were additional amended returns filed and I offered them to counsel at that time and called another witness rather than take the time to examine them.

Mr. Gillen: That was it, your Honor.

Q. Now, Mr. Weisz, I have before me a folder that you produced and in the folder are 1, 2, 3, 4, 5 returns. With the Court's permission I would like you to look at these and after you have looked at them, I will ask you a question. Now, Mr. Weisz, my question is, having examined the folder that I

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(Testimony of Chris R. Weisz.)

handed back to you, the one that you produced in court Friday last, have you found, in addition to those and in addition to what has been offered in evidence, any other returns or amended returns for the 21 Club, the 311 Club——

Mr. Campbell (Interrupting): Pardon me, may that be broken into individually? I think he has to refer to different files.

Q. All right, then we will break the question down. In addition to what you have in the folder there and in addition to [524] what may be in evidence or in custody of the court, marked for identification and therefore out of your hands, do you find any other return or amended return, first of all for the 21 Club?

Mr. Campbell: I suggest this question is calling for his conclusion as to what is in the custody of the court.

Mr. Gillen: I am distinguishing what we already have.

Mr. Campbell: I think the question is if he has any more, what he has found any more than he is producing.

The Court: I think that is what you mean?

Mr. Gillen: That is right. I want to eliminate what he has already produced before the court and see if there are any additional, that is my purpose.

A. No.

Q. May I ask you the same question as to the 311 Club, have you in your possession now any

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(Testimony of Chris R. Weisz.)

additional returns, or amended returns, for the 311 Club?

A. No, except I brought a 311 Club return with me which was in the wrong return.

Q. By wrong return do you mean that it did not refer to the 311 Club, which is involved in this matter? A. That's right.

Q. It was some other 311 Club?

A. 311 Cafe, and inadvertently put it in with this. Has nothing to do with this. [525]

Q. Was that 311 that you brought a mislaid file?

A. No, we just misread it in going through and didn't realize it was a different return and involves 311 Washington Street, San Francisco, and we put it in.

Q. Now may I ask the same question as to the B & R Smoke Shoppe, any additional returns in your possession, or amended returns, which have not been presented to the court yet?

A. We have these two returns in this file, which I gave you Friday.

Mr. Campbell: Was that for the same year?

Mr. Gillen: No, 1943 and 1944. I should like to offer in evidence the two documents in the form of partnership returns just handed me by the witness. The first document is for the year 1943 for the B & R Smoke Shoppe, and the second document is for the year 1944 for the B & R Smoke Shoppe, both designated "Amended Returns." May they be marked in evidence as defendant's Exhibits?

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(Testimony of Chris R. Weisz.)

The Court: Yes.

Mr. Campbell: No objection.

The Court: They may be admitted in evidence as defendant's Exhibits N and O.

Q. Now may I inquire, Mr. Weisz, if you have any additional returns, or amended returns, other than are before the court for 110 Eddy enterprise?

A. No. [526]

Q. Now I will ask the same question with regard to the Day-Night Smoke Store. A. No.

Q. And I will ask the same question with regard to the 186 Club?

A. I have two additional for the 186 Club. These were in the folder which I gave you Friday evening.

Mr. Gillen: I should like to offer both of these in evidence for the defendant, may it please the Court, and I should like to have the partnership return for the year 1943 for the 186 Club marked as the first in order.

The Clerk: P.

Mr. Gillen: And the corporation excess profits return marked next for 1943.

Mr. Campbell: Is that a fiscal or calendar year?

Mr. Gillen: That is a fiscal year.

Mr. Campbell: For identification, will you state the fiscal period for that?

Mr. Gillen: Ending June 30, 1943, and beginning July 1, 1942.

The Court: Exhibit P admitted.

Q. Now I show you here a photostatic copy of

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(Testimony of Chris R. Weisz.)

what purports to be an additional return for the calendar year 1944 for the same place, 186 Club, and I will ask you, Mr. Weisz, if you will look at it and tell us exactly what it is. [527]

Mr. Campbell: Just a minute—I am going to object to that, if the Court please, the document should be marked first for identification.

Mr. Gillen: You are right. May I have this marked for identification, your Honor?

Q. I am handing you what I have already described and which is now designated as defendant's Exhibit R for identification. Be kind enough to look at that, Mr. Weisz, and tell us what it represents.

A. That is a corporation income and declared excess profits tax return for the fiscal year July 1, 1942, to June 30, 1943.

Q. Now there are some impressions on there of rubber stamps. Will you tell us what those mean?

A. The received stamp?

Q. Yes, the various rubber stamp impressions that are left on the face of that document, will you tell us what they mean?

A. There is a "Received" stamp dated May 31, 1944, First District of California.

Q. What does that mean, that that was the date it was received by the Collector of Internal Revenue, First District of California?

A. Yes, says, "Received with remittance."

Q. That means received with money that was paid on it?

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(Testimony of Chris R. Weisz.)

A. Yes, that's right.

Q. Was there any other stamp bearing any other significance to you as a deputy collector on [528] there?

A. Yes, another stamp on here which says, "Revenue Agent in Charge Received July 12, 1945, San Francisco."

Q. That the revenue agent in charge received that particular document on the date given?

A. Yes.

Q. That would be received from the collector's office, is that correct? A. Correct.

Q. In other words, the May stamp was when the taxpayer turned it into the collector of internal revenue and the July stamp is when the agent in charge received it from the collector, is that correct?

A. That's right.

Q. Any other stamp of significance on there?

A. There is a "Reviewed" stamp, which has been crossed out.

Q. What does the "Reviewed" stamp mean?

Mr. Campbell: Apparently it has been cancelled.

The Court: The witness can answer.

A. Well, the "Reviewed" stamp ordinarily means that it has been reviewed by some office, either the collector's office or the revenue agent's office. I can't tell which one this is. It has been crossed off so badly.

Q. You are not able to determine the date?

A. The date is very clear, date November 30, 1944.

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(Testimony of Chris R. Weisz.)

Q. Now, Mr. Weisz, while you are holding that in your hand—— [529]

The Court: Do you want to have this offered in evidence?

Mr. Gillen: Yes, I will offer it.

Mr. Campbell: No objection.

The Court: Exhibit R admitted in evidence.

Q. Now, I will hand back to you Exhibit R, which is now in evidence, and I will show you also Exhibit Q for the defendant, which is also in evidence and which appears to be another form of return for the same corporation for the same period of time. Will you explain the reason for those two different returns for the same corporation for the same period of time?

Mr. Campbell: Objected to, calling for his conclusion as to what was in the taxpayer's mind.

The Court: Let us have the question.

(Question read.)

The Court: We will hear what the answer is.

Mr. Campbell: I didn't understand what the question was.

Mr. Gillen: I presume counsel withdraws the objection?

Mr. Campbell: Yes.

(Question read.)

Q. Two different forms. I have different forms, do you notice that? A. I wouldn't know.

Q. Well, do you know whether or not it is not

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(Testimony of Chris R. Weisz.)

a fact that at that particular time all corporations were required to file two forms, one form of which was called the corporation income [530] and deferred value excess profits tax return, which is defendant's Exhibit R, and the other of which was called corporation excess profits tax return, which is defendant's Exhibit Q. Does that recall anything to your mind?

Mr. Campbell: I will stipulate that is a fact, that was the law.

Mr. Gillen: We will accept the stipulation that all corporations were required at that time to return those two forms.

Mr. Campbell: Well, not all corporations, but this type of corporation.

Mr. Gillen: Well, all right, this type of corporation was required to return those two forms for their accounting or fiscal return, whatever it might be.

Mr. Campbell: It is a matter of law.

Q. Now, Mr. Weisz, attached to defendant's Exhibit Q, we find an orange sheet and a green sheet. Can you tell us what those are?

A. That's a consent for extending the statute of limitation.

Q. In other words, that is where the corporation or the taxpayer consents to permit the government to have a longer period than the period of statute of limitations to examine into the matter, is that correct? A. That's right.

Q. In other words, it prevents the outlawing of

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(Testimony of Chris R. Weisz.)

the matter, is that correct? [531] A. Yes.

Q. And will you tell us what is the last consent date, what date does it extend to on that exhibit?

A. June 30, 1952.

Q. So the taxpayer has consented to permit the government to have until June 30, 1952, to continue its investigation of that and has not taken advantage of the statute of limitations, is that correct?

A. Yes.

Q. Now, before we leave defendant's Exhibit R, which is the corporation income and declared value excess profits tax return for the fiscal year commencing July 1, 1942, and ending June 30, 1943, and which you have identified as having been received, from the stamp on the face of it by the Collector for the First District of California, on May 31, 1944, do you find in your records the original from which that photostat copy was taken, or the original return which was received on May 1, 1944?

A. I have a note here where I have this number.

Q. Do you know what happened to the return?

A. No, I don't.

Q. Was it misplaced or lost?

A. I don't know.

Q. Did you look for it when you were looking for all these records and were you unable to find it? [532] A. I don't have that note.

Q. You have a note that you were looking for such a numbered document, do you? A. Yes.

Q. What is your recollection when you made the

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(Testimony of Chris R. Weisz.)

search? Were you unable to find it where it should have been, or unable to find it any place? Do you have my question in mind? A. Yes, I do.

Q. I am asking you now for your own independent recollection of what you encountered, or what the result of your search was for this particular return?

A. Hasn't this return been offered in evidence, the original?

Q. No, I do not believe so. In fact, I am certain it has not. If you care to look at your evidence, I would be glad to have you check with the clerk. I am sure the original has not been offered in evidence. You have no recollection at this moment of finding that in your search?

A. No, I do not. I do not remember.

Q. You have no recollection of whether you found it or not?

A. That's right, I do not know. There were so many of them.

Q. This return would be a matter that was coming before your official attention, is it not?

A. Yes.

Q. You were assigned to produce this document?

A. That is right. [533]

Q. Would you say that this is an instance where a mislaid or lost return has come officially to your attention?

Mr. Campbell: Objected to because he said he did not know. He has been given the opportunity to make the examination——

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(Testimony of Chris R. Weisz.)

Mr. Gillen: All right, we will withdraw the question until such time as he has checked with the clerk of the court. May I suggest he be returned after he has an opportunity to check, so we won't delay matters now?

Mr. Campbell: That is satisfactory.

The Court: Yes.

Q. It appears that 186 Club was a corporation and not a partnership, isn't that correct; is treated as such by the government?

Mr. Campbell: Objected to; that is calling for his conclusion, if the Court please. He is not the man to pass upon such matters.

The Court: I think the question really means what appears from the document.

Mr. Campbell: No, Mr. Gillen just said, treated as such by the government.

The Court: Reframe your question.

Q. From what appears from the documents, the form of returns which you have produced here, which are now in evidence, it is true, is it not, that the United States Internal Revenue [534] collector treated this organization or enterprise, the 186 Club, as a corporation rather than a partnership or individual business?

Mr. Campbell: Objected to as incompetent and immaterial, not within the scope of this man's examination.

The Court: He can answer if he knows. Do you know?

A. Well, the returns would so indicate.

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(Testimony of Chris R. Weisz.)

Q. Now, Mr. Weisz, I want to show you plaintiff's Exhibit 89, which you will find is the partnership return for the year 1945 for the Menlo Club, and attached to that is a letter. I would like to have you look at the letter and tell us, if you know, what is the meaning of the initial "M" alongside the purported signature of Elmer Remmer, the defendant?

Mr. Campbell: Just a minute—that portion of the signature certainly can not——

Mr. Gillen: Suppose counsel does not point out his ability or limitation of Mr. Weisz. Mr. Weisz may know more than you think he does.

Mr. Campbell: I ask the jury to disregard the last statement of counsel and also I point out to the Court that the "M" actually referred to is a handwritten "M," which is a portion of the signature; therefore, I object to the question as calling for conclusion of this witness.

Mr. Gillen: I am asking him if he has any knowledge. If he hasn't, all he has to do is to say no.

The Court: Let us have the question. [535]

(Question read.)

Mr. Campbell: I will ask your Honor to examine the exhibit.

The Court: He may answer the question.

A. No.

Q. You don't know whether it means Maundrell for Harold Maundrell who was the bookkeeper for the Menlo Club, do you? A. No.

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(Testimony of Chris R. Weisz.)

Mr. Gillen: With the Court's permission, I would like to read from the letter attached to the 1945 Menlo Club return, which is plaintiff's Exhibit 89 in evidence. I would like to read the letter.

The Court: You may.

Mr. Gillen: This is all in typewriting with the exception of the purported signature. (Reads Exhibit 89.)

Q. And then the inked signature, "Elmer F. Remer" and then below that the inked initial "M," and below that in typewriting the word "Partner." Now, it appears, does it not, Mr. Weisz, that the data from some period the preceding year had been used as the basis of estimating to arrive at what was due that year, is that correct?

Mr. Campbell: Objected to as argumentative. The document speaks for itself and makes its own explanation.

Mr. Gillen: All right, I will withdraw it.

The Court: It is withdrawn. [536]

Q. I am going to show you, Mr. Weisz, plaintiff's Exhibit 57 for identification, which appears to be a 1943 return for the 21 Club and San Diego Social Club, which you produced here on Friday, if my recollection serves me right. If there is no objection and without further ado, I will offer it in evidence.

Mr. Campbell: We have no objection, your Honor, provided that, for the purpose of keeping the exhibits in some semblance of order, that it be

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(Testimony of Chris R. Weisz.)

marked as exhibit for the defendant instead of plaintiff's number.

The Court: Instead of being admitted as Exhibit 57, it would be admitted as defendant's exhibit next in order, Exhibit S.

Mr. Campbell: That was produced when Mr. Billington was on the stand.

The Court: Yes, just a moment. We can get along without any discussion.

Mr. Gillen: I think that is all, Mr. Weisz, thank you. Jury and alternate jurors admonished and short recess taken at 11 o'clock.

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEISZ

resumes the witness stand on

Redirect Examination

By Mr. Campbell:

Q. Mr. Weisz, prior to the recess—— [537]

Mr. Gillen: May I interrupt counsel for a moment. Did Mr. Weisz learn whether or not the exhibit R, the photostat, there was in his record any note of that?

Mr. Campbell: Yes, I am just going to show him defendant's Exhibit J for identification and ask him if that is not the same exhibit of which a pho-

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(Testimony of Chris R. Weisz.)

tostat has been put in as defendant's R, concerning which he was asked whether or not he had produced such a document.

Mr. Gillen: We will stipulate it is.

Mr. Campbell: I wish to show that to the witness.

The Court: You may proceed.

Q. I am going to hand you defendant's Exhibit R, the photostatic copy of which was shown to you by Mr. Gillen. He asked you if that was an instance of a misplaced return; and also defendant's Exhibit J for identification, and ask you to compare them and state whether or not J for identification is the original of which R is a photostatic copy? A. Yes.

Mr. Campbell: Thank you. That's all.

Recross-Examination

By Mr. Gillen:

Q. Mr. Weisz, "J" for identification is the document that we called for and received from you on cross-examination, isn't that correct?

A. Well, I produced it at some time.

Q. It is marked defendant's Exhibit. It was called for, isn't [538] that true?

A. Yes, it must be.

Mr. Gillen: We offer it as defendant's J in evidence.

Mr. Campbell: Do you wish to withdraw R at this time?

Mr. Gillen: No, we will leave them both in.

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(Testimony of Chris R. Weisz.)

Mr. Campbell: Very well.

The Court: Exhibit J is admitted.

Mr. Campbell: That's all, Mr. Weisz.

The Court: Is there any reason why this witness could not be finally excused now?

Mr. Campbell: We desire to keep him for other purposes.

The Court: Very well.

GEORGE E. SIMMONS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. George E. Simmons.

Q. Where do you reside, Mr. Simmons?

A. El Cerrito, California.

Q. What is your business or occupation?

A. Public accountant, insurance and real estate.

Q. What is the name of your firm or the concern with which you are located?

A. My own practice.

Q. You practice under the name of George Simmons? [539] A. G. E. Simmons.

Q. And do you have any one associated with you in that business?

A. No public accountant, no.

Q. Is there one Lester Simmons who is associated with you?

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(Testimony of George E. Simmons.)

A. He was associated with me.

Q. And over what period of time was he associated with you?

A. To about 1944 to 1947 or '48, I don't remember which.

Q. What is the office address of your business?

A. The present office, 3803 McDonald Avenue, Richmond.

Q. Now, in connection with your public accounting work, did you keep, or supervise the keeping of the records of the 21 Club?

A. Will you restate the question?

(Question read.)

A. No, sir.

Q. Did you at any time have the records of the 21 Club? A. No, sir.

Q. Did any one connected with your firm or your business do so?

A. I might explain that I was hired as an auditor and bookkeeper, not to supervise and not in an accounting capacity; simply was an employee.

Q. I asked you, did you keep the books of the 21 Club? A. Yes, sir.

Q. You did keep them? A. Yes, sir. [540]

Q. Did you keep the books of the San Diego Social Club? A. Yes, sir.

Q. And did you keep the books of the 311 Club?

A. Yes, sir.

Q. By whom were you employed for that purpose? A. Messrs. Pechart and Kessel.

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(Testimony of George E. Simmons.)

Q. By Messrs. Pechart and Kessel, you refer to the two men who were on the stand here this morning? A. Yes, sir.

Q. Are you acquainted with the defendant, Elmer Remmer?

A. No, sir—correction—I know of Elmer Remmer.

Q. Did you ever meet Elmer Remmer?

A. Yes, sir.

Q. And did you ever meet him in connection with your employment as to the books of the 21 Club, the San Diego Social Club or the 311 Club?

A. I never discussed it with him.

Q. Did you keep the books of those three clubs during the years 1944, 1945, and 1946?

The Court: Maybe I missed something, I don't quite get that question. I only heard two clubs with which this gentleman was employed.

Q. Mr. Simmons, I asked you as to the 21 Club, you kept the books there? A. Yes. [541]

Q. You also kept books of the San Diego Social Club? A. That is right.

Q. And did you also keep the books of the 311 Club? A. Yes, sir.

Q. And did you keep those books of those three clubs during the years 1944, 1945 and 1946?

A. I don't remember whether the 311 was in existence at that time. If it was, I kept the books.

Q. You do recall that the 21 Club and the San Diego Social Club were in existence at that time, is that correct? A. Yes, sir.

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(Testimony of George E. Simmons.)

Q. And if the 311 Club was in existence at that time, you kept its books, is that right?

A. Yes, sir.

Q. Now you were served with a subpoena, Mr. Simmons, to produce all books of any description for the period January 1, 1943, to January 31, 1947, inclusive, relating to the following businesses: 21 Club, San Diego Social Club, and 311 Club, all of El Cerrito, California. Have you produced such records? A. No, sir.

Q. Do you have any records of any kind relating to those three clubs in your possession?

A. No, sir.

Q. Do you have any work papers with relation to those three clubs in your possession? [542]

A. No, sir.

Q. When was the last time such matters were in your possession?

A. As far as I can remember in 1947 and the first part of '48.

Q. Had you delivered all such records to some one at that time?

A. They were left with the employer when I left his employ.

Q. You have not, since 1947 or 1948, been employed in connection with any of these three businesses?

A. No, sir. I might amend that to this extent, that in 1949 I handled the books of one small restaurant for Pechart and Kessel.

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(Testimony of George E. Simmons.)

Q. Aside from that, you severed your relationship, is that correct? A. Yes, sir.

Q. Are you acquainted with one Joseph Billington? A. Yes, sir.

Q. Now, in connection with those three businesses to which I have referred, did you prepare certain partnership returns of income for them?

A. Yes, sir.

Q. I am going to show you plaintiff's Exhibit 54, being partnership return of income Jos. Billington, doing business as 21 Club, and ask you if that is a return which you prepared in 1944?

A. Yes, sir.

Q. What was the source of the information which you placed in [543] this return?

A. The source was from Messrs. Billington and Pechart and Kessel.

Q. Did you examine any books or records in that connection? A. Yes, sir.

Q. Were those books and records which were kept by you? A. Yes, sir.

Q. Now, Mr. Simmons, you were familiar, were you not, with the operation and the nature of the operation of the 21 Club? A. Yes, sir.

Q. Where was it located?

A. In El Cerrito on Panhandle Boulevard and San Diego Street.

Q. Was that at an address known as 90 San Diego Street? A. I believe so.

Q. Would it refresh your recollection to examine the return? A. That's right.

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(Testimony of George E. Simmons.)

Q. Now at 90 San Diego Street was there more than one of these clubs located?

A. There was one building which had a restaurant and bar in one section, a gambling house in the other section.

Q. The restaurant and bar were known under what name? A. The 21 Club.

Q. And the gambling part was known by what name? A. San Diego Social Club.

Q. First let me ask you as to the physical set-up. Was the [544] gambling establishment behind the restaurant and bar or to one side?

A. Well, it depends what way you look at the building. The entrance was into the bar and restaurant. The gambling was in the other room.

Q. Was there a separate entrance to the gambling establishment? A. Not that I know of.

Q. So that in order to enter the gambling establishment one had to pass through the bar and restaurant, is that right?

Mr. Gillen: Objected to as leading and suggestive, also misquoting the witness. The witness said he didn't know that he knew of.

Mr. Campbell: Well, it is immaterial. I will withdraw it.

Q. Now with reference to these books which you kept both for the 21 Club and the San Diego Social Club, where did you keep them?

A. 315 San Pablo Avenue.

Q. At your office? A. Yes, sir.

Q. From what source did you get the informa-

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(Testimony of George E. Simmons.)

tion—let us take the 21 Club first—that went into those books?

Mr. Gillen: Objected to as already asked and answered. He said he kept the books and got the information from Pechart, Kessel and [545] Billington.

The Court: Objection overruled.

A. The information was received daily or weekly in the form of report from the manager, which were entered into the records as I kept them.

Q. Who was the manager of the 21 Club?

A. The first time was Mr. Cavani and later Mr. Billington.

Q. Do you recall during what period of time it was Mr. Cavani?

A. Well, Mr. Cavani was the first. I don't remember what time Mr. Billington took over. I think it was in October of 1945 or '46. I think it is '45.

Q. Who was manager of the San Diego Social Club from whom you got information?

A. Mr. Billington.

Q. So then, as I understand, the San Diego Social Club was a gambling room?

A. That's right.

Q. Mr. Cavani managed the bar and restaurant, is that correct? A. Yes, sir.

Q. And Mr. Billington managed the gambling establishment? A. Yes, sir.

Q. Now was the 21 Club a sole proprietorship, a partnership, or a corporation?

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(Testimony of George E. Simmons.)

A. As I remember, Mr. Cavani operated the 21 Club as an individual for some time.

Q. Then? [546]

A. I am not entirely sure. Apparently it was all grouped together after that between Mr. Billington and Mr. Cavani. The operations were consolidated.

Mr. Gillen: I will object, if the Court please, and move the answer be stricken as purely opinion, conclusion and speculation of the witness; if your Honor will listen to the answer.

The Court: Motion will be denied.

Q. I am going to show you government's Exhibit 72, partnership return of income of the 21 Club for the fiscal year beginning January 1, 1944, and ending September 30, 1944, and ask you if you prepared that return? A. No, sir.

Q. Do you know by whom it was prepared?

A. No, sir.

Q. I am going to show you government's Exhibit 72A, partnership return of income for the calendar year 1944 of Frank Cavani, doing business as the 21 Club, and ask you whether or not you prepared that return? A. Yes, sir.

Q. I am going to show you plaintiff's Exhibit 54, partnership return of income for the calendar year 1944 of Joseph Billington, doing business as 21 Club, and ask you if you prepared that return?

A. Yes, sir. [547]

Q. Now I call your attention to the fact that both of these returns purport to be of the 21 Club,

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(Testimony of George E. Simmons.)

one being that of Frank Cavani, doing business as the 21 Club, and the other that of Joseph Billington, doing business as the 21 Club, and ask, if you will, to state why the two returns were filed?

The Court: Will you refer to the exhibit numbers in your questions?

Q. In asking you that question, Mr. Simmons, I am referring to plaintiff's Exhibits 54 and 72A, being partnership returns, both for the calendar year 1944.

A. I don't know. I prepared them, but I don't know.

Q. Upon whose instructions did you prepare those returns?

Mr. Gillen: Just a moment. I am going to offer an objection, assuming something not in evidence—upon whose instructions. It is leading and suggestive and the witness has already answered he doesn't know why two returns were made.

The Court: It is leading.

Mr. Campbell: I don't think it suggests who gave him the instructions. Very well, I will withdraw the question.

Q. Can you state from the examination of those returns, if you will first examine plaintiff's Exhibit 54, Mr. Simmons, will you state the nature of the operation set forth thereon?

Mr. Gillen: Objected to, the document speaks for itself. It is in evidence.

The Court: Read the question. [548]

(Question read.)

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(Testimony of George E. Simmons.)

Mr. Gillen: It is previously testified to.

The Court: Objection overruled. Answer the question.

A. I can not tell.

Q. You can't answer. All right, sir.

Mr. Campbell: I would like to have this photostat marked——

The Court: The jury will be excused now.

(Jury admonished and alternate jurors, and excused at 11:40.)

(In the absence of the jury.)

The Court: I desire to have an order entered admitting the witnesses Mr. Kessel and Mr. Pechart, to bail in the sum of five thousand dollars each, conditioned upon their appearance here tomorrow morning and whenever ordered by the Court, and that bail is to be approved by the United States attorney. We will now be in recess until 1:00 o'clock.

Mr. Pike: Before the Court recesses, if we could have a number assigned to this last exhibit, the photostat, by the clerk.

Clerk: 93.

Mr. Gillen: I wonder if I might ask your Honor this. On the appearance Friday of Mr. Kessel on the witness stand and upon his stating to the Court that he declined to answer the question, giving his reasons, I made a statement to your Honor in the absence of the jury as to the position of the defense in this case and I wonder if I may have the permis-

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(Testimony of George E. Simmons.)

sion of the [549] Court to make that statement in the presence of the jury. He is a government witness.

The Court: Yes, sir, you may. Call it to my attention when we open court again.

Mr. Gillen: Thank you.

(Noon recess taken at 11:45.)

December 10, 1951, 1:45 p.m.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Simmons, prior to the noon recess you testified that you had returned all of the records called for in the subpoena duces tecum that was served on you. To whom did you return those records?

A. That were left with the Pechart and Kessel organization when I left.

Q. And at what address?

A. 315 San Pablo Avenue, El Cerrito.

Q. And you have not seen them since that time?

A. No, sir.

Q. Mr. Simmons, I will ask you whether or not, during the course of your employment, you drew a

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(Testimony of George E. Simmons.)

profit and loss statement and balance sheet of the 21 Club as of December 31, 1943? [550]

A. I do not remember it.

Mr. Campbell: I will ask to have this marked for identification as government's next in order.

Q. While counsel is examining that, I will ask you whether or not you drew a property schedule of the San Diego Social Club as of 1943 and 1944?

A. I do not remember, sir.

Mr. Campbell: I will ask to have this marked for identification as government's Exhibit 95 for identification.

Q. I show you government's Exhibit 94 for identification and I particularly call your attention to the balance sheet and profit and loss statement attached thereto, and ask you if that is a document which you prepared in the course of your employment?

A. I prepared this. Whether or not the figures are correct, I don't know now.

Q. You did prepare that, however?

A. I did prepare it, yes, sir.

Q. Was that prepared from such books and records as were made available to you or were available to you at that time? A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's Exhibit 94.

Mr. Gillen: May it please the Court, before your Honor rules on the admission of the document, I would like to ask Mr. [551] Simmons some ques-

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(Testimony of George E. Simmons.)

tions on voir dire to inquire as to the authenticity of it?

The Court: Yes, sir.

Q. (By Mr. Gillen): Mr. Simmons, with the Court's permission, I will ask you to look at this exhibit again and tell us what there is about this that causes you to recognize it, or enable you to recognize it as something you prepared?

A. I remember the figure of approximately 1700 loss.

Q. Is that the only thing that enables or assists you? A. Yes, sir.

Q. There is nothing about any of the other figures? A. Just a blank.

Q. But you do recall that you did prepare it. That showed a 1700 odd dollar loss?

A. That's right.

Q. At that time, 1943?

A. This is written in 1944.

Q. I mean for 1943? A. Yes, sir.

Q. There is nothing else about the document that assists you in any wise recalling the preparation? A. That is right, sir.

Mr. Gillen: That is sufficient, your Honor, and I offer the objection to its admission. It purports to be a copy of something. There is no original signature or anything on the [552] document. Would your Honor care to see it?

The Court: Read the previous question and answer.

(Question and answer read.)

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(Testimony of George E. Simmons.)

The Court: I think the objection will go more to the weight than to the admissibility. The exhibit will be admitted in evidence, Exhibit 94.

Q. (By Mr. Campbell): Mr. Simmons, I show you plaintiff's Exhibit 95 for identification and ask you if this is a document which you prepared in the course of your employment?

A. I wouldn't know, sir.

Q. Is there anything to which you could refer which might refresh you recollection in that record?

A. Nothing, sir. I have no way.

Q. I am going to show you, Mr. Simmons, government's Exhibits 54 and 72A, being partnership return of income for the year 1944 of Jospeh Billington, doing business as the 21 Club, and Frank Cavani, doing business as the 21 Club, respectively, and ask you to examine those, which you have heretofore testified you prepared. I will also hand you government's Exhibit 95 for identification and ask you if examination of the first two mentioned exhibits refreshes your recollection as to preparation of the document marked for identification? You will examine particularly the depreciation schedules set forth on those returns.

A. These returns for Joseph Billington and Frank Carvani, 1944. [553] This memorandum is headed "San Diego Social Club." I can't remember anything about that.

Q. Very well. In connection with the keeping of these books, did you become acquainted with Walter Parman?

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(Testimony of George E. Simmons.)

A. I believe the latter part of '43 or the first of '44.

Q. And what, if any, connection did he have with any of these clubs?

A. He was operating manager of the San Diego Social Club.

Q. Do you recall over what period of time?

A. No, sir, I do not.

Q. What do you mean by operating manager?

Mr. Gillen: Objected to as calling for opinion and conclusion.

The Court: Objection overruled. You may answer the question.

Q. He had charge of the gambling portion of the San Diego Social Club for a certain length of time, comparatively short, if I remember.

Q. Do you recall when he left?

A. No, sir.

Q. Do you recall who succeeded him?

A. About seven or eight of them. I can't remember off-hand.

Q. Did you become acquainted, in the course of your employment, with one A. Ruggiardo?

A. Yes, sir. [554]

Q. Sometimes known as Tony Ruggiardo. How do you spell that, Mr. Simmons?

A. I don't know.

Q. What was his connection with the Club?

A. He was manager for a while of the San Diego Social Club.

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(Testimony of George E. Simmons.)

Q. When you say manager, do you mean operating manager again? A. Yes, sir.

Q. Over what period of time was he operating manager?

A. 1943 to possibly '45, possibly '46, I can't remember which year.

Q. Was he operating manager at the same time Parman was? A. He preceded Mr. Parman.

Q. I understood you to say that Parman was there in 1943 until early 1944?

A. That is right.

Q. Did you mean preceded or succeeded?

A. They were both there at the same time, they changed off.

Q. It required more than one operating manager?

Mr. Gillen: Objected to as calling for conclusion.

The Court: Objection will be sustained as to that.

Q. To your observation, would there be more than one operating manager present at the same time? A. Yes, sir.

Mr. Gillen: Calling for opinion and conclusion. He might be present and not be working. [555]

The Court: Objection overruled and the answer may stand.

Q. As I understood you to say, Riggardio was there until some time in 1945, is that correct?

A. Or 1946.

Q. Did you become acquainted with one Andrew

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(Testimony of George E. Simmons.)

Desimone in the course of your employment?

A. Yes, sir.

Q. What was his connection?

A. Well, I would again call him an operating manager.

Mr. Gillen: Just a minute. I move the answer be stricken, no certainty—would call—stipulation. It is the witness' characterization. If he knows, he should say so, if he doesn't know, he may say so.

The Court: The answer may stand.

Q. Over what period of time was he there?

A. Possibly the same period as the other two.

Q. Now you said Parman left in 1944 and Riggiardo was there until probably 1946. Do you recall how long Desimone was there, over what period?

A. No, sir, I do not.

Q. In the course of your employment did you become acquainted with one Dimitria Sarantos?

A. Yes, sir.

Q. Can you spell that?

A. S-a-r-a-n-t-o-s. [556]

Q. And what was his connection there?

A. Sort of a head game keeper.

Q. What did you observe——

Mr. Gillen: We offer the objection—"sort of a head"—uncertain answer, characterization by the witness.

The Court: The answer may stand.

Q. What period of time was he there?

A. The early part of forty—I just don't know.

Q. You don't recall that time?

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(Testimony of George E. Simmons.)

A. I can't recall that time.

Q. In the course of your employment did you become acquainted with one Michael Nechek?

A. Yes, sir.

Q. What was his connection?

A. He was sort of a head game keeper.

Mr. Gillen: Same objection.

The Court: Same ruling.

Q. What do you mean by a head game keeper?

A. I am not very much familiar with the gambling fraternity names and activities. This is from my observation only.

Mr. Gillen: Then I move it be stricken. It is obvious the witness does not know.

The Court: Motion denied.

Q. Just go ahead, what was your observation?

A. Well, he acted as head man at the gambling table. [557]

Q. And over what period of time was he there?

A. I don't know, sir. A very short time.

Q. Do you recall in what year?

A. No, sir.

Q. Mr. Simmons, I am going to show you government's Exhibit 93 for identification, a photostatic copy, and ask you if you recognize the document of which this is a photostat?

A. It is a copy of information that I made up for the field auditor, as I remember.

Q. Was that made up from any books or records which were maintained for that club, the San Diego

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(Testimony of George E. Simmons.)

Social Club, for the year 1944, in the course of your employment?

A. I don't know, sir. It might have been made from the books. It might have been made up from memorandum that I had in my possession at the time.

Q. When you say memorandum which you had in your possession at the time, do you refer to memorandum which you had made or which had been provided to you in the course of your employment?

Mr. Gillen: I am going to object to that question, may it please the Court, as leading and also as containing an assumption. The man so testified and said he didn't know—it might have come from some books and might have come from some memorandums he had in his possession. I think the question is very leading.

The Court: Let me have the question. [558]

(Question read.)

The Court: Objection overruled. Answer the question.

A. I thought I answered that question.

(Question read.)

A. It was made from some records in my possession, just where I don't know. That is a copy——

Q. I——

Mr. Gillen: Just a minute—he hasn't finished his answer.

Q. Did you finish your answer?

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(Testimony of George E. Simmons.)

A. That is a copy, a memorandum, as I said before, it was made up for one of the field auditors. Whether or not this is correct, I can't remember now.

Q. I am trying to find out from you what you made it up from.

Mr. Gillen: Objected to as asked and answered. He says he doesn't know, it might have been made up from some books, might have been made up from memorandums in his possession.

The Court: I think we have covered that ground.

Mr. Campbell: I offer in evidence Exhibit 93 for identification.

Mr. Gillen: To which we offer an objection, may it please the Court. I would like to see the document. I would like to examine this gentleman on voir dire.

The Court: You may.

Q. (By Mr. Gillen): Mr. Simmons, this document, this photostatic [559] exhibit, which contains four photostatic pages which have been designated thus far prosecution's Exhibit 93 for identification, has written on it in what appears to be ink, "Office copy." Do you recognize the printing?

A. Yes, my handwriting.

Q. Now what became of the original of this?

A. I wouldn't have the least idea.

Q. Did you ever deliver it to anyone, the original of this? Did you retain it as your office copy?

A. I don't know, sir.

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(Testimony of George E. Simmons.)

Q. Now you mentioned that you made this up for a field agent.

A. A field auditor for the government.

Q. What do you mean by field auditor for the government?

A. Internal Revenue auditor, comes in and makes audit of the taxpayer's books.

Q. Do you recall how long after the year 1944 this was made up?

A. Probably 1946 or early part of '47, I don't remember; probably '46.

Q. Two or three years later? A. Yes, sir.

Q. And you do recognize the printing on this copy as your printing? A. Yes, sir.

Q. And that is something that you have retained, is it, in your office, or did you turn that over to the government? [560]

A. The original from which this was made was retained in my office. This has no signatures on it, so it is simply an office copy.

Q. You mean the four sheets from which these figures were made were retained in your office?

A. Yes.

Q. And what happened to the original of this, the original document?

A. That document was turned over to the Revenue Department.

Q. And when?

A. Some time in late 1946 or '47.

Q. And to whom particularly, do you recall?

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(Testimony of George E. Simmons.)

A. No, sir, I do not. One of the two revenue officers.

Q. You don't know the name of the men?

A. Mr. Farley or Mr. Gould, I don't remember which.

Q. Now do you know how the prosecution got a photograph of your office copy that was retained by you?

A. Possibly I didn't make myself clear. This copy was made up and given to the revenue agent.

Q. Yes?

A. And he made the photostatic copy evidently.

Q. Let us see if we understand each other. Did you make two copies of this?

A. I had one original copy in the office and I made up another and marked it "Office Copy" and gave it to the revenue agent. [561]

Q. You marked the one you gave to the revenue agent "Office Copy"? A. Yes, sir.

Q. And you retained the original?

A. Yes.

Q. Do you have that now? A. No, sir.

Q. Did the original copy contain anybody's signature? A. That I can't recall.

Q. Did you sign it?

A. I signed that one, yes, sir. I signed it as having prepared that copy.

Q. Was anybody else's signature on the original that you retained? Any taxpayer's signature?

A. I don't think so. It doesn't indicate so there.

Q. Will you tell us why it was that you gave the

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(Testimony of George E. Simmons.)

office copy rather than the original to the field auditor?

A. As I remember, he asked for a copy.

Q. He asked for a copy? A. For a copy.

Q. Was this return ever made? Was it ever filed? A. That I don't know, sir.

Mr. Gillen: I think, may it please the Court, that I will have to offer the objection that this document, this exhibit, is something that was prepared by Mr. Simmons, as he has [562] related, from data or under circumstances that he doesn't now recall and that it was never presented to or signed by anybody so far as his knowledge is concerned, except he signed it as the one who prepared it, and that he gave an office copy to a field auditor for the government and retained the original and so far as he knows, the original was never filed and so, of course, it couldn't be binding on anybody. In other words, if I may make myself clear, from this testimony, suppose somebody comes to my bookkeeper and says, make up some data, and he makes it up and gives it to him and I never see what he made up, I never sign it, I never return it as any declaration against my interest, so it can not be binding certainly on this defendant, whose name does not appear there on the document itself.

Mr. Campbell: Yes, it does, under schedule I.

Mr. Gillen: I mean it doesn't appear as returned. I would like your Honor to see this document.

Mr. Campbell: I wish to be heard. As your

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(Testimony of George E. Simmons.)

Honor examines it, I particularly direct your attention to Schedule I, as set forth as partnership distributive shares.

The Court: I would be glad to hear from you, Mr. Campbell.

Mr. Campbell: I wish to point out to your Honor that this document was prepared by this witness in the course of his employment as bookkeeper for that particular organization, as well as the other organization. He testified that it was prepared [563] from memorandum or books which he had in his possession as a result of that employment, and I think counsel's objection actually goes to the weight of the document rather than to its admissibility. We are forced, of course, to rely upon secondary evidence here because the witness has put all his original books of account in the hands of his employers.

Mr. Gillen: May I be heard further?

The Court: Yes.

Mr. Gillen: In the first place we must recall that this witness has stated that he was employed by Pechart and Kessel and that in the course of the employment with Pechart and Kessel that he kept some books for certain organizations in which they were interested. He stated definitely and emphatically and unequivocally that he had never done any work for the defendant here and had never discussed the matter with him. Here we have something that is in the form of a return, may it please the Court, and if it was ever filed as a return, the origi-

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(Testimony of George E. Simmons.)

nal should be in the hands of the prosecution and it should be produced here, but since it is not produced here, we must assume that that was never filed as a return, but was some data made up on form of return some two years later; that the partnership never signed it as a return, either for themselves or for the partnership and it is just some data that is made up from whatever it was—Mr. Simmons is very sketchy about it. Certainly that would not be binding upon the defendant in [564] this case and I do not think the proper foundation is laid. Maybe they can do it, or maybe they can produce the original return, if it was ever filed, but I think it is without foundation and should not be received by your Honor at this time.

Mr. Campbell: We do not contend that this document was filed as a return, but this is a document that was prepared by this man in the course of his duties as a bookkeeper.

Mr. Gillen: Not for this defendant.

Mr. Campbell: The evidence here shows that the defendant claimed to have and reported income from those concerns as a partner in those stores. The other documents here in evidence show that he is a partner in this organization.

The Court: That is the thought I have, Mr. Gillen, while this witness' testimony alone might not show any relationship, other evidence we have had does. The document will be admitted in evidence.

Mr. Gillen: It doesn't indicate, may it please the

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(Testimony of George E. Simmons.)

Court, it is form of return that was prepared even for the partnership.

The Court: But it constitutes a summation of records.

Mr. Gillen: If it was filed for the partnership, I would say it had some dignity and your Honor should consider it, but it has not been filed as a partnership return, may it please the Court.

The Court: Well, it is admitted in evidence, Exhibit 93.

Mr. Campbell: If I may read briefly from this exhibit. [565]

The Court: Yes, sir.

Mr. Gillen: Before counsel reads, may I ask counsel, through the Court, whether or not the government is in possession of that document in its original form, whether or not that document was ever filed as a return for the partnership? If it is, then secondary evidence should not be introduced here. Primary evidence would, of course, be the best evidence.

The Court: Do you desire to answer the question?

Mr. Campbell: Yes, I have no objection. As previously stated, the government does not contend, in fact states that this document was never filed as a return, and I further state that this is the best evidence in our possession of the contents of the document.

Mr. Gillen: It certainly is not binding on the defendant. This man wasn't even working for the defendant.

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(Testimony of George E. Simmons.)

The Court: I think we had better let the matter rest where it is now. Admitted in evidence.

Mr. Campbell: This is Exhibit 93. Is on form of return for partnership income, 1944. (Reads from exhibit.) Reading from Schedule I, "Partner's Shares of Income and Credits" (Reads) Making a total of $48,956.76.

Q. Mr. Simmons, I am going to show you government's Exhibit 55, a 1945 partnership return of income of J. Billington, doing business as the 21 Club and San Diego Social Club, and ask you whether or not you prepared that return in the course of [566] your employment?

A. It was prepared in my office by one of my associates, under my direction.

Q. By whom was the actual preparation done?

A. Mr. Beck.

Q. Was that return prepared under your direction and supervision? A. Yes, sir.

Q. Will you state whether or not it was prepared from books and records which you maintained in the course of your employment?

A. Yes, sir.

Q. I will call your attention to the fact that on the face this return states as being for both the 21 and San Diego Social Club? A. Yes, sir.

Q. Were the two operations combined for the purpose of that return?

A. Yes, sir, physically and for the return both.

Q. I show you government's Exhibit 56, being the 1943 return of Joseph E. Billington, and ask

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(Testimony of George E. Simmons.)

you whether or not you prepared that return?

A. Yes, sir.

Q. And was that also prepared in the course of your employment? A. Yes, sir. [567]

Q. I show you government's Exhibit 72A, being the partnership return of Frank Carvani, doing business as the 21 Club, for the year 1944, and ask you whether or not you prepared that return?

A. Yes, sir.

Q. Was that also prepared from the books which you kept in the course of your employment?

A. That is a '43 return?

Q. '44 return. A. Yes, sir.

Q. Now, Mr. Simmons, you stated that you kept books also for the 311 Club? A. Yes, sir.

Q. Where was that located?

A. 311 Panhandle Boulevard, El Cerrito.

Q. And in the course of your employment in that connection did you prepare partnership returns of income for the years 1944, 1945, and 1946?

A. I don't remember, but I believe I did.

Q. I show you government's Exhibits 74, 75 and 76 and ask you if you prepared those returns in the course of your employment, being partnership returns for the 311 Club for 1944, 1945 and 1946?

A. I personally prepared 1944 and 1946. 1945 was prepared by Mr. Beck under my supervision. [568]

Q. And were all three of those returns prepared from the books maintained by you in the course of your employment? A. Yes, sir.

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(Testimony of George E. Simmons.)

Q. Now what was the nature of the business of the 311 Club during those years?

A. Gambling.

Q. In the course of your employment, did you have occasion to visit the premises of the 311 Club from time to time? A. Yes, sir.

Q. What was the nature of the gambling carried on there during those years, to your observation?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: I do not believe it is material.

Mr. Campbell: I did not ask that question as to the preceding clubs, your Honor, but I do think it becomes material as to this particular one.

The Court: Well, we will sustain the objection for the present. We will see if anything develops which appears to make it material—we will consider the matter again. I can't see where it is material at this time.

Mr. Campbell: Very well.

Q. Was that the only business of the 311 Club?

A. As far as I know, sir. [569]

Q. There was no bar or restaurant in connection with it, is that correct?

A. Not the 211 Club itself, no, sir.

Q. Now were the books of the 311 Club among those which you returned to your former employers at the time you severed your connection?

A. Yes, sir.

Q. I believe you stated you returned them to Mr. Pechart and Mr. Kessel, is that correct?

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(Testimony of George E. Simmons.)

A. Either one of the two or both.

Q. Do you have in your possession any record of any kind with reference to the operation of the 311 Club during the years 1944 to 1946 inclusive?

A. No, sir.

Q. Will you describe the books which were maintained for the 311 Club?

A. Simple cash receipts and disbursements.

Q. You have set those up for each year on a partnership return of income. Were investment accounts set up in those books for each of the partners?

A. There were no real books of the company, simply cash and disbursements.

Q. And they were the only books maintained?

A. Yes, sir.

Q. So there was not a complete set of books, I take it? [570] A. Not a ledger book.

Mr. Gillen: I move to strike the comment of counsel. He said there was not a complete set of books, as his characterization. It might be a complete set of books so far as the books that were maintained is concerned.

The Court: The remark may stand as part of the question.

Mr. Campbell: Yes, I did not mean it as a side remark.

Q. Did the same situation prevail so far as the San Diego Social Club and 21 Club were concerned?

Mr. Gillen: Objected to as calling for opinion

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(Testimony of George E. Simmons.)

and conclusion and his own characterization; the same situation prevail.

Mr. Campbell: I will withdraw the question and approach it in a different manner.

Q. What books of account were maintained for the 21 Club?

A. There was a general ledger for the 21 Club, made up by my predecessor.

Q. To whom do you refer?

A. Mr. Bishop.

Q. And did you continue to maintain that general ledger after you took over?

A. When I took over it was about seven or eight months behind. We endeavored to keep on as we could. I doubt if it was ever up to date.

Q. I was going to ask was it ever brought up to date during [571] that period of time?

A. I hardly think so.

Q. This is during the years 1944 to 1946, inclusive? A. That's right.

Q. Now what books of account were maintained for the San Diego Social Club?

A. Cash receipts and disbursements.

Q. Was any general ledger maintained for that organization? A. No, sir.

Q. Now when you refer to the fact that a book of cash receipts and disbursements were kept regarding the San Diego Social Club, will you state the nature of the entries that you made in that book?

A. The daily record of receipts would be

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(Testimony of George E. Simmons.)

brought over to my office by whoever happened to be available and each day's activities they would show gain or loss for the day, which was entered in my record.

Q. Was that a written or oral memorandum which was brought to you?

A. It was a printed form, signed.

Q. And by whom would it be signed?

A. Whoever happened to be on that particular day.

Q. By whoever happened to be on, do you refer to whoever happened to be managing the business on that day?

A. That is right. Might have been Riggiota, might have been [572] Mr. Parman, might have been somebody else.

Q. In other words, what you term the operating manager? A. That is right, or the cashier.

Q. Would that slip contain more than one paper? A. No, sir.

Q. I take it then it would contain a net figure, showing the profit or loss of the operation of the gambling at the San Diego Social Club for that particular day?

Mr. Gillen: Objected to as leading and suggestive. This is direct examination.

The Court: It is a little leading and suggestive. Could you reframe that question?

Mr. Campbell: Yes, your Honor.

Q. What did that one figure purport to show, Mr. Simmons?

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(Testimony of George E. Simmons.)

A. The receipts or loss for the day, insofar as what was concerned. I paid all bills which were deductions from that figure.

Q. Was a bank account maintained for the San Diego Social Club? A. Yes, sir.

Q. Where was that maintained?

A. Mechanics Bank at El Cerrito.

Q. How many accounts were maintained there for the San Diego Social Club?

A. Covered five or six different operations.

Q. Do I understand there was one account or five or six [573] different accounts?

A. Five or six accounts. Each activity had its own bank accounts.

Q. Will you state what those were?

A. I don't understand the question.

Q. Well, how the bank accounts were divided?

A. Each separate—San Diego Social Club, 21 Club, 311 Club.

Q. But there was only one account for the San Diego Social Club?

A. No, two accounts, one was simply pay roll account, then there would be the main bank account. The pay roll account was taken out of the main account at the bank, as is the usual practice.

Q. Now who were the authorized signators on those accounts?

A. Well, for the San Diego Social Club, for the gambling, probably have Mr. Billington——

Mr. Gillen: Just a moment. I am going to offer

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(Testimony of George E. Simmons.)

an objection to such speculation—"would probably have."

The Court: I think the witness should answer from his own knowledge if he can or without any uncertainty if he can. If he can't answer the question, say you don't know.

Mr. Gillen: Or if the records of the bank accounts are available, they should be produced as the best evidence.

The Court: That answer will go out. We will have the [574] question read. Answer the question directly. If you do not know, say so.

(Question read.)

A. I do not remember on general accounts. On pay roll accounts I or my brother Lester were authorized to sign those pay roll checks.

Q. Were you authorized to draw on the general accounts? A. No, sir.

Q. Of any of the three clubs? A. No, sir.

Q. Now with regard to the 21 Club, you stated that you had a general ledger. Now was there set up in that general ledger investment accounts for each of the partners?

Mr. Gillen: Objected to as leading and suggestive. I think it would be proper to ask what was set up.

The Court: Objection will be overruled.

Mr. Gillen: It is similar to the question that your Honor ruled upon in regard to 311 Club.

The Court: Just a little different.

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(Testimony of George E. Simmons.)

A. I don't know.

Q. You don't know? A. No, sir.

Q. Did you keep those records?

A. They were kept by Mr. Bishop.

Q. After you began your employment, I believe you stated in [575] 1944, did you maintain any such accounts? A. Not to my knowledge.

Q. Did you maintain any such accounts, that is, partners accounts, on any of the three clubs, that is to say the 21 Club, the San Diego Social Club or the 311 Club, to which reference has been made?

A. No books were kept except the Internal Revenue report showing the distribution.

Q. What was the source from which you obtained the distribution of profits or loss at the end of each year?

Mr. Gillen: Objected to as asked and answered. He said he kept daily reports from whoever happened to be in charge and in addition, because he paid the bills himself, he knew what other deductions were to be made for current bills.

The Court: Objection overruled. Answer the question.

Q. Do you understand the question?

A. No, may I have the last question?

(Question read.)

A. Messrs. Pechart and Kessel, either one or both.

Q. And was that true of each of the three clubs?

A. Yes, sir.

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(Testimony of George E. Simmons.)

Q. Taking, for example, government's Exhibit 54, the 1944 partnership return of income of Joseph Billington, doing business as the 21 Club, and calling your attention to Schedule I, where the reported profit of 3799 and some odd cents is [576] divided $1800 to Remmer, $900 each to Kessel and Pechart, and $190 to Mr. Billington, do I understand that the information from which you put those figures down there was given to you by Mr. Pechart and Mr. Kessel?

A. Not Joseph Billington, no, sir.

Q. From what source did you get the information in that return?

A. Both Billington and Pechart themselves.

Q. That is to say from all three?

A. Yes, sir, to the best of my knowledge.

Q. Calling your attention to government's Exhibit 93, the office copy which was never filed, I believe you stated, of 1944, of Joseph Billington, doing business as the San Diego Social Club, and dividing the 48 thousand dollar profit set out here as among eight or nine individuals——

Mr. Gillen: Just a minute—may it please the Court I think you misquoted the record in your question. I do not think this witness did state that was never filed as a return. He stated he did not know. Mr. Campbell stated it was not.

Mr. Campbell: Yes, I so state. I will reframe my question.

Q. Calling your attention to plaintiff's 93, the office copy of 1944, of 1944 purported partnership

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(Testimony of George E. Simmons.)

return of income, for Joseph Billington, doing business as San Diego Social Club, wherein some $48,900 of profit is divided among some eight [577] or individuals, from what source did you obtain the information as to the division to be made of that profit among those individuals?

A. If I may go back just a moment. It was rather hard to determine who owned that and which. It was my understanding these people were all partners——

Mr. Gillen: Just a minute——

Mr. Campbell: Counsel is right.

The Court: That may go out as not responsive.

Q. You must answer my question directly, Mr. Simmons.

The Court: Just answer the question.

(Question read.)

Mr. Gillen: Just a moment—I am going to offer several objections. In the first place, I offer the objection this question was asked and answered some time ago on direct examination. The gentleman does not know, he thought, to the best of his recollection, he obtained the information that he put in that exhibit either from some books or from some memorandum he had and that is as far as he went on that. My next objection is that it is not shown to be a return for the reason that this witness testified that it was something that he prepared for a field auditor for the Internal Revenue Department, who asked him for a copy, and finally counsel's question

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(Testimony of George E. Simmons.)

contemplates that there was such a division of profits as was shown in there, which is not the fact. There is not anything [578] on that. He said he prepared some statement for a field auditor from some information he may have gotten from books or from some memorandum and he doesn't know whether that was ever filed as a return or not, so there is no evidence in the record at all that there was ever any distribution to anybody that is mentioned in there.

The Court: Let me have the question again.

(Question read.)

The Court: Objection overruled. Answer the question.

A. I don't know, sir.

(Jury and alternate jurors admonished and short recess taken at 3:00 o'clock.)

3:15 p.m.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Simmons, I call your attention to the fact that on the three returns of the 311 Club, being

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(Testimony of George E. Simmons.)

plaintiff's Exhibits 74, 75 and 76 respectively, there is named at the top of the return W. M. Pechart, D. N. Kessel and Fred Grunewald, doing business as 311 Club. Who is Fred Grunewald?

A. Fred Grunewald is the owner of the building in which the 311 Club is located.

Q. I also notice in respect to the 1944 return of Billington, [579] doing business as the 21 Club, plaintiff's Exhibit 54, there is attached as a part of the return an agreement between Walter M. Pechart and David N. Kessel, partners, and Fred Grunewald. Did he have any connection with that club, the 21 Club?

A. No, sir. The agreement is attached to the wrong form.

Q. By wrong form, to what form should that have been attached? A. The 311 Club.

Q. That was attached there by you at the time you made it up?

A. I don't know, sir. Probably stapled to the wrong return.

Q. Now with respect to any of the three organizations, that is, the 311 Club, the San Diego Social Club, or the 21 Club, did you ever see any partnership agreements?

A. No, sir, outside the 311 to which that memorandum refers.

Q. By memorandum you refer to the memorandum which is stapled to government's Exhibit 54, is that correct? A. Yes, sir.

Q. Which you say should have been stapled to

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the return of the 311 Club? A. Yes, sir.

Q. And that is the only agreement that you have seen among any of the parties? A. Yes, sir.

Q. And as I recall, you prepared both the 21 Club return, Exhibit 54, to which that is attached, and the 311 Club, Exhibit [580] 74, is that correct?

A. Yes, sir.

Q. To which you said it should have been attached? A. Yes, sir.

Q. Do you recall the circumstances under which it was attached to Exhibit 54?

A. Probably a clerical error before the returns were sent in.

Mr. Campbell: I see. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Simmons, during the years 1944, 1945, and 1946, who were your employers in connection with the three clubs that have been mentioned here, the 311 Club, 21 Club and San Diego Social Club?

A. Messrs. Pechart and Kessel.

Q. Did you ever make an individual return for Elmer F. Remmer, the defendant here, or for his wife, or for either of them? A. No, sir.

Q. By the way, I take it that your organization was an independent organization of public accounts, is that correct?

A. No, sir, we were paid individuals by Pechart and Kessel.

Q. I mean you had your own organization, they were not the only people that you kept books for?

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(Testimony of George E. Simmons.)

A. No, we had others.

Q. So you had your own organization, but Pechart and Kessel employed you to keep books for those three enterprises? [581] A. Yes, sir.

Q. Now I will ask you to look at defendant's Exhibits F and G and I am going to ask you whether you recall receiving either or both of these letters from Mr. Pat Mooney, inquiring of you concerning any distributive share out of the 21 Club or the San Diego Social Club for Elmer Remmer?

Mr. Campbell: For what year does that refer?

Mr. Gillen: 1944.

Q. Do you recall receiving those letters, sir?

A. I do not recall whether these were the letters. I received one or two letters from Mr. Mooney similar to these.

Q. You recall that Mr. Mooney wrote you on May 23, 1945, and requested as follows:

> "Will you please let me know the amount of the distributive share of Mr. Elmer F. Remmer partnership return for the 21 Club in El Cerrito for the year 1944? We have to have these figures as I may have to file an amended income tax return 1040. Thanking you for your prompt attention in this matter. I might add that I was in your office about a year ago with Mr. Willie Kyne. With the writer's kindest personal regards. Sincerely, Pat Mooney, Chief Field Agent."

Do you recall a letter similar to that coming to you?

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(Testimony of George E. Simmons.)

A. Yes, sir. [582]

Q. Now do you recall whether or not you ever answered that letter? A. I did.

Q. And do you recall what you said in that letter? A. No, sir.

Q. Let me ask you if you recall whether or not you advised Mr. Mooney that you did not have that data at hand, that it might be in the possession of Mr. Lewis, who was former collector of Internal Revenue at San Francisco?

A. I do not remember, sir.

Q. Let me ask you to look then at defendant's Exhibit G and see if this refreshes your recollection. It is another letter on May 7, 1946, from Mr. Mooney to you.

A. I probably received this or a similar letter.

Q. Now, Mr. Simmons, does this refresh your recollection that you referred Mr. Mooney to Mr. Lewis at 333 Montgomery Street, San Francisco?

A. I don't think so.

Q. Let me read this to you:

"May 10, 1946. Dear Mr. Simmons: I was unable to get Mr. Lewis at 333 Montgomery Street, San Francisco, regarding the partnership returns of Elmer F. Remmer for the 21 Club in El Cerrito. You may have returns in your possession at this time and no doubt you can give me the distributive [583] share of Mr. Remmer in the accounting. It is necessary to have these figures in order to complete Mr.

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(Testimony of George E. Simmons.)

Remmer's return. Thanking you for your courtesy in this matter, very truly yours, Chief Field Deputy."

Does that refresh your recollection?

A. I recall the incident, but what happened I don't know.

Q. Well, let me ask you if it would refresh your recollection if you were told Mr. Pat Mooney testified here that when he inquired of you of information for any distributive net share of the partnership in the 21 Club of Elmer Remmer, that you informed him at that time that that data was out of your hands and was now in the hands of Mr. Lewis, who had formerly been the collector of Internal Revenue at San Francisco, and who had subsequently resigned from that post and had become a lawyer and tax expert at San Francisco with offices at 333 Montgomery Street. Do you recall that?

Mr. Campbell: Objected to as assuming a fact not in evidence.

Mr. Gillen: I can show counsel the records.

The Court: That seems to be my recollection.

Mr. Campbell: I will withdraw my objection.

The Court: You may answer the question. The substance of the question is, does that refresh your memory?

Mr. Gillen: Yes, your Honor. Do you have my question? [584] A. Will you repeat it?

(Question read.)

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(Testimony of George E. Simmons.)

A. I recall writing Mr. Mooney. I remember that part of it, that the information was in the hands of Mr. Lewis and I didn't have it at that time.

Q. Do you know whether or not you ever furnished Mr. Mooney with any information on the distributive share of any profit out of the 21 Club that was to go or did go to Mr. Remmer?

A. I did, sir.

Q. In what form did you give him that information?

A. By letter, after discussions in my office.

Q. Was it subsequent to the last letter that he wrote you May of 1946, and I am referring now and showing you defendant's Exhibit G, in which he said he couldn't get in touch with Mr. Lewis and asked you if you now had that information?

A. Before this day I talked to Mr. Mooney. I didn't furnish anything after this date.

Q. You can see by reading that letter that Mr. Mooney still did not have the information; isn't that obvious to you?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Read the letter and see if it does not assume yet that Mr. Mooney did not have the information that he wanted and was asking if you now had it?

Mr. Campbell: Same objection. [585]

The Court: Same ruling.

Mr. Gillen: That it is argumentative?

The Court: Yes.

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(Testimony of George E. Simmons.)

Mr. Campbell: That is my objection.

The Court: I think it is asking this witness for his view of the exhibit.

Mr. Gillen: All right, let me put it this way:

Q. Can you tell us if you had already given Mr. Mooney the information he wanted?

A. No, sir.

Q. So when he wrote you this letter May 19th, he didn't have it?

Mr. Campbell: Same objection, argumentative.

The Court: Same ruling.

Q. Did you write a letter to Mr. Mooney in answer to defendant's Exhibit G, in which you told Mr. Mooney you had already given him the information? A. I do not remember, sir.

Q. Well, what did you do with regard to that letter?

A. I might have written; I might have referred it to Mr. Lewis. I have no knowledge what happened after that.

Q. Isn't it a fact, Mr. Simmons, you had already referred him to Mr. Lewis and he wrote you he was unable to get Mr. Lewis and asked you if the information had come back in your hands?

Mr. Campbell: Objected to as [586] argumentative.

The Court: Same ruling. Objection sustained.

Mr. Gillen: That it is argumentative.

Q. Will you read that exhibit, Mr. Simmons, and tell us whether or not that refreshes your recollection that you had not, up to that time, given any

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(Testimony of George E. Simmons.)

information to Mr. Mooney regarding any distributive share due Mr. Remmer?

Mr. Campbell: Objected to as asked and answered.

The Court: He may look at the exhibit. I think the question was to examine the instrument and determine whether or not it refreshes his memory; wasn't that the question?

Mr. Gillen: Yes, your Honor.

A. I don't know whether I ever answered this letter or not.

Q. Do you know whether you ever gave Mr. Mooney information regarding the distributive share due Mr. Remmer out of the 21 Club?

A. I remember writing Mr. Mooney one letter, giving him the distributive share of Mr. Remmer for a certain year, the year of which I don't remember.

Q. Would you say it was before this letter, defendant's Exhibit G, or after? A. Before.

Q. Before? A. Yes, sir.

Q. Did you obtain any explanation from Mr. Mooney at any time [587] as to why he wrote this letter, saying he didn't have the information, if you had already given it to him?

Mr. Campbell: Objected to as argumentative.

The Court: He can answer that yes or no.

(Question read.)

A. No, sir.

Q. Now, Mr. Simmons, I am showing you here

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(Testimony of George E. Simmons.)

the prosecution's Exhibit 54, which purports to be the return for 1944 of Joseph Billington, doing business as the 21 Club, and in which it is shown that Joseph Billington had received a distributive share of the profit in the sum of $190, and in which there appears your name and your stamp, G. E. Simmons and Associates, as the person who made up that return. You recall making that return, do you not? A. Yes, sir.

Q. And I believe your testimony, in answer to Mr. Campbell's question, was that you received the information of that distributive share in the sum of $190 to Mr. Billington from Mr. Pechart, Mr. Kessel and Mr. Billington, himself; is that correct?

A. Yes, sir.

Q. Now the following year, to wit, 1945, your organization made up the return for J. Billington, doing business as the 21 Club and San Diego Social Club, and the return as the person who made it up was signed by R. Beck, Frank E. Simmons and Associates, and in that return it is shown that Mr. Billington received [588] $3,658.17. Can you tell us where that information was obtained?

A. It was the distributive percentage received from Messrs. Billington, Pechart and Kessel, and this is not the share of his actual receipt. It is his proportionate share. Whether he got the money or not, I cannot tell.

Q. That is the same position that prevailed as to the $190 the year before? A. Yes, sir.

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(Testimony of George E. Simmons.)

Q. You don't know whether he got the money either? A. No, sir.

Q. But those three gentlemen, Mr. Pechart, Mr. Kessel and Mr. Billington, told you that that was his distributive share, $190; is that correct?

A. Yes.

Q. Is that the same thing that occurred the following year when his distributive share was 3,600 odd dollars? A. Yes, sir.

Q. Did you get that information yourself from those three gentlemen? A. I don't remember.

Q. I understood you to say that you have never discussed any of these returns or the profits or the business of either of these, or any of these three enterprises, with Mr. Remmer, the defendant in this case? A. That is correct. [589]

Q. Now, Mr. Simmons, I am going to show you what has been introduced here as prosecution's Exhibit 93, and that, if you remember, is the document which you said you made up for a field auditor a year or two after 1944, or two or three years after 1944, I believe you said either 1946 or 1947, and I will ask you to note that in that exhibit the distributive share, or the distributive percentage, to Mr. Billington is set forth as two thousand dollars, while for the same year in the return that was filed by you, the distributive share for Mr. Billington was set forth as $190, in Exhibit 54. Can you tell us how that difference arose? Both of those were prepared by you. Can you tell us the reason for that difference, namely, that 54 shows Billing-

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(Testimony of George E. Simmons.)

ton was entitled to a percentage of $190 while Exhibit 93 shows him entitled to a percentage of two thousands dollars? Can you tell us why the difference?

A. The $190 distributive share refers to Joseph Billington doing business as the 21 Club. On this photostatic copy for Joseph Billington, doing business as the San Diego Social Club, the distributive share is two thousand dollars. They are two different entities.

Q. Two different enterprises?

A. Two different enterprises.

Q. So then that Exhibit 93 has nothing to do with the 21 Club at all? A. No, sir. [590]

Q. Now again referring to Exhibit 54, prosecution's Exhibit 54, which is the Joseph Billington return for the 21 Club in 1944, which, if I understand your testimony correctly, that this two-page agreement that appears attached hereto, mentioning some terms of agreement between Pechart and Kessel and a man named Grunewald, was attached to this return inadvertently? A. Yes, sir.

Q. That did really belong to the 311 Club?

A. Yes, sir.

Q. Because Mr. Grunewald was the owner of the building in which the 311 Club was housed and Mr. Grunewald had nothing to do with the 21 Club and the San Diego Social Club; is that correct?

A. Yes, sir.

Q. It was mere inadvertence?

A. Mere inadvertence, that's right.

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(Testimony of George E. Simmons.)

Q. Now in prosecution's Exhibit 72A, you made a return for the year 1944 for one Frank Carvani; you recall that return? A. Yes, sir.

Q. Mr. Simmons, isn't it a fact that Frank Carvani never did actually manage the 21 Club, but that his name had initially appeared on the license and that he was supplanted by another person because of the death of somebody that was running an enterprise in San Francisco?

A. My recollection is Frank Carvani, as far as we were concerned, from the heading on the books of account—— [591]

Q. (Interrupting): Well, let me ask you this, do you recall——

Mr. Campbell: I don't think he finished his answer.

A. (Continuing): ——but when we tried to find Frank Carvani, he was very seldom available. Perhaps we saw him three times during that interval.

Q. Was it within your knowledge that Mr. Frank Carvani was conducting another enterprise altogether in San Francisco?

A. I didn't know anything about that.

Q. Does it refresh your recollection, Mr. Simmons, that you called upon Frank Carvani to make a return because Frank Carvani's name had been initially on the license; does that refresh your recollection? A. That I do not remember.

Q. Mr. Bishop, whom you have mentioned here as your predecessor on this account, did he work for Mr. Pechart and Mr. Kessel also?

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(Testimony of George E. Simmons.)

A. Yes, sir.

Q. And he was the man who had set up the ledger on the general account for the 21 Club?

A. Yes, sir.

Q. And you found it when you took over?

A. Yes, sir.

Q. And you found it to be somewhat behind?

A. Yes, sir.

Q. And hadn't been kept up to date? [592]

A. Yes, sir.

Q. Mr. Bishop had been lax——

Mr. Campbell: I am going to object to that, as calling for conclusion of the witness.

Q. Well, let me put it this way—that indicated to you a laxity on the part of the man who is keeping the books, rather than on the part of the people who employed him; is that correct?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Q. Well, did you ever talk this account over with Mr. Bishop?

A. Quite frequently. Mr. Bishop was ill the biggest part of the time.

Q. Did Mr. Bishop tell *you had* fallen behind on the bookkeeping?

Mr. Campbell: Objected to that as calling for hearsay.

The Court: Objection sustained.

Q. Well, at all events, you did the best you could to bring the books up to date? A. Yes, sir.

Q. And you didn't have any difficulty in getting

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(Testimony of George E. Simmons.)

hold of people who assisted you in bringing the books up to date?

A. During those times it was hard to get competent help. I had only my brother and I and one man.

Q. I mean you were able to get the information you needed to bring the books up to date and you did it as best you could with your staff; is that correct? [593] A. Yes, sir.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Simmons, reference has been made here particularly in some correspondence that was purportedly between you and Mr. Mooney and this gentleman, Mr. Lewis, a former collector at San Francisco. Was Mr. Lewis collector of Internal Revenue during the years that you were keeping these books? A. No, sir.

Q. As a matter of fact, he had not been collector since 1938, had he?

Mr. Gillen: We will stipulate he was not collector but was in private practice, both as a lawyer and tax expert.

The Court: You accept that stipulation?

Mr. Campbell: Yes, I accept that stipulation. That's all.

(Witness finally excused.)

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LESTER SIMMONS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Lester E. Simmons.

Q. Where do you reside?

A. 806 Liberty Avenue, El Cerrito.

Q. What is your business or occupation?

A. Accountant. [594]

Q. With whom are you associated at this time?

A. Pechart and Kessel.

Q. During the years 1944 to 1946 were you associated with Mr. Pechart and Mr. Kessel?

A. 1945 and '46.

Q. Were you also at that time associated with your brother? A. I was.

Q. Your brother testified that he severed his connection with Pechart and Kessel late in 1946 or early in 1947. Are you able to fix that date with any greater certainty?

A. I believe it was '48.

Q. It wasn't until 1947. I take it that after he severed his connection, you remained on; is that correct? A. That's right.

Q. Now during the years 1944, 1945 and 1946, were you working under your brother's supervision or independently?

A. The year 1944 is not involved. I was not in California at that time.

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(Testimony of Lester Simmons.)

Q. But after you came here?

A. I worked for him.

Q. Was that the same thing during the year 1946? A. Yes, sir.

Q. Now a subpoena duces tecum was served upon you, Mr. Simmons, to produce all records of any description for the period January 1, 1943, to January 31, 1947, inclusive, relating to the [595] following businesses: 21 Club, San Diego Social Club, and 311 Club, all at El Cerrito, California; is that correct? A. Yes, sir.

Q. Do you have such records? A. No, sir.

Q. Do you have any records of any kind in your possession? A. I have no records.

Q. Do you have any work papers for that period in your possession? A. No, sir.

Q. Where are such records, if you know?

A. Mr. Remmer has them.

Q. When were they delivered to Mr. Remmer?

A. Some time in April, 1951.

Q. And who made the delivery to Mr. Remmer?

A. Well, Mr. Remmer picked them up at the Pechart office.

Q. Were you there on that occasion?

A. Yes, sir.

Q. You say it was in April of 1951?

A. That's right.

Q. And so far as you know, have they been in Mr. Remmer's possession at all times since then?

Mr. Gillen: Objected to as calling for conclusion.

Mr. Campbell: I will withdraw that question.

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(Testimony of Lester Simmons.)

Q. Since April, 1951, when Mr. Remmer picked up these records, [596] that are called for in this subpoena, that is to say, the records of the 21 Club, San Diego Social Club, and the 311 Club, have you seen them since that time? A. I have not.

Q. Who was present on that occasion when Mr. Remmer picked these records up? A. Myself.

Q. And who else? A. No one.

Q. Mr. Remmer was there, I take it?

A. Naturally.

Q. And Mr. Pechart? A. No.

Q. Had you previous to that time been given instructions by anyone to turn those records over to Mr. Remmer?

A. Mr. Remmer requested the records and Mr. Pechart approved it.

Q. Mr. Pechart approved it? A. Yes, sir.

Q. At the time that those records were turned over to Mr. Remmer, did you obtain a receipt for them? A. Yes, sir.

Q. Do you have that receipt?

A. Mr. Pechart has it.

Q. Do you know if he has that here with [597] him? A. He is not here.

Q. I mean to say, did he bring it here to court with him? A. I think he did.

Mr. Campbell: If the Court please, may the further examination of this witness be deferred until 10:00 o'clock tomorrow morning until the other matter has been determined?

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The Court: Yes, we will take our recess at this time.

Mr. Gillen: Before your Honor excuses the jury, may I make a statement that your Honor said you would permit me to make?

The Court: Yes, sir.

Mr. Gillen: In the absence of the jury on Friday, your Honor called for some comment regarding the problem that confronted the Court at that time, with reference to the appearance on the witness stand of Mr. Kessel. At that time I stated to your Honor, and wish to reiterate, with your Honor's permission, in the presence of the jury, that Mr. Kessel, and since that time Mr. Pechart, are both witnesses subpoenaed by the prosecution, by the government, and their attitude and their decision regarding whether or not they desire to testify in this matter is something that rests entirely with them on the advice of independent counsel. They were accompanied from San Francisco by Mr. Chas. Wiseman as counsel, and also represented here this morning by Joseph P. Haller, a Nevada attorney, with offices in Reno, and it is the desire of the [598] defense that your Honor should know, and the jury should know, that their decisions and determination what they should do in the face of any orders your Honor makes, is entirely their decision and that the defense is not in any wise participating in this matter. I might say to your Honor that it has been the contemplated thought of the defense in this case to call Mr. Pechart and Mr. Kessel as defense witnesses——

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Mr. Campbell: Just a minute.

Mr. Gillen: The Court said I could make a statement. If the Court thinks I am making an improper statement, he is well able of advising——

The Court: I do not think we should go into matters of what the defense contemplates. I think the substance of the statement made the other day to the Court in the absence of the jury is pretty well covered.

Mr. Gillen: If your Honor feels so.

The Court: I think so. No need to go any further at this time. The record will show and the jury will understand the position of the defendant, as stated just now by Mr. Gillen. So the jury is excused until 11:00 o'clock tomorrow.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [599]

December 11, 1951—2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

The Court: Proceed.

DAVID N. KESSEL

a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Mr. Kessel, I am going to repeat to you the question which was asked you yesterday. Do you know Mr. Remmer's occupation?

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(Testimony of David N. Kessel.)

A. I decline to answer. It would tend to incriminate me.

Q. On what grounds?

A. On the grounds it may incriminate me.

Mr. Campbell: I press the question, your Honor.

The Court: That question was propounded to the witness on Friday and yesterday, Monday, December 10, 1951, and the same response was made. The defendant declined to answer then on the ground that the answer would tend to incriminate him. Thereupon the matter was continued until this morning at 10:00 o'clock. The Court at that time heard from counsel for the witness legal argument in behalf of the witness' position and also received certain exhibits in evidence. At the conclusion of the morning session I indicated that I would order the witness to answer the question, so I will now order the witness to [600] answer the question which was propounded by Mr. Campbell. Will you please read the question to the witness again?

(Question read.)

A. At the present time I do not know.

Q. Do you know what his occupation was during the years 1944 to 1946, inclusive?

A. I decline to answer the question.

Mr. Campbell: I press the question, your Honor.

The Court: What is your reason for declining to answer?

Mr. Campbell: I think, your Honor, if it is the

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(Testimony of David N. Kessel.)

same reason in each instance, that it may be deemed to have been stated.

The Witness: Yes.

The Court: Same reason. Does counsel for the witness desire to have any further presentation in regard to the present situation?

Mr. Wiseman: No, your Honor.

The Court: I give counsel for the witness an opportunity to be heard if they so desire and they may make any showing that they might desire.

Mr. Wiseman: Do I understand, your Honor, there has been an order or direction made by the Court?

The Court: I think the question was merely propounded and the witness has refused to [601] answer.

Mr. Wiseman: I presume there has been no order?

The Court: No order made.

Mr. Wiseman: I assume our understanding was there would be an order made in respect to the question.

The Court: No, I do not know what the situation might be. I cannot contemplate the questions that may be propounded.

Mr. Wiseman: As I understand, with respect to each particular question it would be considered by the Court before he orders and order and direction be given.

The Court: So I will now direct the witness to answer the question just propounded by Mr. Camp-

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(Testimony of David N. Kessel.)

bell. Please read the question again to the witness.

(Question read.)

A. Cafe business and gaming.

Q. Where, if you know, was that business conducted by Mr. Remmer?

A. I refuse to answer that question.

The Court: The Court will order and direct the witness to answer the question.

A. That was at the 21 Club, and San Diego Social Club.

Q. Where were the 21 Club and San Diego Social Clubs located?

A. Somewhere on Panhandle Boulevard.

Q. Were they at Panhandle Boulevard and San Diego Street or Avenue in El Cerrito? [602]

A. Yes, sir.

Q. Do you know the amount of Mr. Remmer's investment in those enterprises during the years 1944 to 1946, inclusive?

A. I refuse to answer that question.

Mr. Campbell: I press the question, your Honor.

The Court: The Court will direct the witness to answer the question.

A. Mr. Remmer owned the property. I don't know how much he had invested. He never took an active interest in the business.

Q. Do you know who the bookkeeper or bookkeepers were for those businesses, that is, the 21 Club and San Diego Social Club, during the years 1944 to 1946?

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(Testimony of David N. Kessel.)

A. I think we had Mr. Simmons, the two Simmons accountants.

Q. Is that the George Simmons who appeared on the stand here yesterday? A. Yes, sir.

Q. Who employed Mr. Simmons for that purpose? A. The Club employed him.

Q. By the Club, to what individual or individuals do you refer?

A. I had 25 per cent, Mr. Pechart had 25 per cent, Mr. Remmer had 50 per cent. He was paid to keep the books.

Q. Was that division of 50 per cent to Mr. Remmer applicable to both the 21 Club and the San Diego Social Club?

A. It was sort of a combined interest. One was a cafe and [603] one was a gaming house; one was called the San Diego Social Club and one was called the 21 Club. The San Diego Social Club was the gaming house and the 21 Club was the bar and restaurant.

Q. They were both housed under the same roof?

A. Yes.

Q. Are you acquainted with one Joseph Billington, sometimes known as Frankie Denny?

A. I decline to answer the question.

The Court: The Court directs and orders you to answer the question.

A. Yes, I do know Mr. Denny.

Q. Under what name did you know him during the years 1944 to 1946?

A. Under the name of Joseph Billington.

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(Testimony of David N. Kessel.)

Q. To your knowledge did he have some connection with the 21 Club and San Diego Social Club?

A. I refuse to answer that question.

The Court: The Court directs you to answer the question, Mr. Kessel.

A. He had a job there. He was no partner in the business. He just had a job.

Q. What was the nature of his job?

A. Well, he took care of the bar and the restaurant.

Q. And what, if you know, was he paid for his services in that connection? [604]

A. I think he got about seventy-five a week and bonus; about seventy-five.

Q. You say he was not a partner in the venture?

A. Not a partner.

Q. Did you know one Frank Cavani during the years 1944 to 1946?

A. I refuse to answer the question.

The Court: The Court directs you to answer the question, sir.

A. Yes, I do know Mr. Cavani.

Q. Did he have some connection with the 21 Club and San Diego Social Club during that period?

A. The only thing I knew about him, the license was in his name at one time.

Q. Did he have anything to do with the operation of either of the clubs? A. No, sir.

Q. Nor was he a partner in the operation of the club?

A. Just simply a name only on the license.

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(Testimony of David N. Kessel.)

Q. Who is Frank Cavani?

A. I didn't know him very well.

Q. Where does he live?

A. Well, he lives in San Francisco.

Q. By license are you referring to liquor licenses? A. Liquor license. [605]

Q. And when was that put in his name, if you know?

A. I wouldn't remember, but I believe he was the first man named on the license when the club opened.

Q. And during the period in question, 1944 to 1946, was the license continued in his name?

A. I wouldn't be sure. I think it was changed to Billington. I wouldn't be sure.

Q. Were you in 1944 acquainted with Walter Parman? A. I refuse to answer that.

The Court: The Court will order and direct you to answer the question, Mr. Kessel.

A. I know a Walter Parman.

Q. To your knowledge did he have any connection with the operation of the 21 Club or the San Diego Social Club? A. Just worked there.

Q. What was the nature of his employment?

A. He was sort of a manager in the gaming room.

Q. Did he have any interest in the operation of the establishment? A. Not that I know of.

Q. Were you, during 1944, acquainted with one A. Riggardio, sometimes known as Tony Riggardio?

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(Testimony of David N. Kessel.)

A. I refuse to answer the question.

The Court: The Court will direct and order you to answer the question, Mr. Kessel. [606]

A. He also worked at the 21 Club.

Q. What was the nature of his employment?

A. He also helped out in the restaurant.

Q. Did he have any interest in the operation of the two clubs? A. I do not think so.

Q. He was simply an employee?

A. Yes, sir; just an employee.

Q. Did you, during 1944, know one Andrew Desamoni?

A. I refuse to answer the question.

The Court: Same order. The Court will direct you to answer.

A. He was also employed in the gaming room.

Q. Did he have any interest in the enterprise?

A. Not that I know.

Q. Did you, during 1944, know one Demetris Sartanos? A. I refuse to answer.

The Court: Same order. The Court directs you to answer.

A. He also worked in the gaming room. Just a paid employee.

Q. Was my pronunciation of that name correct?

A. I wouldn't know how to pronounce it myself.

Q. Do you know to what individual that refers though? A. Yes, sir.

Q. Did he have any interest in the enterprise?

A. Just a paid employee.

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(Testimony of David N. Kessel.)

Q. During the year 1944 did you know one Michael Necheck? [607]

A. I refuse to answer.

The Court: Same order.

A. He was also a paid employee.

Q. In what part of the establishment was he employed? A. The gaming room.

Q. Was he also a paid employee?

A. A paid employee.

Q. Did he have any interest in the enterprises, to your knowledge? A. None that I know of.

Q. There has been testimony here, Mr. Kessel, that the books and records of the 21 Club, of the San Diego Social Club, as well as those of the 311 Club, all in El Cerrito, were delivered in about April, 1951, to the defendant, Elmer Remmer, and that a receipt was given therefor.

Mr. Gillen: Objected to as leading and suggestive.

Mr. Campbell: It is preliminary to the question.

The Court: Objection overruled.

Q. Do you have such receipt? A. No, sir.

Q. Do you know who does have that receipt?

A. I refuse to answer the question.

The Court: The Court will direct you to answer the question.

A. Mr. Pechart has the receipt. [608]

Q. Were you, during the years 1944 to 1946, inclusive, familiar with the operation or business known as the 311 Club, located at 311 Panhandle Boulevard?

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(Testimony of David N. Kessel.)

A. I refuse to answer the question.

The Court: The Court orders you to answer the question, Mr. Kessel.

A. Yes, I was.

Q. Did Mr. Remmer, the defendant here, have an interest in that business or profits thereof?

A. No, sir. Would you repeat that question?

(Question read.)

Q. Shall I divide the question?

A. I wish you would.

Q. Did Mr. Remmer have an interest in the business?

A. I decline to answer the question.

The Court: The Court does order and direct you to answer the question, Mr. Kessel.

A. Mr. Remmer was no partner in that business.

Q. Mr. Kessel, I will ask you if you had an arrangement with Mr. Remmer, whereby he received a part of the profits of that business during the years 1944 and 1945?

Mr. Gillen: We are going to offer the objection, may it please the Court, this gentleman is Mr. Campbell's witness. The questions are very leading and suggestive. The direct examination should be conducted the same as any other direct [609] examination, I know your Honor will agree. He is cross-examining his own witness.

The Court: The Court will overrule the objection.

(Question read.)

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(Testimony of David N. Kessel.)

Mr. Gillen: We offer the further objection it has been asked and answered by the witness.

The Court: Objection overruled.

A. I refuse to answer.

The Court: The Court orders you to answer the question. You know, counsel—I am speaking to the witness' counsel now—it seems to me unusual and frivolous, if this witness is going to stand on his constitutional rights, he should do so, rather than force the Court to use time filling this record full of orders.

Mr. Wiseman: That was the suggestion I had this morning, that some arrangement could be made for stipulation that could be entered. The thing I suggested this morning; that it would be deemed——

The Court: No, he will have to claim his privilege whenever he intends to claim it, but claiming it is one thing and abandoning it is another. That is the thing that annoys me. We are just wasting so much time cluttering the record. Now it would seem to me that if the witness, in good faith, is claiming a [610] privilege under the Constitution, he ought to stand on it and not abide with the order of the Court. In other words, if he is going to answer a question by the order of the Court, it is a frivolous thing to keep going the way we are now.

Mr. Wiseman: I think he is compelled to under the law to stand upon his rights.

The Court: I can't understand, if he is claiming his privilege and then answers the question when

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(Testimony of David N. Kessel.)

directed what is his position? Hasn't he waived the privilege as to that question?

Mr. Wiseman: I don't think he has waived his privilege. He is sustaining his privilege and also obeying the order of the Court. He would be caught between two fires.

The Court: I was hoping we might find some way of simplifying it.

Mr. Wiseman: I am willing to go along. That is what I suggested this morning, but he is answering questions under order of the Court.

The Court: The thought I had, if his claim was made in good faith, it would seem to me he would stand on.

Mr. Wiseman: If he did that, he would be in contempt of the order of the Court, which the witness apparently doesn't intend to do.

The Court: Very well. [611]

Mr. Wiseman: Unless it is understood in the interest of time——

The Court: No, I think he ought to be entitled to make his claim as he goes along.

(Last question read.)

A. I refuse to answer that.

The Court: The Court will order you to answer the question.

A. We did not have any agreement. It is customary in the 21 Club and 311 Club and we gave Mr. Remmer a bonus, just a friendship bonus. One was across the street from the other and we just

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(Testimony of David N. Kessel.)

gave a bonus and whatever the bonus is, it is on the books. I don't know the amount. It is customary in our business to give a bonus. The place he had over there and the other place run in conjunction and we give him a little bonus. I don't know the amount. The amount is on the books, and as I said before, that is all I know about the business. I wasn't very active in it; in fact, I wouldn't be there maybe once a week or once every two weeks.

Q. How was that amount arrived at?

A. Well, I don't know. My business is all percentage, something on the net. I only noted the amount. I don't remember the percentage. As I said, I wasn't very active there and I didn't pay much attention because I had my own business to take care of. [612]

Q. It was then based upon percentage?

A. No, just a friendship bonus. I don't know whether 2 per cent or 5 per cent or 10 per cent.

Q. I am going to show you government's Exhibit 74, being partnership return income for 1944 of W. M. Pechart, D. N. Kessler and Fred Grunewald, doing business as the 311 Club, and ask you if you recognize that return? A. Yes, I do.

Q. Is that the return of the 311 Club for the year 1944?

A. Well, I never knew the amounts that were added. The accountant took care of any account.

Q. You do recognize the document, though?

Mr. Gillen: Is that some copy?

Mr. Campbell: This is the original.

BLEED THROUGH— POOR COPY

(Testimony of David N. Kessel.)

Mr. Gillen: It speaks for itself.

A. I recognize the signatures.

Q. I call your attention to Schedule I, "Partner's share of the income"; it sets forth the following: E. L. Price, $1241.66; Fred Grunewald, $2793.72; E. Remmer, $1257.18; W. M. Pechart, $3562.03; D. N. Kessler, $3562.03. Directing your attention specifically to E. Remmer, $1257.18, I will ask you if that refreshes your recollection in any manner as to how the amount paid to Mr. Remmer was arrived at?

A. As I said before, I never paid no attention to this Club. I came out there maybe once a week or once every two weeks, [613] maybe once a month, and I know there was a little money—I thought it might have been five or six hundred at one time, but I don't recollect—it might be $1257 just as well as five hundred.

Q. Do you recall who managed the club at that time, referring to the 311 Club?

A. I don't remember the man's name.

Q. I call your attention to the fact that the third person mentioned here, in addition to yourself and Mr. Pechart, is one Fred Grunewald. Who was Fred Grunewald?

A. Mr. Grunewald owned the building.

Q. Did he have anything to do with the management of the concern?

A. He had nothing to do with the management.

Q. I call your attention to, under the Schedule I, "Partner's Share of Income," there is the name of

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(Testimony of David N. Kessel.)

one L. E. Price. Who was L. E. Price?

A. I believe he worked there.

Q. Did he have an interest in the enterprise?

A. I do not think so.

Q. Was he an employee?

A. Employee, paid employee.

Q. He is listed here as a partner. Does that refresh your recollection as to his connection with the 311 Club?

A. He might have been listed as a partner, but I think the [614] accountant listed him as a partner and then later on they changed it. There were only three people in the partnership.

Q. Only three people?

A. Mr. Grunewald, myself and Mr. Pechart.

Q. Was that true for both the years 1944 and 1945? A. That is correct, yes.

Q. Aside from these businesses to which I have called your attention, do you know of any other businesses in which Mr. Remmer had an interest, either as a partner or receiving a share of the profits, during the years 1944 to 1946, inclusive?

A. None with my partner.

Q. You say "my partner"; to whom do you refer? A. Mr. Pechart.

Q. These three then were the only ones which you and your partner had any contact with Mr. Remmer?

A. That is right, the only ones I know.

Q. Do you know of any other businesses in or

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(Testimony of David N. Kessel.)

about El Cerrito in which Mr. Remmer had an interest? A. No.

Mr. Gillen: Objected to as leading and suggestive.

Mr. Campbell: He said, no.

The Court: Objection overruled. The answer may stand.

Mr. Golden: I will withdraw the objection if he has answered.

Q. In whose name were the licenses at the [615] 311 Club?

A. They belonged to Mr. Grunewald. Mr. Grunewald, he owned the building.

Q. They were in his name?

A. He had nothing to do with that. That was his part. It was on the same premises but had nothing to do with it. That was his own saloon and that was his own profit, whatever he made, that was his own.

Q. Did Mr. Remmer contribute any capital or investment in the 311 Club?

Mr. Gillen: Objected to as asked and answered. He said Mr. Remmer had no interest in it; he was given a friendship bonus.

The Court: Objection will be overruled. Read the question.

(Question read.)

A. None monies whatsoever; nothing.

Q. Now coming back to the 21 Club and San Diego Social Club, which you have testified that Mr. Remmer had a 50 per cent interest in during

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(Testimony of David N. Kessel.)

the years 1944 to 1946, inclusive, were any formal papers of agreement or partnership drawn up?

A. No, sir; there was no agreement of partnership.

Q. You had no agreement?

A. No agreement.

Q. By that you mean there was no written agreement?

Mr. Gillen: Objected to as leading and [616] suggestive. This is his witness that he is cross-examining.

The Court: I understand counsel withdraws that question.

Mr. Campbell: Yes, I withdraw that question.

Q. What was the nature of agreement or understanding that you had with Mr. Remmer as to the division of profits?

A. Mr. Remmer had 50 per cent and I had 25 and my partner, Mr. Pechart, had 25 per cent. We had no agreement. That is the way we do business.

Q. When you use the word "agreement," what do you mean by that?

A. We had no agreement. We just simply—I had 25, Mr. Pechart had 25, and Mr. Remmer had 50.

Q. By the word "agreement," are you referring to a written agreement? A. Yes, sir.

Mr. Gillen: Objected to as leading and suggestive, cross-examining his own witness.

The Court: Objection overruled. You may answer the question.

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(Testimony of David N. Kessel.)

A. We had no written agreement.

Q. As I understand you, you did have this understanding as to the division of profits; is that correct? A. Yes, sir.

Q. Now when was that first entered into?

A. I can't remember that. It might have been the first day that we opened the doors. [617]

Q. Well, when was that?

A. '43 or '44. I took no active part in this.

Q. What is your best recollection as to when the 21 and San Diego Social Clubs were opened?

A. I think they were opened about '43 or '44, between '43 and '44; I wouldn't know for sure.

Q. I am going to show you plaintiff's Exhibit 56, the individual income tax return of Joseph E. Billington for the year 1943, prepared by G. E. Simmons and associates and reporting the profit and loss from the business known as the San Diego Social Club, and ask you if that refreshes your recollection as to when that business was opened?

A. I never saw this return; in fact, I saw very few returns. These were made out by the auditor.

Q. Does the fact that Joseph E. Billington reported the operation of the San Diego Social Club in 1943 of itself refresh your recollection?

A. If it is on our books, that is the amount and that is all I know about it. If the accountant has it on the books and it is recorded, that is the amount. I wouldn't know the amount.

Q. And where are the books of the San Diego Social Club and the 21 Club at this time?

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(Testimony of David N. Kessel.)

A. I refuse to answer.

The Court: The Court will direct the witness to answer the question. [618]

A. The books were turned over to Mr. Remmer. Mr. Remmer wanted the books.

Q. Do you recall when they were turned over to him? A. Sometime in April.

Q. And at that time were there also turned over to him the books of the 311 Club?

A. All the books were turned over. He wanted them for his personal tax. He had some tax trouble and he wanted the books. I was in there when he got the books.

Q. Will you state whether or not he has had those books since that time?

Mr. Gillen: That is certainly calling for his opinion and conclusion.

Mr. Campbell: If he knows.

Mr. Gillen: That is cross-examination of his own witness and calling for speculation.

Mr. Campbell: I am examining under difficulties.

Mr. Gillen: I assign that as misconduct.

The Court: Objection is overruled. Answer the question.

Mr. Gillen: May I make an assignment of misconduct?

The Court: I think by making the assignment you would give prominence to something that no one else heard. I do not believe anybody heard it. The objection is overruled. Read the question.

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(Testimony of David N. Kessel.)

(Question read: "Will you state whether or not he has had [619] those books since that time, if you know?")

A. I refuse to answer.

The Court: The Court directs you to answer the question.

A. Mr. Pechart has a receipt for the books and I believe Mr. Remmer has the books.

The Court: That answer is not responsive. It may go out. Listen to the question.

(Question read.)

A. As far as I know, Mr. Remmer has the books and we have the receipt.

Mr. Gillen: I move the answer be stricken as not responsive—"as far as I know."

Mr. Campbell: I think it is responsive.

Mr. Gillen: I don't think it is, and at this time I desire to make assignment of misconduct against counsel for asking these questions because I charge the questions are being asked in bad faith, which will develop before your Honor.

The Court: The record may show the assignment.

Mr. Gillen: We will develop later what we charge bad faith.

The Court: I want to make an observation, not in regard to this particular subject, but any like subject you think it is necessary to make an assignment. The record will show the reasons for it.

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(Testimony of David N. Kessel.)

Mr. Gillen: It is sometimes hard for jurors to follow [620] remarks of counsel.

The Court: But assignment is not for the benefit of the jury. It is for the appellate court.

Mr. Gillen: The assignment is for the appellate court and the assignment is directed to your Honor and the assignment is for the benefit of the jury, to the extent that your Honor may act upon assignment concerning a matter that the jury has heard.

The Court: I have a little different view of it. I don't see it.

(Last question and answer read.)

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Kessel, is it not a fact that before the 21 Club and before the San Diego Social Club came into existence that you and your partner, Mr. Pechart, employed an accountant by the name of Bishop? A. Yes, sir.

Q. And Mr. Bishop kept books for you and your partner in connection with your business enterprises? A. Yes, sir.

Q. And that was exclusive of the 21 Club or the San Diego Club; is that correct?

A. That's right.

Q. I am talking about before those clubs came into existence. [621] Now when the San Diego Club and the 21 Club came into existence, it is a fact,

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(Testimony of David N. Kessel.)

is it not, that Mr. Bishop continued serving you and Mr. Pechart and included in his work for you the keeping of the books of the 21 Club and the San Diego Club? A. That is correct.

Q. It is a fact, is it not, that Mr. Bishop became a very sick man and subsequently died?

A. That is correct.

Q. It is a fact, is it not, Mr. Bishop became too ill to continue his work for you, that you then employed the services of an accounting firm as G. E. Simmons and Associates?

A. That is right.

Q. And G. E. Simmons and his associates kept books for you and your partner, Mr. Pechart, for the several and various enterprises in which you were interested; is that correct?

A. That is right.

Q. And included in those enterprises was the 21 Club and also the San Diego Social Club, which had then come into existence; is that true?

A. That is right.

Q. And Mr. Bishop had also kept the books for the 311 Club, is that so, or had the 311 Club come into existence after Mr. Bishop became too ill to work for you?

A. I don't think he ever kept the books for the 311 Club. [622]. I think he had died.

Q. You and Mr. Pechart paid Mr. Bishop for keeping books for your various enterprises out of your own funds; is that true?

A. That is right.

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(Testimony of David N. Kessel.)

Q. And you have stated that you were inactive, insofar as the 21 Club and the San Diego Social Club was concerned, that you only went there infrequently; is that correct?

A. That is correct.

Q. And took no participation in the active operation of either the gaming room or the restaurant or the bar? A. That's right.

Q. Now I understood you to testify that in regard to the 311 Club, that this Mr. Grunewald owned the building and had a tavern business operating there; is that correct?

A. That is right.

Q. And that he derived his interest from the 311 Club by permitting you and your partner to operate in conjunction with this tavern?

A. That's right.

Q. And he conducted his tavern business and you conducted the other business yourselves, you and your partner; is that correct? A. Yes.

Q. And he derived his share in the profits from the use of his building and the location and so on; is that correct? A. Yes. [623]

Q. Now with regard to the 21 Club and the San Diego Social Club, it is true, is it not, that not Mr. Remmer but Mr. Grunewald owned the building; is that correct? A. That is right.

Q. And you and your partner conducted the gaming portion, or so-called San Diego Social Club; is that correct? A. That is right.

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(Testimony of David N. Kessel.)

Q. And insofar as the restaurant and tavern was concerned, who conducted that?

A. That was taken care of by Billington and Riggardio. They handled the restaurant and tavern.

Q. To your knowledge did Mr. Remmer work at the 311 Club in any capacity at any time?

A. Never.

Q. To your knowledge did Mr. Remmer work at the 21 Club in any capacity at any time?

A. Never worked there.

Q. To your knowledge did Mr. Remmer work at the San Diego Social Club in any capacity at any time? A. Never.

Q. To your knowledge did Mr. Remmer spend any time in any of those three clubs? Do you understand my question?

A. Yes, I do. Never spent any time in the 311 Club, but he used to visit the 21 Club. Had dinner in there.

Q. He used to go in there for dinner at the 21 Club? [624] A. Yes.

Q. Now you stated in your direct examination that the books that were kept by your accountants, namely, the accounts of the 311 Club, the accounts of the 21 Club, and the accounts of the San Diego Social Club, had been turned over to Mr. Remmer by your partner, Mr. Pechart, and that a receipt had been taken? A. That's right.

Q. And I believe that Mr. Campbell in his question fixed the time as April of 1951?

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(Testimony of David N. Kessel.)

Mr. Campbell: Objected to as assuming a fact not in evidence. The witness fixed the time.

Mr. Gillen: Mr. Campbell asked so many leading questions——

Mr. Campbell: I ask that be stricken.

The Court: I think so.

Q. Well, regardless of who fixed the time, do you now recollect that time or can you state the time was about April of 1951?

A. Sometime in April. It might have been April 21st, I don't know the exact date.

Q. I am talking about the year.

A. I wouldn't know the year.

Q. You wouldn't know the year? Mr. Kessel, was it within your knowledge, or is it within your knowledge that Internal Revenue Agents Farley and Gould took over all of the books and records and the accounts of the 21 Club and the San Diego Social Club [625] for the years 1943, 1944 and 1945 and worked on them for approximately four months and returned them with an audited report, reporting on the year 1943 on November 21, 1947—that is, completing the report and turning back the books on that year—and reporting on the year 1944, completing their survey and reporting on the year 1944 on April 5, 1948, and completing and reporting on the year 1945 on July 27, 1948, and returned those books and accounts for those two clubs to you and Mr. Pechart and your accounts on the dates given?

A. The books were audited at that time by these

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(Testimony of David N. Kessel.)

two agents. They were about four or five months and they returned them to us.

Q. They turned the books over to you?

A. Yes, sir.

Q. And is it true that those books were in the possession of you and your partner and your accountants from not later than July of 1948 until they were turned over to Mr. Remmer in the month of April of 1951?

A. Well, I never saw the books there because I never kept track of all the books that were there.

Q. In regard to the 311 Club, is it within your knowledge that the same two agents had those books, which were turned over voluntarily to them by you and your partner, and worked on those books for a matter of four or five months and returned them to you as being through with them on July 27, 1948, and that they [626] were in your possession from that time until April of 1951, when they were turned over to Mr. Remmer?

A. I wouldn't know the exact date, but they audited all the books of all the enterprises.

Q. Is it within your knowledge that the Internal Revenue agents, when they turned the books back, stated that they had completed their audits and were through with those books?

Mr. Campbell: "Within your knowledge"—no proper foundation laid.

The Court: You may answer the question.

A. I believe they were through with the books.

Q. Well, believe—did the agents tell you they were through?

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(Testimony of David N. Kessel.)

A. Well, I never spoke very much to the agents.

Q. You don't know? A. I don't know.

Q. Now do you know why Mr. Remmer wanted to take over the books in 1951, April?

Mr. Campbell: Objected, calling for his conclusion.

Mr. Gillen: I am calling for his knowledge, if he knows. If he doesn't, he can say so.

The Court: He may answer the question.

Mr. Campbell: I submit, if the Court please, it should be in the form of conversation. He can't interpret Mr. Remmer's mind except as told to him by Mr. Remmer.

The Court: Well, I will sustain the objection in that form. [627]

Q. Mr. Kessel, did Mr. Remmer ever have any conversation with you in which he stated to you why he wanted to take over the books of those three clubs? A. He never asked me for them.

The Court: We are getting along fine, so I don't want any exchanges between counsel. I don't want any remarks made back and forth between counsel at all.

Mr. Gillen: I think that is all.

Mr. Campbell: That is all.

(Witness excused.)

(Jury and alternate jurors admonished and short recess taken at 3:05 p.m.)

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3:20 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

WALTER M. PECHART

a witness on behalf of the plaintiff, being previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Mr. Pechart, I will put to you again the question which was asked you yesterday. With regard to a portion of the premises which you rented from Mr. Remmer, known as the San Diego Social Club, did you operate any business on those premises?

A. I refuse to answer on the ground it may tend to incriminate me. [628]

Mr. Campbell: I press the question.

The Court: The Court will now, and does, order and direct you to answer the question.

A. Yes, I was putting in a booking office.

Q. What do you mean by booking office?

A. Race horses.

Q. And in what year was that?

A. That I can't say. It was after the 21 Club had closed. It is a matter of record on my returns.

Q. During the years 1943 and 1944 particularly, and up to and including 1946, were you associated with the defendant, Elmer Remmer, in the opera-

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(Testimony of Walter M. Pechart.)

tion of any business or businesses on those premises? A. May I have the question?

(Question read.)

A. I refuse to answer on the ground it may incriminate me.

The Court: The Court now orders and directs you to answer the question, Mr. Pechart.

A. Yes, I was.

Q. What was the nature of the business or businesses with which you were associated with Mr. Remmer? A. Gambling, cafe and food.

Q. What name or names did those businesses operate under?

A. The food and cocktail, lunch, operated under the name of 21 Club; the gaming room operated under the name of the [629] San Diego Social Club.

Q. Who, if any one, supervised the operations, so far as the bar and food were concerned?

A. Mr. Denny and Mr. Riggeotti.

Q. By Mr. Denny are you referring to Joseph Billington, sometimes known as Frankie Denney?

A. Yes, I am.

Q. Was it by the name of Denny that you knew him? A. Yes, I did.

Q. In whose name were the liquor licenses?

A. At what time?

Q. In the years 1943 to 1946, inclusive.

A. I couldn't say. They were in two names at that time when first taken over.

Q. Is the name Frank Cavani familiar to you?

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(Testimony of Walter M. Pechart.)

A. Yes.

Q. Is that one of the names on the license?

A. Yes.

Q. Is the name Joe Billington familiar to you?

A. Yes.

Q. Is that one of the names on the license?

A. That is right.

Q. At that time did you know anyone by the name of Joe Billington?

A. I knew Billington, but I am not sure on the first name. [630] That is Frank Denny, the same man, but I am not sure of the first name.

Q. At that time were you aware that Billington and Denny were one and the same man?

A. Yes, I was.

Q. Do you recall approximately when the change was made in the licensee's name from Cavani to Billington? A. No, I have no idea.

Q. Do you recall who directed that change to be made?

A. I know I didn't. That I couldn't say.

Q. You know you didn't? A. That's right.

Q. Who was in charge of the gambling part of the business, or what was known as the San Diego Social Club?

A. Well, there was a gentleman by the name of Walter Parman, a gentleman by the name of Michael Necheck, a gentleman by the name of Andrew Desamoni.

Q. Was there also a Tony Riggoetti?

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(Testimony of Walter M. Pechart.)

A. Well, he was more or less the overseer of food and the bar.

Q. How about Dimetios Saratan?

A. He was what we call the floor boss.

Q. Is that the correct way to pronounce his name? A. Jimmy Sarantos.

Q. Who were the interested parties, so far as division of the profits of the operation of those two clubs? [631]

A. Well, it was Pechart, Kessel and Remmer.

Q. What was Mr. Remmer's interest?

A. Mr. Remmer's interest was 50 per cent, Pechart and Kessel 25 per cent apiece, but we gave bonuses at the end of the month.

Q. Did any of the parties to whom you gave bonuses have any interest in the business itself?

A. Now when you say interest, do you mean any investment?

Q. Yes. A. They did not.

Q. Were the bonuses which you gave based upon the profits for the month? A. That's right.

Q. And were they given to whatever employees were employed during that month?

A. Well, they were given to the key men.

Q. In that regard, did you continue to give bonuses to those men after they left your employment? A. After they left the employment?

Q. Yes. A. Absolutely not.

Q. So that the bonuses, as I understand it, were given to them for the purpose of employment.

A. They stopped when the employment stopped.

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(Testimony of Walter M. Pechart.)

Q. By whom were the bonuses paid?

A. By whom were the bonuses paid? [632]

Q. Yes.

A. By the cashier and the floor man, the manager, Mr. Riggeotti, the overseer.

Q. Do you know how that was handled on the books of the business?

A. It is all on the books, but how it was handled I can't state. It is six or seven years ago and the accountant made all those sheets up.

Q. Who kept those records?

A. To start with, a man by the name of Bert Bishop; he was our accountant, and he passed away and then Mr. G. E. Simmons came in.

Q. When was that business opened, incidentally?

A. What business?

Q. The 21 Club and San Diego Social Club?

A. In '43.

Q. And when was it that Mr. Simmons took over after Mr. Bishop's decease?

A. That I couldn't say.

Q. Do you presently have the records of that business, as well as the records of the 311 business, for the period 1943 to 1946, inclusive, in your possession?

Mr. Gillen: To which we offer objection, may it please the Court. It has been established in the record that the books were out of this witness' possession, out of the [633] bookkeeper's possession, out of the partners' possession and repeated asking of that question is for the purpose of emphasis.

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(Testimony of Walter M. Pechart.)

The Court: Objection overruled. Answer the question.

(Question read.)

A. No, I have not.

Q. Do you have in your possession a receipt from anyone, indicating to whom you delivered the books? A. Yes, I have.

Q. Will you produce that receipt?

A. To whom?

Q. Will you produce it to the Court at this time? (Witness produces document.) May I see the document?

The Court: Yes.

Mr. Campbell: May this be marked for identification, if the Court please, Plaintiff's 96?

The Court: So marked.

Mr. Gillen: As to prosecution's Exhibit 96 for identification, the defense is prepared to stipulate it may be offered in evidence if the prosecution cares to.

Mr. Campbell: We offer it.

The Court: It may be admitted in evidence.

Mr. Campbell: At this time I would like to read this document to the jury. Plaintiff's Exhibit 96, April 24, 1951.

(Reads Exhibit 96.)

Q. Mr. Pechart, do you know the amount of investment of [634] Mr. Remmer in the 21 Club?

A. No, I do not.

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(Testimony of Walter M. Pechart.)

Q. Do you know the amount of his investment in the San Diego Social Club?

Mr. Gillen: Just a moment. I am going to offer the objection it is leading and suggestive and assuming something not in evidence. There is no reference here that there was any investment at all.

The Court: I think the objection is good on the grounds it is assuming something not in evidence.

Mr. Campbell: Possibly the latter; I can't see how it is leading and suggestive.

The Court: No, I am more interested in the latter.

Mr. Campbell: I will reframe the question. The question and answer may be stricken.

Mr. Gillen: And so far as the previous question and answer——

The Court: Yes, the previous question and answer will be stricken.

Q. Mr. Pechart, do you know the amount of Mr. Remmer's investment, if any, in the 21 Club?

A. No, I do not.

Q. Do you know the amount of Mr. Remmer's investment, if any, in the San Diego Social Club?

A. No, I do not. [635]

Q. During the years 1943 to 1946, inclusive, did you, yourself, spend any time on these premises during operating hours? A. Yes, I did.

Q. Did you, yourself, take any active part in the management? A. No, I did not.

Q. In connection at the time the business was opened of the San Diego Social Club, or the gam-

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(Testimony of Walter M. Pechart.)

bling part of the business, was a bank roll set up?

A. Yes, it was.

Q. And what was the amount of that bank roll?

A. I couldn't say at the present time. It is entered in the books, the amount.

Q. What is your best recollection?

A. I haven't the slightest idea.

Q. Did Mr. Remmer contribute to that bank roll?

A. Whatever is in the books is correct.

Q. You have no recollection of what is in the books? A. No, I haven't.

Q. When was the last time that you examined the books?

A. I don't believe I have ever examined them. I have an auditor, a certified public account, and I left it entirely up to him.

Q. You stated that you had never examined the books, but that whatever was in the books was correct. Will you explain that answer? [636]

A. Well, whatever was turned over to my auditors I would say was correct, yes.

Q. You believe it was correctly entered?

A. Yes, I do.

Q. Did they make reports to you from time to time as to such matters?

A. Monthly reports, yes.

Q. And were monthly reports made with respect to the San Diego Social Club?

A. No, I had several enterprises and it was made as a whole.

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(Testimony of Walter M. Pechart.)

Q. On those enterprises was there also included on this monthly report sheets the operations of the 21 Club and San Diego Social Club? A. Yes.

Q. Were those among the records turned over to Mr. Remmer?

A. No, just for my own personal use.

Q. You still have those records, do you?

A. No, I have not.

Q. Where are those records now?

A. Well, they were of no value to me.

Q. I didn t ask you whether or not they were of value, I asked you where they are.

Mr. Gillen: Just a minute, I object, he is arguing and cross-examining his own witness. This is direct examination and it smacks all the way through of cross-examination of his [637] own witness.

The Court: Objection overruled. Answer the question.

(Question read.)

The Court: Can you reframe the question?

Q. Where are those monthly reports sheets of the 21 Club and the San Diego Social Club at the present time?

A. It wasn't a report sheet. It was an adding machine tape to let me know how we were going along, whether we were going in the red or using black ink.

Q. How was that adding machine record taken? Was each business shown separately? A. No.

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(Testimony of Walter M. Pechart.)

Q. Then do I understand there was only one figure on the tape? A. That's all.

Q. Do you at the present time have in your possession—I do not mean physically on the stand, but in your business possession—any records relating to the assets, liabilities, receipts or disbursements of the 21 Club or the San Diego Social Club for the years 1943 to 1946 inclusive?

A. No, I haven't.

Q. Calling your attention to plaintiff's Exhibit 96, receipt of Mr. Remmer for various matters set forth in it, I will ask you if included on there were all records of any kind pertaining to the operation of the 21 Club, San Diego Social Club for the years 1943 to 1946 inclusive, which were in your [638] possession at the date of that receipt?

A. As far as I know, yes.

Q. Were you present at the time those records were turned over to Mr. Remmer?

A. I am not sure whether I was or not. Mr. Remmer talked to me about the records and asked me if the government had them or if I had them and asked me if they had been audited and I told him yes——

Mr. Campbell (Interrupting): That is not responsive to my question.

(Question and answer read.)

The Court: The answer may stand.

Mr. Gillen: I do not think the witness has completed his answer.

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(Testimony of Walter M. Pechart.)

The Court: I think he has fully answered the question.

Mr. Campbell: I think the first part of the answer fully answers the question.

The Court: Yes, I think it does. The question is fully answered now.

Q. During the years 1944 and 1945 were you familiar with the business known as 311 Club, situated at 311 Panhandle Avenue in El Cerrito?

A. Yes, I was.

Q. Did Mr. Remmer have an interest in that club? A. No, sir. [639]

Q. Did you have, during those years, some arrangement or arrangements whereby Mr. Remmer was to receive a portion of the profits of that club?

A. No, I gave him a small portion because he didn't approve of the club being in there. As a matter of courtesy I gave what we call it a little bonus. As far as any investment, he didn't have one dollar invested.

Q. On what was that bonus based, that is to say, was it a percentage?

A. I am not sure whether it was a 5 or 10 per cent cut off 75 per cent at the time. I am not sure. The records will show.

Q. Those are on the records referred to on the receipt before you, are they not? A. Yes.

Q. And you say it was a percentage taken from 75%? A. I am not sure, but I think it was.

Q. That is your best recollection?

A. Yes, it is.

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(Testimony of Walter M. Pechart.)

Q. Now what was the location of the 311 Club with relation to that of the San Diego Social Club?

A. Across the street.

Q. And when was the 311 Club opened?

A. After the 21 Club.

Q. Do you recall what year?

A. No, I do not. It is in the books, in the records. [640]

Q. I believe you previously stated that the San Diego Social Club was opened in 1943?

A. San Diego Social Club and 21 Club were opened. You asked me about the 311 Club?

Q. Yes.

A. The 311 Club was across the street and opened after the 21 Club and the San Diego Social Club.

Q. Do you know how long after, to the best of your recollection?

A. It might have been eight months or a year, I couldn't say. I am not positive.

Q. Now with relation to the 311 Club and the percentage which you say you gave to Mr. Remmer, that arrangement was made at the time the 311 Club, I take it, was opened, is that correct?

A. No, we hadn't opened the 311 Club.

Q. I mean your arrangement with Mr. Remmer, when was that entered into?

A. Started the moment it was open.

Q. How long did it continue?

A. Until we closed.

Q. And when did you close the 311 Club?

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(Testimony of Walter M. Pechart.)

A. Well, I couldn't state.

Q. Did that arrangement continue throughout 1944 and 1945?

A. If we were open, it did.

Q. I am going to show you government's Exhibit 74, 1944 partnership [641] return of income of Pechart and Kessel and Grunewald, and ask you if you are familiar with the signature appearing as the party mentioned in that return?

A. Yes, I am.

Q. That is your signature?

A. Yes, that is my signature.

Q. Now does that refresh your recollection as to whether or not you were open during the year 1944?

A. What is the date? It must have been. This is March 15, 1945, so it must have been 1944.

Q. And that is return for 1944, is it not?

A. That is correct.

Q. I show you plaintiff's Exhibit 75, 1945 return of Pechart, Kessel and Grunewald for that year, and I call your attention to the signature of the party purportedly making the same and ask you if you are familiar with that signature?

A. That is mine.

Q. Is that your signature? A. Yes, it is.

Q. Now does that refresh your recollection as to whether or not you were open and operating during that year?

A. This is dated March 4, 1946. Does that mean this is filed of '46 or '45?

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(Testimony of Walter M. Pechart.)

Q. I ask you to examine the document. You will observe it is return of income for 1945. [642]

A. That's right.

Q. Does that refresh your recollection?

A. Yes, it does.

Q. That you were or were not open in 1945?

A. We were.

Q. I show you plaintiff's Exhibit 76, return for 1946 of Pechart, Kessel and Grunewald, calling your attention to the language, "Not in Operation" and to the signature appearing as the party making the same. Are you familiar with that signature?

A. Yes, I am.

Q. Whose signature is that?

A. David N. Kessel.

Q. And referring to the document itself and the words, "Not in operation," does that refresh your recollection as to whether or not the 311 Club was operating during 1946? A. Yes it was.

Q. It was in operation or was not?

A. It was.

Q. And over what part of 1946 was it operated?

A. That I couldn't say.

Q. So that when this return, plaintiff's Exhibit 76, recites "Not in Operation," that it was isn't the fact?

A. It would not be in operation if the return says it was not in operation. [643]

Q. Now let's straighten this out. Were you, or were you not, during the calendar year 1946, operating the 311 Club?

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(Testimony of Walter M. Pechart.)

A. I would say no. It am not positive.

Q. Now directing your attention again to government's Exhibit 74, the 1944 return, and particularly to Schedule I, being 1944 return of the 311 Club, under "Partner's Share," I will direct your attention to the fact that some $12,416.61 of profit is reported on this return and that under Schedule I, "Partnership Shares of Account" is listed: E. Remmer, $1,257.18, slightly more than 10 per cent of the entire net income. I will ask whether or not that refreshes your recollection as to the profit-sharing arrangement which you had with Mr. Remmer?

A. This was prepared by my auditors and my accountants, has my signature on it, so it must be right.

Q. Does that refresh your recollection as to the profit-sharing arrangement which you had with Mr. Remmer for that year? A. No, it does not.

Mr. Gillen: Just a moment—I am going to offer an objection.

The Court: He has already answered no. Does that make any difference?

Mr. Gillen: No, it does not. In the first place, I object to Mr. Campbell's characterization as partnership arrangement. It was described otherwise.

The Court: There is some question about [644] that.

Mr. Gillen: And No. 2, my second objection——

The Court (Interceding): I think your objection comes a little late on that score. You have

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(Testimony of Walter M. Pechart.)

heard that question phrased that way two times.

Mr. Gillen: I move it be stricken.

The Court: It will stand. Motion denied.

Mr. Gillen: All right, then I make the objection the witness testified he had no recollection, but his accountant made it up and it must be right. I object to the speculation, conclusion on his part. If he has no recollection, he should say so. If he has a recollection, he should tell us.

The Court: The answer may stand. The motion is denied.

Q. Now, Mr. Pechart, I am going to show you plaintiff's Exhibit 75, the partnership return of income of 311 Club for the year 1945, and call your attention on the first part thereof to this language, under deductions: Salaries and wages $55,844.76; plus bonus, $20,785.34; total deduction for salaries and wages, $76,630.10. I will ask you whether or not any part of the amount listed here of bonus, $20,785.34, was paid to Elmer Remmer?

Mr. Gillen: Which exhibit is that?

Mr. Campbell: 75.

A. It is my signature and on the back of it Elmer Remmer, $584.92. I didn't prepare it. I wouldn't swear whether it is true or not. [645]

Mr. Pechart: I made a mistake in my testimony. May I correct it?

The Court: Yes, you may.

Mr. Pechart: When you asked me if I visited Mr. Remmer's home I stated yes; you asked where

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(Testimony of Walter M. Pechart.)

he lived. I said El Cerrito. I should have said Orinda, California.

The Court: We will take our recess at this time.

(Jury and alternate jurors admonished and excused.)

(In the absence of the jury.)

The Court: All right, Mr. Golden.

Mr. Golden: I only wanted to inquire if the Court would set a time for argument of the matter of deposit of those records last Friday. On Friday it was arranged or at least tentatively.

The Court: Argument will be had any time, should it happen, that you intend to introduce records.

Mr. Golden: The point is in the interim they are sealed up and we can't look at them.

The Court: I didn't order them sealed up.

Mr. Golden: In chambers Friday afternoon, after court had recessed—the reporter was not present, but some of the attorneys on each side were in there, and it was arranged over the week end that they would remain inaccessible to both sides. [646]

The Court: That was because we couldn't agree at that time. See if I have the right recollection of that. Agreement might be entered into between counsel whereby each side could have access to those records. That is what I would like to see done, if it is possible to do it.

Mr. Golden: If your Honor will recall, we expressed grave legal doubts as to the legal propriety

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of the Court's action and it was tentatively arranged that your Honor would hear argument on the matter at one o'clock Monday, yesterday, and then something else came up. There is no record to show that we deposited those books and documents and we would like to be heard on it at a time convenient to the Court.

The Court: I am not going to open that question at the present time. The ruling will remain as the former ruling.

Mr. Golden: We would like, your Honor, to make a motion for the return of that material and other material and motion to suppress the introduction of that material and other material in evidence.

The Court: I think we can take care of the matters as the situation presents itself. I had in mind the idea we would probably encounter a serious legal problem and when we did, I proposed to hear from counsel. But I am not going to go behind the ruling [647] I made requiring the production of the records in the clerk's office.

Mr. Golden: I understand your Honor wouldn't vacate that order, but the motions we wish to make are for the return of that material and other material and motion to suppress the use——

The Court: Very well, but I am not going to postpone or delay this trial for hearing of those motions.

Mr. Golden: We do not care to postpone or delay the trial. We will make that at any time, we

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will make it at nine o'clock tomorrow, at any time your Honor wishes.

The Court: No.

Mr. Pike: I am familiar with the circumstances of what took place last Friday with reference to orders and no order whatsoever was made by the Court at that time. However, the circumstances of the records having deposited with the clerk of the court by defense counsel were brought to the Court's attention and the concensus of the expressions there was neither the prosecution nor the defense would have access to those records, but there should be some further indication by the Court as to their being available to both parties, and if counsel's inquiry is directed to the proposition that they would like to have access to the records, I am in accord with that view. I feel that the records should be made accessible to both parties under conditions convenient to the clerk, so [648] work there and if necessary make arrangements to see them in the evening after usual court hours, which I feel could be arranged.

The Court: I believe that suggestion was made Friday and I believe the Court indicated that that could be approved. That is my recollection. I approve such an arrangement.

Mr. Golden: I ask permission to make a motion for the return of them and other material and for suppression of its use in evidence prior to the time it is opened up to the prosecution. I am willing to make the motion at any time.

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The Court: Well, you can make your motion now.

Mr. Golden: All right, your Honor.

Now, if the Court please, the following records were deposited on Friday afternoon at approximately 1:30 in the afternoon, in compliance, under protest, with the Court's order, namely: (Starts to read list of records deposited.)

The Court (Interrupting): Do you have to read that long list into the record? Can't you give it to the reporter to copy?

Mr. Golden: I don't want to detain your Honor. Under Rule 41(e) of the Rules we are entitled to make a motion and produce evidence. It is going to take some time.

The Court: Well, we will be in recess until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:12 p.m.) [649]

December 12, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

(Jury and alternate jurors admonished and excused until 11:00 o'clock.)

(Argument regarding documents filed with the clerk in absence of the jury.)

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December 12, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury stipulated.)

MR. PECHART

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Pechart, when you were on the stand yesterday, I made inquiry as to certain individuals whom you described as employees in various capacities in the 21 Club and the San Diego Social Club, you recall that, do you? A. Yes, sir.

Q. Mr. Pechart, in connection with the operations of the 21 Club and the San Diego Social Club, who was it that hired or originally employed Joe Billington, or Frankie Denny, as you said you knew him? A. Well, I did not hire him.

Q. Well, who did, if you know? [650]

A. Well, that I couldn't say. When the place was opened, he was in there.

Q. But you had nothing to do with his work?

A. I had absolutely nothing to do with the hiring of Mr. Denny.

Q. With regard to Walter Parman, who hired him?

A. Mr. Parman was sent to us either from the Lake or San Francisco. I don't know who hired him.

Q. Either from where?

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(Testimony of Walter M. Pechart.)

A. Mr. Parman was sent to us from the Lake, that is Lake Tahoe, or San Francisco. At that time Mr. Parman took charge I wasn't around El Cerrito.

Q. Did you have anything to do with his initial hiring? A. No, I did not.

Q. Do you know whether or not Mr. Parman had been employed at Cal-Neva at Lake Tahoe immediately to his employment at the San Diego Social Club?

A. Before he came to the San Diego Social Club?

Q. Yes.

A. No, Mr. Parman, I am pretty sure, came from the East, I am not positive.

Q. I thought you said from the Lake?

A. He was either on a vacation up to the Lake or he was on a vacation in San Francisco.

Q. In regard to A. Riggogardi, sometimes known as Tony Riggogardi, do you know who initially hired him? [651] A. No, I do not.

Q. Did you initially hire him?

A. No, I did not.

Q. Do you know where he had been employed prior to coming to the 21 Club and the San Diego Social Club?

A. He was with the State Board of Equalization.

Q. Of the State of California? A. Yes.

Q. With regard to Andrew Desimone, do you know who hired or employed him in connection

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(Testimony of Walter M. Pechart.)

with the operation of the 21 Club and San Diego Social Club?

A. I think I had something to do with that.

Q. You hired him?

A. I didn't hire him, I suggested him.

Q. To whom did you suggest that he be employed? A. Mr. Remmer.

Q. And he was subsequently employed?

A. Yes.

Q. With regard to Demitris Sarantos——

A. That is Jimmy Arantos. I hired him.

Q. He was known to you as Jimmy Sarantos?

A. Yes.

Q. Incidentally, what were his duties there?

A. He was a floor boss.

Q. You hired him? [652] A. Yes, I did.

Q. In connection with hiring him, did you consult with Mr. Remmer? A. No.

Q. Now, as to Michael Mecheck, did you hire him?

A. I did not hire him. I couldn't say who hired him.

Q. You don't know who hired him?

A. No, he was the floor boss, the manager, he had the power of hiring.

Q. Do you know whether or not Mr. Kessel hired any of these individuals to whom I have referred?

A. I think he suggested Jimmy Sarantos to me.

Q. And you in turn hired him? A. Yes.

Q. Now you testified, I believe, Mr. Pechart, that

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(Testimony of Walter M. Pechart.)

certain bonuses were paid to these employees by way of percentages, is that correct?

A. That is correct.

Q. Who fixed the amount of those percentages?

A. Well, the cashier, manager, and probably a couple of the bit bosses and myself, whoever happened to be on the floor.

Q. Were they fixed from day to day or month to month?

A. Oh, no; the end of the month.

Q. The end of each month?

A. That's right. [653]

Q. Were those percentages fixed and determined prior to the rendering of the services or after the services had been rendered?

A. After the services had been rendered.

Q. Did those bonuses apply to the 21 Club, that is to say, the bar and restaurant operation, as well as the San Diego Social Club, the gaming operation? A. That I couldn't say.

Q. You say you cannot say, do you mean you do not remember? A. I do not know.

Q. Will you state whether or not the same bonus percentage was used each month, or whether it varied from month to month, depending on——

A. I refuse to answer that question on the grounds it may tend to incriminate me.

Mr. Campbell: I hadn't quite finished the question. I will reframe the question, Mr. Pechart.

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(Testimony of Walter M. Pechart.)

Q. Was the same bonus percentage used each month, or did it vary from month to month?

A. I refuse to answer the question on the grounds it will tend to incriminate me.

Mr. Campbell: I press the question.

The Court: The witness is ordered and directed to answer the question.

A. As far as the key men, it was supposed to be the same and [654] if it varied, I don't remember. When I talk about key men, I am referring to the manager.

Q. Will you state who those key men were?

A. Well, there was Walter Parman, Andrew Desimone, Mike Necheck.

Q. Those were the key men. And what was the bonus percentage that was arrived at to pay to them?

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled.

Mr. Gillen: He testified about percentage of 75 per cent of net profits yesterday.

Mr. Campbell: No, I think counsel is confused.

The Court: Objection overruled. Answer the question.

A. I am not positive. I think the manager was to receive five per cent off Pechart and Kessel, five per cent off Remmer.

Q. Let me see if I understand you correctly. From Pechart and Kessel combined share of 50 per cent, five per cent was to be paid?

A. That is correct.

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(Testimony of Walter M. Pechart.)

Q. And from Mr. Remmer's 50 per cent, five per cent was to be paid?

A. That is correct. That was to the general manager.

Q. And you had during that period of time, I take it, one after the other of the three gentleman managers?

Q. We had three there probably at one time, but they weren't all in the capacity of general manager. [655]

Q. There would just be one general manager at a time? A. Just one general manager, yes.

Q. And he would receive five per cent from you and from Mr. Remmer, is that correct?

A. Yes.

Q. Now as to the other employees that were receiving bonuses, what percentage would they receive?

A. That I do not recall. I do not recall what Mr. Sarantos received and he was our key man, but he never was a general manager. I know we gave him a bonus, compensated him each and every month, but I do not recall what it was in the book.

Q. When you say "our key man," to what do you refer?

A. I mean he was the man that was suggested I hire him. You asked me who hired these other gentlemen and I told you I didn't know.

Q. Was your arrangement such that you had a man in there looking after your interests?

A. My arrangement was when the boxes were

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(Testimony of Walter M. Pechart.)

taken off and the cash was balanced at the end of the night, Mr. Sarantos was in there.

Q. And he had been hired by you and Mr. Kessel? A. That is right.

Q. When you refer to the boxes being taken off, you refer to the metal boxes at the gambling table?

A. Not metal, they were wood. [656]

Q. In which bills are placed that pass over the gambling table and were passed by the dealer and it is customary to count those before the end of the evening?

A. It is customary to count them before at least three people.

Q. Did Mr. Remmer have a key man during that period of time?

Mr. Gillen: Objected to as calling for his conclusion.

Q. If you know, for the purpose of being present when the cash was counted?

Mr. Gillen: Objected to as calling for his opinion and conclusion.

The Court: Objection overruled.

A. Well, there was a cashier in there and there was a manager, Mr. Sarantos and Mr. Pechart and Mr. Desimone.

Mr. Campbell: No, I ask the question be read.

(Question read.)

A. Never heard of him having a key man. I had as much authority over the running of the game room as Mr. Remmer did. In fact, Mr. Remmer was very very seldom around there.

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(Testimony of Walter M. Pechart.)

Q. Do you know whether or not any of the three persons who were present at the time the cash was counted had been hired by Mr. Remmer?

Mr. Gillen: Objected to as asked and answered. He asked him in great deal who hired who and the witness has answered.

The Court: Objection overruled.

A. Will you read the question? [657]

(Question read.)

A. You mean in the operation of the 21 Club?

Q. I am referring to the San Diego Social Club.

A. Some one must have hired the key man. I don't know who hired them. I didn't hire them.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Pechart, you were questioned here by Mr. Campbell regarding three enterprises in which you and your partner, Mr. Kessel, had an interest, to wit, 311 Club, 21 Club, and the San Diego Social Club, all in El Cerrito, California. During the same period of time did you have an interest in any other enterprise other than those three enterprises?

A. I refuse to answer the question on the grounds it may incriminate me.

Mr. Campbell: I submit to the Court it is immaterial unless it touched upon the liability of Mr. Remmer here.

The Court: I would like to get your view of that

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(Testimony of Walter M. Pechart.)

in the face of that objection, Mr. Gillen. It does not seem to be material or within the range of direct examination.

Mr. Gillen: I want to know if he has any interest in any other business and I am going to ask if Mr. Remmer had any other interest by way of bonus or partnership or anything else. [658]

The Court: Objection will be overruled.

Mr. Gillen: Now the witness has declined to answer upon his constitutional grounds, may it please the Court, and the defense urges the question.

The Court: Very well. The witness will be, and is directed to answer the question.

A. Yes, I had an office in El Cerrito, a booking office.

Q. Did Mr. Remmer, the defendant in this case, have any interest in any form or manner with that enterprise by way either of partnership or investment or by way of friendship or token bonuses?

A. No, he did not.

Q. Am I to understand your testimony to be that the only interest that he had in any enterprises in which you were interested were the two clubs, the 21 Club and the San Diego Social Club and whatever might have been termed his interest by way of receiving a bonus from the 311 Club, is that correct? A. That is correct.

Q. I understood your direct testimony to be—correct me if I am in error—that the 311 Club was an enterprise that belonged exclusively to you and your partner, Mr. Kessel, is that right?

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(Testimony of Walter M. Pechart.)

A. That is correct.

Q. And that so far as friendship bonus based upon percentage that was afforded to Mr. Remmer was because Mr. Remmer had opposed the opening of that enterprise, is that correct? [659]

A. Yes, he opposed the opening, but that didn't mean anything to me. It was more a matter of courtesy. It is done a great many times in the nature of business that we were in. I didn't have to give it to him.

Mr. Campbell: I ask the portion of his answer where he says it is done a great many times in the nature of business he was in be stricken.

The Court: It may stand.

Q. Your testimony was, was it not, that the 311 Club was located nearly across the street from the 21 Club and the San Diego Social Club, is that correct? A. Yes, it was.

Q. So Mr. Remmer's opposition to the opening of the 311 Club was the fact that it formed a competitive concern, that is, that it competed with the business of the 21 Club and the San Diego Social Club? A. Yes, could be so.

Q. Now at the outset of your direct examination you were asked if you recall what names were on the California liquor license to sanction the operation of the retail liquor concern or the tavern, do you recall that question? A. Yes, sir.

Q. And do you recall that you were asked specifically you remembered at one time the name of Mr.

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(Testimony of Walter M. Pechart.)

Frank Cavani was on there, do you remember [660] that? A. Yes, sir.

Q. And I think you stated that you did not know how long Mr. Frank Cavani remained on the license? A. That's correct.

Q. Is it not true that Mr. Frank Cavani was to become the manager of the 21 Club, that is the restaurant and bar, but because of the death of a man by the name of Bent, who was operating the 110 Eddy establishment in San Francisco, that Mr. Cavani never did become manager of the 21 Club, but remained at the 110 Eddy Club in San Francisco?

Mr. Campbell: If he knows.

Mr. Gillen: I am only asking what he knows.

A. He left the 21 Club in El Cerrito and went over to San Francisco.

Q. Do you recall how long Mr. Cavani was at the 21 Club?

A. It was a short time, I do not remember.

Q. After he returned to San Francisco then another name was put on the license?

A. That is right.

Q. That name was the name of Mr. Billington, was it not?

A. I know he was on the license, but I am not positive.

Q. Now, Mr. Pechart, you were asked a few moments ago regarding the bonuses that were paid to persons you have described not as partners, but as employees in various activities, such as manager, cashier, general manager, floor man, and so [661]

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(Testimony of Walter M. Pechart.)

on. Is it not a fact that the floor man at the San Diego Social Club was paid regularly—perhaps I am not using the right designation when I say floor man—but there was one man who was paid regularly five per cent off the top of the earnings, so that you and your partner received actually only 45 per cent and Mr. Remmer received actually 45 per cent? A. I just stated that.

Q. You stated that? A. Yes, I did.

Q. Who was that man?

A. Whoever the manager was. I don't recall; in fact——

Q. Was that the general manager?

A. Yes.

Q. With regard to the 311 Club, is it or is it not true that the 311 Club opened and closed spasmodically during the time that the 21 Club and San Diego Social Club were in operation?

A. I refuse to answer on the ground it may incriminate me.

Mr. Gillen: The defense respectfully urges the question.

The Court: The witness will be ordered, and is ordered, to answer the question.

A. Yes, it opened and closed.

Q. Over the period of time between 1943, and 1946, could you give us any idea how much of the time the 311 Club was open and how much of the time it was closed? A. No, I cannot. [662]

Q. Would it be your best recollection now that it was open and operating more than it was closed,

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(Testimony of Walter M. Pechart.)

or that it was closed more than it was open and operating? A. I couldn't say.

Q. Now you were also asked regarding the incident occurring during the month of April of 1951, when you, at the request of Mr. Remmer, either personally turned to Mr. Remmer, or had turned over to him, all of the books and accounts of the 311 Club, 21 Club and San Diego Social Club. Do you recall being asked those questions?

A. Yes, I do.

Q. What is your recollection as to whether you personally turned over those records and had a receipt taken from Mr. Remmer, the receipt which is in evidence here?

A. Mr. Remmer met me on the street and asked me if I had my books back from the government, if they had been checked. I told him they had. He said he was having tax problems and wanted to know if I would let him have them.

Q. Did he tell you what he wanted them for?

A. He said he was having tax problems.

Q. Did he tell you what he wanted to do with the books?

Mr. Campbell: Objected to as calling for self-serving examination.

The Court: Objection overruled. Answer the question.

A. He said he wanted to give them to his attorneys. [663]

Q. Did you personally make the delivery to him or did you arrange to have the delivery made?

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(Testimony of Walter M. Pechart.)

A. If I didn't, I had arrangements made with my accountant.

Q. And that would have been?

A. Mr. L. E. Simmons

Q. That is Mr. Lester Simmons at that time?

A. That is right.

Q. You say Mr. Remmer asked you if the government had given you back the books and were they through with them or had they checked them?

A. That is right.

Q. Had the government given you back the books at that time, that is, April of 1951?

A. Yes, they gave us back all our books.

Q. Do you recall when it was that you received the last of your books from the government?

A. No, I do not.

Q. Would it refresh your recollection that the last of your books were received from the government on the 27th day of July of 1948?

A. No, I don't know.

Q. Would it refresh your recollection that the books had been back in your hands or possession for a matter of a year or two before you turned them over to Mr. Remmer?

A. I couldn't say yes or no. [664]

Q. Now do you have any recollection now of how long the government retained those books for the purpose of making their audit or examination?

A. They were making an audit in one of our offices for at least two or three months.

Q. Now when you say in one of your offices, can

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(Testimony of Walter M. Pechart.)

you describe better just what facilities you made available to the government agents for the purpose of working on those books?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question. Objection overruled.

A. Well, we gave them an office in the Rancho San Pablo.

Q. Where is the Rancho San Pablo in relation to your office?

A. It is across the street from our office.

Q. Is that on San Pablo Avenue? A. Yes.

Q. In El Cerrito? A. That is right.

Q. You say they worked there for two or three months on your books?

A. I wouldn't be positive. I would say a couple of months. They were in and out and would be away for a few days and come back, had books scattered all over the place for quite some time. I am not positive about the length of time, but it was rather a long time. [665]

Q. Isn't it a fact that they worked on those books between four and five months?

A. That I couldn't say.

Q. Isn't it a fact that as soon as they were through, they not only gave you your books back, but they gave you a report of their audit?

A. Yes, they gave us a report.

Q. And that was all in your possession, and had been for some time, before Mr. Remmer requested

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(Testimony of Walter M. Pechart.)

you to turn the books over to him so he might take them to his lawyers for his tax problems?

A. They were not in my possession. They were in the possession of my account.

Q. Lester Simmons? A. Yes.

Q. Now isn't it a fact that the government agents who made this audit kept the books as long as they needed them and returned them to you voluntarily?

Mr. Campbell: Objected to as calling for conclusion.

The Court: That may be conclusion.

Mr. Gillen: Well, I can reframe the question, your Honor.

Q. Did you, or to your knowledge, did your counsel ever ask the government to return the books before the government agents voluntarily brought the books back without request from you?

A. That I couldn't say. [666]

Q. Were you present when those books were returned? A. No, I was not.

Q. Do you recall meeting the agents who made the audit, namely Messrs. Farley and Gould?

A. Yes, I did.

Q. Did you ever personally make a request during the period of time that those agents were making the audit of those books in the offices that you made available for them across the street from your own office, did you ever at any time personally make a request that they give you back the books?

A. No, I never did.

Q. Mr. Pechart, what is your recollection with

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(Testimony of Walter M. Pechart.)

regard to the success or lack of success of the 21 Club during the period of time it was in operation? Did it lose money or make money?

A. It never made very much money.

Q. After the San Diego Social Club and the 21 Club closed down was there any time that you thereafter conducted an enterprise in the premises that had once housed the San Diego Social Club that was your own enterprise?

A. I refuse to answer on the ground it would tend to incriminate me.

Mr. Campbell: I don't think the question was finished.

The Court: Had you finished the question. Let us have the question read.

(Question read.) [667]

Mr. Campbell: I am going to object unless the question is directed at events within this indictment. Any events referred to that took place subsequent to December 31, 1946, I object to on the grounds of the question of materiality.

Mr. Gillen: I am inquiring of the witness if such a thing did exist. If it didn't exist, of course——

The Court: (Interceding): Personally I do not see where it is material, this present inquiry.

Mr. Gillen: For one reason, undoubtedly there were books kept of those enterprises that may reflect some profits that may, because of a previous action of the defendant Remmer he claims is charge-

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(Testimony of Walter M. Pechart.)

able to the defendant Remmer. I want to eliminate that.

The Court: The question, as I understood it, is directed to some enterprise which this witness may or may not have conducted which was entirely his enterprise.

Mr. Gillen: That is correct, your Honor. And also may I state, your Honor, that this was introduced, this independent enterprise I am referring to now, was introduced in direct examination and testified to. Reference was made to it by the witness.

Mr. Campbell: I would like to see that.

Mr. Gillen: Very well.

Mr. Campbell: Your Honor, I think there was a question asked of the witness if he had ever rented any premises from [668] Mr. Remmer and he stated he had for a short period of two or three months, is that the question to which counsel refers?

Mr. Gillen: The testimony to which I refer appears on page 628 of the transcript, Mr. Campbell questioning Mr. Pechart shortly after recess, 3:20 p.m. of yesterday:

> "Q. Mr. Pechart, I will put to you again the question which was asked you yesterday. With regard to a portion of the premises which you rented from Mr. Remmer, known as the San Diego Social Club, did you operate any business on those premises?"

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(Testimony of Walter M. Pechart.)

And then the witness refused to answer and the question was pressed and the Court ordered the witness to answer:

"A. Yes, I was putting in a booking office.

"Q. What do you mean by booking office?

"A. Race horses.

"Q. And in what year was that?

"A. That I can't say. It was after the 21 Club had closed. It is a matter of record on my returns."

That was the matter, your Honor.

Mr. Campbell: It was subsequently developed, your Honor, both on direct and on cross-examination, that the only interest this witness and the defendant Remmer had in common were in relation to the operation of the 21 Club, the San Diego Social Club and the courtesy bonus, whatever it may be termed, of the 311 Club. This particular question is asking him directly as [669] to an operation of his own, and I submit that that is immaterial.

The Court: Objection will be sustained.

Q. Mr. Pechart, I am going to show you, with the Court's permission, prosecution's Exhibit 93 in evidence, and I will ask you whether or not you recognize this document or if you have ever seen it before? A. No, I have never seen it before.

Q. You will notice, Mr. Pechart, that that document is labelled, or at least printed form, of the United States partnership return income year 1944, and refers to the return of Joseph Billington, doing

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(Testimony of Walter M. Pechart.)

business as the San Diego Social Club, and purports to set forth the taxable income, the gross and net taxable income of the San Diego Social Club, do you notice that?

A. I noted that on the heading, yes.

Q. Did you also notice that this document was prepared and bears both the signature and stamp of G. E. Simmons and Associates, whom I believe you have identified as the accounting firm which worked for you and your partner, Mr. Kessel, and among other accounts kept the accounts of that club, the San Diego Social Club and the 21 Club and the 311 Club? A. That is right.

Q. Do you know whether or not this return was ever filed?

Mr. Campbell: Objected to on the grounds he has previously stated he had never seen the document. [670]

The Court: He may answer.

Mr. Gillen: He might not have seen it and still know something about it.

The Court: You may answer.

A. I wouldn't swear to that. I have no signature on it. If my signature was on it, then I would probably say it was true and correct.

Q. Of course, Mr. Pechart, this is purportedly the return of the partnership and Billington.

A. I have never seen that before.

Q. So you do not know, of your own knowledge, whether this was ever returned to the government and any payment made?

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(Testimony of Walter M. Pechart.)

A. I know nothing about it whatsoever.

Q. Do you know whether or not such a return was ever brought to the attention of Mr. Remmer, the defendant in this case? A. No, I do not.

Q. Now I understood you to testify—correct me if I am in error—that it was the policy, during the operation of the 21 Club and the San Diego Social Club, of at the end of each month, with the aid of the manager and cashier and persons in charge of the money, of determining what, if any, profits had been derived from the operation the preceding month, is that correct? A. That is right.

Q. And thereupon a bonus would be made up and the bonus that had been contemplated would be paid, is that correct? [671]

A. That's right.

Q. And the persons who had a partnership interest; namely, Mr. Kessel, yourself and Mr. Remmer, their shares of any profits would be divided up in accordance with the percentage to which they were entitled, is that correct?

A. That is right.

Q. I understood you to tesify also that you were usually present when those divisions were made out at the end of the month?

A. That is right.

Q. And do you recall any occasion when Mr. Remmer was ever present when those divisions were being made at the end of the month?

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(Testimony of Walter M. Pechart.)

A. I think all the time I was associated with him he was there only once or twice.

Q. You say in all the times you were associated with him he was there only once or twice. My concern in this question is whether or not he was ever present at the end of the month on the occasion when the divisions of profits would be allocated?

A. Either once or twice.

Q. That he was present when there was a division of profits? A. Yes.

Q. Do you know, of your own knowledge, of the other occasions what, if anything, was done with whatever share was due Mr. Remmer?

A. It was put into a large envelope and the manager put it in [672] the safe.

Q. And do you know whether or not it ever reached Mr. Remmer personally or whether it was sent over to his San Francisco bookkeeper?

A. I know nothing about that.

Q. In other words, all you know, when Mr. Remmer's share was determined and allocated, it was put in an envelope and given to the manager and the manager put it in the safe?

A. That is right.

Q. Who got it after that, if you know?

A. I don't know.

Q. On the two occasions when you say Mr. Remmer was present, did the same thing occur, put in an envelope and put in the safe?

A. That I couldn't say.

Q. Mr. Pechart, do you recall whether or not

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(Testimony of Walter M. Pechart.)

you ever advised Mr. Remmer, whether you personally ever advised Mr. Remmer, as to what, if any, share he had received by way of profit at any time during the operation of the clubs?

A. Did I ever advise him?

Q. Did you ever tell him he made so much last month or this month? A. No.

Q. And you have no knowledge of what knowledge Mr. Remmer may [673] have gained personally as to any profits that he took out of that enterprise? A. None whatever.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Pechart, I would like to get straight in my own mind—I am apparently confused about it—as to the five per cent paid to the general manager. Mr. Gillen referred to the fact that five per cent was taken off the top of the profits; is that the manner in which it was handled?

Mr. Gillen: I think counsel misstated the question.

Mr. Campbell: I will withdraw the question in that form.

Q. In what manner was it actually handled?

Mr. Gillen: Objected to as asked and answered both on direct and cross-examination.

The Court: Objection overruled. Answer the question.

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(Testimony of Walter M. Pechart.)

A. I think—I am not positive, whether it was five or ten per cent, something tells me it was ten, I am not sure—it was taken off the top and the balance was divided.

Q. In other words, first the percentage bonuses were taken off; is that correct?

A. That is correct.

Q. And then the balance was divided, 50 per cent to Mr. Remmer and 50 per cent to you and Mr. Kessel? A. That's right. [674]

Q. And as I understand, you are not positive at this time as to whether it was five or ten per cent to the general manager?

A. No, I am not, but it is on the records.

Q. Now with regard to the examination of the records of the 21 Club and the San Diego Social Club and the 311 Club by the revenue agents, which you referred to on cross-examination, was their examination confined to the records of those three clubs, or did that embrace other records?

A. All of my enterprises.

Q. All of your enterprises? A. Yes.

Q. And were those records carried away with them or were they examined on the premises of one of your enterprises?

A. I know they couldn't have carried them all away. They may have taken some; I can't swear to it.

Q. Do you know whether they took any away?

A. No, I do not.

Q. Isn't it a fact that the period of time that

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(Testimony of Walter M. Pechart.)

they were working on the examination of all of your organizations, that that work was done in a room provided by you on those premises known as the El Rancho San Pablo? A. That's correct.

Q. Now you stated, I believe, in response to Mr. Gillen's question, that Mr. Remmer met you on the street sometime in April of this year and stated that he had tax problems and wanted the [675] records of the 21 Club and San Diego Social Club and 311 Club for his attorney. You recall that testimony? A. Yes, sir.

Q. Now isn't it a fact that those records, or at least a portion of them, had previously been in the possession of his attorney?

A. That I do not know.

Mr. Gillen: We will stipulate that they were. We will stipulate a portion of the records were shown to an attorney by the name of Kessler, whom I believe is related to Mr. Kessel and who practices law in Oakland, turned over some account books to Mr. Golden for a brief period of time and were returned by Mr. Golden to Mr. Kessler approximately in April of 1951.

Mr. Campbell: I think that is indicated by this receipt.

Mr. Gillen: That is right.

Q. Incidentally, do you know Mr. Kessler?

A. Yes, I do.

Q. Was he, and is he, an attorney employed by you and your partner? A. Yes, he is.

Q. And are you familiar with the fact, as stated

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(Testimony of Walter M. Pechart.)

in the stipulation, that certain of the records were turned over to Mr. Golden?

A. No, I did not know that.

Q. You did not? [676] A. I did not.

Q. You, therefore, don't know what records were turned over? A. No, I do not.

Q. Now with regard to the examination made by the revenue agents at Rancho San Pablo, you would say of all your organizations the records of these three clubs constituted what portion of your records? I am referring to bulk.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial. We are only concerned with records——

The Court (Interceding): Well, see what the answer is. Read the question, please.

(Question read.)

A. Only a small portion.

Mr. Campbell: I think that is all.

Recross Examination

By Mr. Gillen:

Q. Mr. Pechart, with regard to the examination by the revenue agents, it is true, is it not, that the records of the three clubs which were introduced here, as well as records of any other enterprise in which you were personally interested, were all kept in your accountant's office, which was in the same building as your office is located; is that correct?

A. No, not all the records. We had records——

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(Testimony of Walter M. Pechart.)

Q. Let me——

Mr. Campbell: May he finish his question?

Mr. Gillen: I am going to interrupt something that might [677] shorten this. I will withdraw the question and put another question.

Q. With regard to the records that were taken over across the street to the Rancho San Pablo, were all those records kept in your office or your accountant's office on the other side of the street when the revenue agents came over to get them or to look at them? A. No, they were not.

Q. Well, let me ask you if this isn't what occurred: Isn't it true that the revenue agents, when they appeared and stated that they desired to make an audit of all your books and records, on seeing the volume of them asked that they might be provided with some place where they could work and wouldn't have to carry them around?

A. That is right.

Q. And you voluntarily provided them with this office in this empty former club across the street, the Rancho San Pablo; is that correct?

A. That is correct.

Q. And they took over there whatever records they needed and worked? A. That is true.

Q. And I presume they came back and forth to get certain records at certain times and brought back certain records; is that true?

A. That is right. [678]

Q. With regard to the percentage that was paid by way of bonus to the so-called key men or top

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(Testimony of Walter M. Pechart.)

men, is it your recollection that, whether it was 5 per cent or 10 per cent, that you and your partner paid that percentage and Mr. Remmer paid that percentage?

A. That is right. I made that statement.

Q. So if it was five per cent, you and your partner would retain 45 per cent of the profits between you and Mr. Remmer would retain 45 per cent?

Mr. Campbell: Objected to because——

The Court: You may answer.

Q. Do you have that in mind?

A. Yes, I do, very clearly. As I stated before, I am not positive; it is either five or ten per cent, but I believe it was ten; that would be five per cent off Mr. Remmer and five per cent off Pechart & Kessel.

Q. You mean a total of 10 per cent?

A. That is right.

Q. You know you paid five or ten per cent and Mr. Remmer paid five or ten per cent?

A. Yes.

Q. Was it within your knowledge that Mr. Remmer also paid to certain so-called key men there in addition some bonus? A. Yes, he did.

Mr. Gillen: That is all. [679]

The Court: Any reason why Mr. Pechart could not be finally excused?

Mr. Gillen: No reason on the part of the defendant.

Mr. Campbell: No, your Honor.

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The Court: Mr. Pechart will be excused. The same order will be made.

Mr. Thompson: At this time I would like to read letter from Theodore M. Monell, attorney at law, San Francisco, dated November 28, 1951, a duplicate of which was sent to defendant's counsel, and at this time I would like to read the letter as the testimony of Mr. Monell.

Mr. Gillen: May it be explained by counsel that the defense has stipulated if Mr. Monell was present—I know he was present here for two days—if he returned and appeared on the witness stand, we have stipulated that he would testify to the matters that appear in his letter as they appear in his letter.

Mr. Thompson: That is correct.

The Court: You may proceed.

TESTIMONY OF THEODORE M. MONELL

as read by Mr. Thompson.

Mr. Gillen: May it be understood our stipulation that this be received is subject to any correction that may appear in any records or matters that should develop later; that is, if the books or records should disclose any need for correction?

The Court: We will meet that as it comes. [680]

Mr. Thompson: I would like the letter I just read marked as an exhibit.

Mr. Gillen: It is read into the record.

The Court: I do not think there is any necessity of marking it as an exhibit.

Mr. Thompson: Your Honor, I have asked

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marked as one exhibit document entitled "Escrow Instructions," dated October 17, 1946, a document entitled "Assignment," to which is attached a lease dated July 23, 1946; a document on the letterhead of Theodore M. Monell, dated October 17, 1946, and a document purporting to be a wholesale inventory of the Transit Smoke Shop, and I now offer these in evidence as plaintiff's Exhibit 97.

Mr. Gillen: These, I take it, are the papers that reflect the transactions that Mr. Monell wrote about.

Mr. Thompson: Those were papers produced by Mr. Monell and examined by myself and Mr. Golden together two or three days ago.

Mr. Gillen: We stipulate that these may be offered in evidence by the prosecution, subject to any corrections that may arise during the course of the trial.

The Court: They may be admitted in evidence.

Mr. Gillen: We stipulate that that exhibit may go in evidence, subject to motion to strike if it is not connected with the defendant.

Mr. Thompson: That is satisfactory. [681]

The Court: That is satisfactory.

Mr. Thompson: (Reads Exhibit 97.)

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GORDON PARTEE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name?

A. Gordon Partee.

Q. Where do you reside?

A. San Francisco; 433 - 14th Avenue.

Q. What is your business?

A. I am in business in Burlingame now, bar and restaurant.

Q. Are you acquainted with Mr. Elmer Remmer, the defendant in this case? A. I am.

Q. During the summer of the year 1945 did you have a conversation with Mr. Remmer?

A. I remember it was '45 I had a conversation with him.

Q. Is that your best recollection as to the time of the conversation?

A. It was during sometime I was vacationing at Lake Tahoe.

Q. Where in Lake Tahoe did the conversation occur? A. Cal-Neva Lodge.

Q. Was anyone else present that you recall?

A. Not to my knowledge. [682]

Q. What was the conversation you had with him at that time?

A. Just a casual conversation, wherein he mentioned at the time that in the future he might be

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(Testimony of Gordon Partee.)

interested in the same kind of business in San Francisco, namely, in a cigar store; that it might work out that the two of us could work a deal together. In other words, he was interested in going into business with me in a cigar store venture of that type.

Q. That was the whole substance of his conversation, is it?

A. In essence it was; it was very short.

Q. Some months later did you have occasion to talk with Mr. Remmer about the same subject matter? A. Yes, quite some time later.

Q. And where did that conversation take place?

A. I am not sure whether it took place in his office on Mason Street or on the street; I am not positive.

Q. It was in San Francisco at any rate?

A. Yes, it was in San Francisco.

Q. And do you recall if anyone else was present at that time? A. No, I don't.

Q. What was the conversation you had with him at that time, as you recall?

A. At that time we talked about Lake Tahoe and just mentioned I had a place in mind that he might be interested in, that I thought would be a good location, and we discussed the purchasing or if he would still be interested in the business [683] venture he had talked about when we spoke at Lake Tahoe.

Q. What was the discussion you had in regard to the purchase of it?

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(Testimony of Gordon Partee.)

A. I told him I had a place I thought could be bought and might be a good business.

Q. And did you tell him what the place was you had in mind? A. No, I told him where it was.

Q. Where was it?

A. It was a going business, an established business, on 85 First Street.

Q. Did you discuss with him the proposed terms of the purchase?

A. Well, we discussed approximate price. I didn't think there was any——

Q. (Interrupting): Do you recall what approximate price was mentioned?

A. No, because I knew that the place could be bought, but it was a matter of deciding if he wanted to buy it before it then became a matter of negotiation with the people who owned it and myself. In this particular case I did all the talking to them.

Q. What, if anything, did Mr. Remmer tell you with regard to your proposal?

A. He was interested in buying.

Q. Did Mr. Remmer remain in San Francisco after that conversation?

A. No, sir. Shortly after that he left. It was a matter of [684] talking back and forth for a period of maybe a week.

Q. You had several conversations with him; is that correct?

A. I am talking now with the people who owned the Transit Smoke Shop.

Q. And then Mr. Remmer left San Francisco?

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(Testimony of Gordon Partee.)

A. He wasn't in town, to my knowledge.

Q. Prior to leaving San Francisco, did he make any suggestion to you with regard to seeing anyone else?

A. He asked me to discuss it with Mr. Kyne.

Q. Did you finally consummate a purchase of the business that you were discussing?

A. Yes, we did.

Q. What was the name of that business?

A. Called the Transit Smoke Shop.

Q. Do you recall now what sums of money you paid for the business?

A. Well, I have, I think, a figure of 22 thousand dollars. The total amount paid for the business was $30,511, $8,511 of which was for the merchandise, as you read in Mr. Monell's letter, the wholesale value of the merchandise.

Q. And the balance of the money was for the business itself and the lease; is that correct?

A. Liquor license, lease, and so on—no, not the lease. The lease didn't have anything to do with that, but goodwill, and so on. [685]

Q. Did you handle any of that sum of 30 thousand some dollars? A. I handled most of it.

Q. To whom did you pay it?

A. Who did I give the money to?

Q. Yes.

A. I gave one check—I guess all the money was paid to Mr. Monell.

Q. From whom did you receive the money that you paid to Mr. Monell? A. Mr. Kyne.

BLEED THROUGH– POOR COPY

(Testimony of Gordon Partee.)

Q. That is Mr. William Kyne?

A. William Kyne.

Q. You first paid a sum of five thousand dollars; is that correct?

A. I think that is correct, yes.

Q. And did you receive that five thousand dollars from Mr. Kyne? A. I did.

Q. In what form was it given to you?

A. Well, if my memory is correct, I just went down to the office on Mason Street and I think I had phoned previous to the time of going and told them I expected to have the five thousand as a deposit, goodwill deposit or something of that nature, and the check was waiting for me when I got there. I doubt if he even handed it to me; it was in an envelope.

Q. Then you delivered that check to [686] Mr. Monell? A. Mr. Monell.

Q. And a few days later you made a payment of 17 thousand dollars?

A. Within a short period of time as negotiations went on; that is correct.

Q. From whom did you obtain that money?

A. Mr. Kyne.

Q. Where did you receive it?

A. I walked up to the Bank of America, No. 1 Powell Street, the Day and Night Branch, stayed in the foyer of the bank and then in a little while Mr. Kyne came with the check.

Q. You walked over with Mr. Kyne; is that correct? A. That is correct.

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(Testimony of Gordon Partee.)

Q. And you waited for Mr. Kyne and he came back with the money? A. Yes.

Q. And he gave you a check for 17 thousand dollars? A. That is right.

Q. And you delivered that check to Mr. Monell?

A. That is correct.

Q. Another payment of $8,511.01 for the inventory of the business, where did you obtain that money?

A. It was obtained in the same manner.

Q. From Mr. Kyne? A. From Mr. Kyne.

Q. Did you, yourself, use any of your own personal funds in [687] making the purchase of the business known as the Transit Smoke Shop?

A. I did not.

Q. Who is Mr. Benjamine Partee?

A. That is my brother.

Q. Was Mr. Benjamine Partee at any time interested as a partner or owner or otherwise in the business known as the Transit Smoke Shop?

A. No, he was not. He had nothing to do with it.

Q. You handled the entire transaction yourself and for yourself; is that correct?

A. That is correct.

Q. And you and Mr. Remmer and Mr. Kyne enter into a written partnership agreement regarding the Transit Smoke Shop?

A. There was an agreement made.

Q. Have you, pursuant to subpoena, produced that agreement?

A. It may seem funny, but I had it here with

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(Testimony of Gordon Partee.)

me, but at some time in the period of time I was here I lost it.

Q. You lost it at the Mapes Hotel?

A. Yes, sometime. I don't know how it happened, but I just lost it.

Mr. Gillen: If this is a correct or photostatic copy, the defense will stipulate it may be used in lieu of the original which was lost by Mr. Partee.

The Court: We will take a recess at this [688] time.

(Jury and alternate jurors admonished and 15-minute recess taken at 2:30 p.m.)

2:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. PARTEE

resumes the witness stand on further

Direct Examination

By Mr. Thompson:

Mr. Thompson: Your Honor, I now offer in evidence plaintiff's Exhibit 98, which is agreement dated November 21, 1946, between Gordon Partee, Elmer Remmer and William Kyne.

Mr. Gillen: I think we have a surprise for you. I think Mr. Partee's original agreement was found on the floor.

A. It was found on the floor.

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(Testimony of Gordon Partee.)

Mr. Thompson: I offer it in evidence, your Honor.

Mr. Gillen: No objection.

The Court: Exhibit 98 is admitted in evidence.

Q. Mr. Partee, I show you Exhibit 98; do you recognize the signatures on the third page of the exhibit? A. Yes, I do.

Q. Whose signatures are they?

A. Mine, Elmer Remmer and William E. Kyne.

Q. And that agreement provides in part that you shall have 50 per cent interest in the Transit Smoke Shop, Mr. Remmer a 25 per cent interest, and Mr. Kyne a 25 per cent interest? [689]

A. That is right.

Q. In connection with the starting of that business, Mr. Partee, were there other expenses in addition to the sums to which you have already testified?

A. There was one other expense to add and that would be deposit we had to put on the lease, total of $1,500, three years at $500 per month.

Q. Do you means three years or three months?

A. $1,500 was deposited, I guess for the last three months' rent at the end of the lease. In other words, we had to put up $1,500.

Q. From what source did you receive that $1,500? A. The same way.

Q. From Mr. Kyne? A. Yes.

Q. Did you also establish a change fund for the business?

A. There was a change fund established; I couldn't tell you the exact amount.

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(Testimony of Gordon Partee.)

Q. Can you approximate the amount, according to your best recollection?

A. To my best recollection, it would be about a thousand dollars.

Q. From whom was that money obtained?

A. I do not remember.

Q. I call your attention, Mr. Partee, to plaintiff's Exhibit 98, agreement, wherein it is recited that the second parties, namely, Elmer Remmer and William E. Kyne, contributed the sum of [690] $32,011.01 to the capital assets of the partnership.

A. That figure is correct.

Q. That is the figure you arrived at at the time the agreement was executed? A. Yes.

Q. And that is the only contribution to the capital, is that correct? You, yourself, made no contribution? A. No contribution.

Q. In defining the partnership interests, I think I incorrectely read the agreement to you. If you will examine the third paragraph of the agreement, would it not be more correct to say that you had a 50 per cent interest and Mr. Kyne and Mr. Remmer together had a 50 per cent interest, according to the agreement?

A. That is right. It is better to put it that way. If we had $100, I would take $40 and Mr. Kyne would take $25 and Mr. Remmer take $25.

Q. Is that the manner in which the profits of the partnership were divided? A. It is.

Q. When were partnership profits distributed?

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(Testimony of Gordon Partee.)

A. Within the period month, according to how the check was done.

Q. At the end of the month you would write a check for yourself for 50 per cent of the profits and one to Mr. Remmer for 25 per cent and one to Mr. Kyne for 25 per cent? A. That's right. [691]

Q. Was the business operated under that ownership and under those conditions continuously to the end of 1946, that is, that year?

A. Yes. We were in business perhaps maybe a month and a half during the period of 1946, from November 15, 1946, to the end of the year.

Q. Then you continued in business for 1947 also?

A. Yes, went on.

Q. Did you file an income tax return for the partnership in the calendar year 1946, that is, for the two months' of operation? A. Yes.

Q. I show you plaintiff's Exhibit 92, and state whether or not that is the partnership return which you filed for the Transit Smoke Shop business?

A. I would say it is. I see my signature on it and it is a partnership return.

Q. There is a typographical error, is there not, on the return, where you name is spelled Parter?

A. That is correct.

Q. What character of business was operated by the Transit Smoke Shop during the year 1946?

A. Well, we had located on a street that is quite heavily trafficked, right near the terminal, and we had a regular merchandising store, we had liquor, was open 24 hours, day and night; we had pin-ball

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(Testimony of Gordon Partee.)

machines, cigars, I believe I mentioned liquor, merchandise, magazines. [692]

Q. Was there a back room to the business?

A. No back room; one large store. Oh, there was a back room, I mean we used it for storing liquor and storage space, but I mean the store was one large room.

Mr. Thompson: At this time, your Honor, I would like to read to the jury a portion of the figures from Exhibit 92, the partnership return for the Transit Smoke Shop for the calendar year 1946, covering the period from November 1, 1946, to December 31, 1946. Total net income after business deductions was $8,797.82, less salaries and wages, rent and repairs and the like, left an ordinary net income of $3,809.04, and that sum was distributed as follows: Gordon Partee, 85 First Post Street, San Francisco, percentage of time devoted to business, 50. His distributive share was $1,904.52. Elmer F. Remmer, Orinda, percentage of time devoted to business, 25. His percentage share was $952.26. William E. Kyne, 975 Lawton Street, San Francisco, percentage of time devoted to business, 25; distributive share, $952.26; total, $3,809.04.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Partee, you spoke in your direct examination of a conversation had between you and Mr. Remmer at Cal-Neva Lodge on Lake Tahoe during

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(Testimony of Gordon Partee.)

the summer of 1946, when you were vacationing there; is that correct?

A. It could have been '45; I am not sure of the year, '45 or '46. [693]

Q. And you said that there was some mention in the conversation about the possibility of your going in business with him? A. Yes.

Q. Now it is true, is it not, Mr. Partee, that you are a former football star of St. Mary's College?

A. Thank you, yes.

Q. And that you belong to the St. Mary's College Alumni? A. Yes.

Q. And Mr. Remmer also attended St. Mary's and belonged to the Alumni; is that correct?

A. Yes.

Q. And you struck up your conversation by your both having attended the same educational institution?

A. Yes, I had met Mr. Remmer, I think, at a game or something, just casually.

Q. And this mention of business was a casual thing and at a later time you observed this location which you thought was a good potential business place? A. That is correct.

Q. You mentioned that it was quite a well-traveled portion of San Francisco. It is right in the path of the East Bay terminal, that takes the traffic across the Bay Bridge; is that correct?

A. That is correct, all the traffic.

Q. Both human and vehicular traffic?

A. That's right. [694]

BLEED THROUGH– POOR COPY

(Testimony of Gordon Partee.)

Q. Also it is closely located, is it not, to some large steamship and railroad office buildings, within a short distance?

A. All of that vicinity is generally office buildings. I am not sure about train terminals.

Q. I mean, you were close to the Southern Pacific building, the main office?

A. The Western Pacific.

Q. And the Matson Navigation Company is in close proximity; is that correct? A. Yes.

Q. And finding this location, you proposed this as a likely place to go into business?

A. That is right.

Q. Now, Mr. Partee, on the occasions that you have mentioned when you went to the bank with Mr. Kyne and he gave you the money for these two payments, as I recall, did Mr. Kyne on those occasions take cash to the Day and Night Branch of the Bank of America at No. 1 Powell Street, San Francisco, and obtain a cashier's check for you?

A. I wouldn't know about that. I never saw any cash at any time.

Q. You don't know how he purchased the cashier's checks? Were they cashier's checks?

A. Yes.

Q. So when you spoke to Mr. Kyne about the necessity of [695] meeting, for instance, the 17 thousand dollar payment, you and he went to the bank together and you waited until he transacted the business of obtaining the cashier's check?

A. That is correct.

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(Testimony of Gordon Partee.)

Q. And whether he paid cash or whether he wrote a check on the account, you don't know?

A. No.

Q. Now do I understand correctly, Mr. Partee, that you conducted the operation there yourself?

A. That's right.

Q. And you kept your accounts down there, and what did you do with the final accounting in the preparation?

A. I kept a regular daily running account that at the end of the month I would bring all of the business or all the records that pertained to the business down and leave them in Mr. Remmer's office.

Q. I notice in prosecution's Exhibit 92 the preparation was made by a Mr. C. D. Ayton, public accountant. Did you turn over your records to him?

A. That is correct.

Q. He was the man who was keeping the books for Mr. Remmer and Mr. Kyne?

A. That is right.

Q. And I notice on this exhibit there is a signature, purported signature, of Gordon A. Partee, I believe you have already [696] identified that for Mr. Thompson as your signature; is that true?

A. Yes.

Q. Insofar as you can recall, at the time you signed this document and now, when it is shown to you, does that truly reflect the earnings, disbursements, and whatever of the Transit Smoke Shop?

A. It does.

BLEED THROUGH– POOR COPY

Mr. Gillen: I think that is all; thank you.

Mr. Thompson: That is all, Mr. Partee.

(Witness finally excused.)

JAMES OGLESBY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. James Oglesby.

Q. Where do you live?

A. 433 Baden Street, San Francisco.

Q. What is your employment?

A. Business manager, Franklin Hospital in San Francisco.

Q. Where is the Franklin Hospital located?

A. 14th & Noe Streets, San Francisco.

Q. Have you brought with you, in accordance with subpoena, the original records of the Franklin Hospital relating to the account of Elmer Remmer?

A. I have. [697]

Q. Have you from those records, which appear to be quite bulky, made a transcript of his account?

A. I have.

Q. Will you produce it, please?

Mr. Gillen: We will stipulate Mr. Remmer had pneumonia and was in the hospital and paid this amount of money.

Mr. Thompson: We do not accept the stipula-

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(Testimony of James Oglesby.)

tion, your Honor. We offer in evidence Exhibit 99.

Mr. Gillen: We stipulate it may go in evidence without objection.

The Court: It may be admitted.

Q. Mr. Oglesby, I show you Exhibit 99. Will you state during what period Mr. Remmer was a patient in the Franklin Hospital?

A. From February 7, 1946. This does not indicate the date of his discharge. I think it was February 14, 1946.

Q. And did Mr. Remmer pay you for the services performed for him by the Franklin Hospital?

A. Yes, he did.

Q. On what date? A. February 14, 1946.

Q. And in what amount? A. $279.38.

Mr. Thompson: You may cross-examine.

Mr. Gillen: My only question would be, from my personal experience, how it was so reasonable. I think I have no further [698] cross-examination.

(Witness finally excused.)

WILLIAM B. STRONG

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. William B. Strong.

Q. Where do you live?

A. 1315 Monroe, Evanston, Illinois.

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(Testimony of William B. Strong.)

Q. What is your business?

A. I am credit manager for the Blackstone.

Q. The Blackstone Hotel? A. Yes, sir.

Q. Where is the Blackstone Hotel?

A. 636 Michigan, South Michigan.

Q. In Chicago, Illinois?

A. Chicago, Illinois.

Q. How long have you been employed at the Blackstone Hotel? A. Oh, seven years.

Q. Have you brought with you an account of the Blackstone Hotel relating to Elmer Remmer?

A. I have.

Q. Will you produce it, please? You have produced a transcript you made from your hotel records? A. That's right. [699]

Mr. Thompson: I ask that the transcript be marked plaintiff's exhibit next in order.

The Clerk: 100.

Mr. Thompson: I would like to have marked for identification, your Honor, the record account with Mr. Remmer with the Blackstone Hotel.

Mr. Gillen: Would that be the originals?

Mr. Thompson: Yes.

Mr. Gillen: May we call that 100-A?

Mr. Thompson: That is satisfactory.

Q. Mr. Strong, I show you plaintiff's Exhibit 100-A for identification; will you state generally what those are?

A. What was it you wanted to know about this one?

Q. What are they in the way of records?

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(Testimony of William B. Strong.)

A. Well, that is the active, the only record we have, I mean; it is the front office guest register as they set up the ledger sheets, such as this, and those are posted thereon.

Q. And are those the records of the Blackstone Hotel which are kept, made and maintained in the regular course of the business of that hotel?

A. That is right.

Q. And is it part of the business of the Blackstone Hotel to make and keep records of that character? A. Oh, yes.

Q. Do these records record payments made to the Blackstone Hotel [700] by Mr. Elmer Remmer during the years 1945 and 1946? A. Yes.

Mr. Thompson: I offer Exhibit 100-A in evidence, your Honor.

Mr. Gillen: To which we offer the objection, may it please the Court, there is no proper foundation laid. In other words, may it please the Court, to clarify the grounds of my objection, there must be a foundation laid to show whether or not these were personal or pleasure accounts or whether they were account of obligations incurred as business expenses. That would be material, because they would be deductible business expenses, so the offer is premature, may it please the Court. There would have to be that foundation laid.

Mr. Thompson: If the Court please, I believe a number of witnesses have testified already at the trial that Mr. Remmer's business was conducted at Cal-Neva Lodge and San Francisco, California.

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(Testimony of William B. Strong.)

The Court: Objection overruled. They may be admitted in evidence.

Mr. Gillen: I challenge the record to show that his business——

The Court (Interceding): I wasn't interested in that point of view.

Mr. Gillen: May I make a record, your Honor? Counsel has made a statement that I think would tend to confuse the [701] triers of fact.

The Court: You may make your statement.

Mr. Gillen: The witnesses who testified here did not confine Mr. Remmer's business or his business trips or his business activities to Cal-Neva or San Francisco or El Cerrito. They testified there were businesses there.

The Court: The jury will determine what the witnesses testified.

Mr. Gillen: Of course, your Honor, if these are business trips, it is material. They are deductible.

The Court: That may be shown. If that is shown——

Mr. Gillen (Interrupting): Of course, the burden is entirely to show on the government, your Honor. We do not haye to prove, the burden is on the prosecution, as your Honor well knows.

The Court: The objection is overruled. The ruling will stand.

Q. Mr. Strong, I show you Plaintiff's Exhibit 100-A and by examining that exhibit, will you state what, if any, payments were made by Mr. Remmer to the Blackstone Hotel in the year 1945?

Mr. Gillen: Same objection, no foundation laid.

BLURRED COPY

(Testimony of William B. Strong.)

The Court: Same ruling.

Mr. Gillen: I would like to recall to your Honor's mind, if it has slipped your mind, that there was some evidence produced by the prosecution here that Mr. Remmer had some business [702] activities in the East, to wit, the purchase of two carloads of whiskey.

The Court: The ruling will stand. Let us have the question.

(Question read.)

A. Yes, October 31, 1945, $36.23 and November 11, 1945, $118.73. I believe those are the only two in '45; and October 14, $58.77.

The Court: That is 1945?

A. Yes, sir.

Q. Do you find a payment under date of October 2, 1945? A. Four hundred dollars.

Q. Do you also find a payment under date of October 7, 1945? A. Yes, two thousand.

Q. According to your records, at the time Mr. Remmer paid you that sum of two thousand dollars, did he owe the hotel two thousand dollars?

A. No, he didn't. That could have been a check that we put through there. I don't recall just what that was.

Q. As a result of that payment of two thousand dollars, was Mr. Remmer given a credit on the hotel account? A. That's right.

Q. And after that sum of two thousand dollars was paid by Mr. Remmer, what amount remained

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(Testimony of William B. Strong.)

to the credit of Mr. Remmer with the Blackstone Hotel? [703]

Mr. Gillen: Objected to as assuming something not in evidence because the witness has said it might have been cashing of check and leaving the greater portion of the check there as balance.

The Court: The question before that did state something about credit.

Mr. Gillen: That is right, but he said it might not be payment, he said it might be a check cashed and leaving a balance.

The Court: Objection will be overruled. Read the question.

(Question read.)

A. $1,878.10.

Q. What, if any, payments were made by Mr. Remmer to the Blackstone Hotel during the year 1946?

A. Yes; June 25, $123.50; October 6, $120.83; November 16, $77.57.

Q. Referring back, Mr. Strong, to the credit balance which Mr. Remmer had after paying the hotel the sum of two thousand dollars, do your records show whether or not that payment was used up by Mr. Remmer in hotel services or was any sum of that refunded to him?

A. Well, yes, there was a refund made to him.

Q. Will you refer to your record and state the date of the refund and the amount of the [704] refund? A. You have it on——

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(Testimony of William B. Strong.)

Q. (Interrupting): Well, you have it in there, that is the one we are referring to, Exhibit 100-A. Refer to the date of October 3, 1945.

A. October 31, 1945, $1,392.56.

Q. Does the record which you have before you, Exhibit 100-A, show the daily charge for the room occupied by Mr. Remmer on the occasions when he visited the Blackstone Hotel?

A. Well, when he paid this, it was $10.00, $10.00 room.

Q. On what date was it that he occupied a ten dollar room? A. October 30th.

Q. What year? A. 1945.

Q. Will you go on through the exhibit and see if you find any other room rents paid by Mr. Remmer?

A. November 9th, $10, and then he had a suite here.

Q. What date was that?

A. He came on the 24th of September, 1945, and he had a suite, paid $26.50 a day for that and kept that until October 14th.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Strong, due to the fact that your records reflect a refund, you would say, would you not, that Mr. Remmer apparently cashed a check for two thousand dollars and took cash of $200 and left $1,800, which was the balance to him, less the two hundred? [705] A. It is a credit, yes.

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(Testimony of William B. Strong.)

Q. Instead of taking money away, he left it there with the cashier, is that correct?

A. I would say so.

Q. And then in the interim there were some modest charges made there, such as the ten dollar rooms and finally he drew down what remained to his credit on your books, the sum of $1,392.50, is that correct? A. That is correct.

Q. This suite you mention for $26.50 a day, is that the type suite usually used for business purposes, business conferences and the like?

A. Yes.

Q. You wouldn't know from your records, of course, Mr. Strong, whether or not the occasions of his visits to your hostelry were on business trips or on pleasure trips? A. No, I wouldn't know.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Thompson:

Q. Will you describe the suite that Mr. Remmer hired for $26.50 a day?

Mr. Gillen: What materiality would that have? It was more than one room.

The Court: Objection overruled. Answer the question.

Mr. Gillen: I will offer the further [706] objection——

The Court: I have already ruled.

Mr. Gillen: May I offer a further objection?

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(Testimony of William B. Strong.)

The Court: Well, go ahead.

Mr. Gillen: This man can not know from his records what the suite was.

Mr. Thompson: We are trying to find out, your Honor.

The Court: Just a minute. The objection is overruled. He may answer the question.

A. Well, consisted of parlor and bedroom; in this case, it was two bedrooms.

Q. Two bedrooms and parlor. Are those suites used only for business purposes?

Mr. Gillen: Objected to as calling for conclusion.

The Court: Objection overruled.

A. Well, yes.

Q. Only for business?

A. Oh, no, no; not only for business.

Q. Is your hotel patronized exclusively by business men? A. I would say so.

Q. Exclusively? A. Yes.

Q. Nobody that comes to your hotel for pleasure?

Mr. Gillen: Now he is cross-examining his own witness. It is improper redirect examination, certainly. He is trying to impeach the gentleman. [707]

The Court: Well, reframe the question.

Q. Is your hotel, Mr. Strong, the Blackstone Hotel, used only by people who come to Chicago on business?

Mr. Gillen: Objected to as calling for opinion and conclusion and speculation on his part.

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(Testimony of William B. Strong.)

The Court: Objection overruled. Answer the question.

A. Well, I imagine business and pleasure, yes, whatever any hotel would be used for.

Q. Just like any other hotel?

A. I think so, yes.

Q. Will you refer to your record, Exhibit 100-A, which I believe you have there before you, and state whether or not, on the date that Mr. Remmer paid to the hotel the sum of two thousand dollars he owed the hotel any money?

Mr. Gillen: I am going to offer objection now, in view of the cross-examination, it is assuming something which is not in evidence. There is no evidence here now—we have explained that he did not pay the hotel two thousand dollars, that he left a credit on the books, which was refunded to him in the sum of thirteen some odd dollars.

The Court: Objection overruled. Answer the question.

(Question read.)

A. Yes, $121.90.

Q. And the credit balance which remained to the credit of Mr. Remmer, after the payment was made, was arrived at after deducting [708] the amount that he owed the hotel?

A. That is correct, yes.

Mr. Thompson: That's all.

BLURRED COPY

(Testimony of William B. Strong.)

Recross-Examination

By Mr. Gillen:

Q. So, in other words, on that occasion he just paid what he owed the hotel, $121.90, took $100 and left the rest in credit? A. That's right.

Q. So he did not pay the hotel two thousand dollars, did he? A. No.

Q. Do you have the number there of the suite which he occupied? A. At that time?

Q. At the time he paid the $26.50 a day?

A. Oh, yes; 504-5 and 6.

Q. And that consisted of sitting room and two bedrooms, is that correct? A. Yes.

Q. Now is it the practice of your hotel, as it is the practice of many hotels, if a man takes a suite he may have another man with him and only one man's name is put down, whoever takes the suite?

A. That is correct.

Mr. Gillen: That's all.

Mr. Thompson: That is all.

(Witness finally excused.) [709]

FRANK A. BRAY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Frank A. Bray.

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(Testimony of Frank A. Bray.)

Q. Where do you live?

A. 2539 30th Ave., San Francisco.

Q. What is your business?

A. I am controller of Shreve & Company.

Q. What character of business is conducted by Shreve & Company?

A. Jewelry and silversmiths.

Q. Where is that business located?

A. At 200 Post Street.

Q. Have you brought with you the records of Shreve & Company relating to an account with Elmer Remmer? A. I have.

Q. Will you produce them, please? I ask the record be marked Exhibit 101.

The Court: So marked.

Mr. Gillen: The defense, may it please the Court, would have no objection to this exhibit being received in evidence, with the exception there is a payment that was made in 1947, pertaining to obligations incurred in 1946. Of course, that would mean that the obligations incurred should be eliminated and also the payment of 1947, because we are only concerned with [710] what was paid in the years involved in the indictment.

Mr. Thompson: That is correct, your Honor. We are interested only in payments made during the years 1944, 1945, and 1946.

Mr. Gillen: Otherwise we have no objection.

The Court: It will be admitted in evidence if that can be removed some way.

Mr. Gillen: There is a fixed amount there and

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(Testimony of Frank A. Bray.)

I think it can just be deducted from the 1946 charges.

The Court: Very well.

Q. Referring to Exhibit 101, will you state the purchases that were made on that account which were paid for during the years 1944, 1945, and 1946, and the amounts of the payments?

Mr. Gillen: Now just a moment. First of all, may it please the Court, I think it will be found that they were not all purchases. Some are repairs and replacements of things. They wouldn't all be purchases and you couldn't contemplate all the charges of 1946, because of the very matter I mentioned a moment ago.

The Court: Can you reframe your question to meet the situation?

Mr. Thompson: I believe if the question is read again, it does eliminate—I said purchases made during those years which were paid for during those years.

Mr. Gillen: They are not all purchases. It still doesn't [711] meet the objection.

Mr. Thompson: I don't care what you call them. The charges to the account.

Mr. Gillen: That is better.

A. Do you want in dollars and cents or individual items?

Q. Individual items.

A. On March, 1944, diamond ring, $106.87. On the same day there was another diamond ring, $168.75. Under March 31, 1944, there was repairs,

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(Testimony of Frank A. Bray.)

total $129.37. That was for altering a ring and also altering a bracelet. In May of 1944, there was a charge for mounting a diamond in amount of $25. On June 7, 1944, there was another ring purchase, $122.50. That is described as pladium ring, so I don't quite know whether that is correct terminology for whatever that purchase was. On June 30, 1944, purchase of pladium ring for $73.50. On February 5, 1945, there was a ring made as ordered, which totaled $300. February 16th was a repair, a diamond and emerald bracelet in amount of $5.50. July 26, 1946, there was repairing diamond and emerald bracelet and replace stones for $96.75. December 9, 1946, purchase of gold charm for $12.25.

Mr. Gillen: I think some of those items, if the Court please, were not paid for until 1947, and therefore, should be eliminated. I move that they be stricken. Counsel can very easily see what the charges were for 1946, and deduct from that the payment made in 1947, to eliminate those [712] charges.

The Court: Meet that suggestion, Mr. Thompson, if you can.

Mr. Thompson: The last item should be stricken, $12.25.

The Court: That item will be stricken. What item is that?

Mr. Thompson: Gold charm, $12.25.

The Court: That will be stricken. That seems to be the only one that you found there of that nature?

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(Testimony of Frank A. Bray.)

Mr. Thompson: That is correct. Would you like to examine the exhibit?

Mr. Gillen: No, if you say that is the only one, that is good enough.

Q. Now, Mr. Bray, will you state when, during the years 1944, 1945, and 1946, those payments were made on that account and in what amount?

A. In the year of 1944, on April 6th, we received $404.99. On June 21st, $25; October 17th, $196. In the year of 1945, on May 5th, we received $305.50. In the year of 1946, on November 6th, $96.75. That is the extent of the payments.

Q. Now do your records show whether those were payments on account either by cash or check or were they credits for returned merchandise?

A. They were not credits for returned merchandise because they are not indicated as such, but it does not show from the application of credit for payment of money, could be either check or [713] actual cash.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Were any of those payments that were charged there on that account paid by other than the holder of the account, to wit, Mr. or Mrs. Remmer?

A. That would not be definitely determined by the company account. It could be paid by either one

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(Testimony of Frank A. Bray.)

of the members or by somebody else, as far as that goes.

Q. It is true, is it not, that that account reflects that some of those payments were paid by an insurance company for Mr. Remmer, isn't that true?

A. There are certain pencilled notations on here. The actual payment, so far as being identified as being paid by one or the other, could only be determined by association of the amount of the charge and the amount of payment. When I say associating the two, I mean where there is a notation that the insurance company might have been involved.

Q. Also on there are charges such as repair or replacing of stones, is that correct?

A. That is right.

Q. Now there is a notation on there in one or two instances that particular charges should be sent directly to the Bridgeman Insurance agent, isn't that so?

A. Yes, there are two notations there. [714]

Q. Will you tell us what notations they were for, what amounts and what items?

A. Well, you can't identify them as to particular items, unless you want to assume that a repair job was to the insurance company.

Q. Just tell us what the pencilled notations state with reference to sending these bills to someone other than Mr. Remmer.

A. Well, it is noted here, "Send bill to C. A. * * *," and I can't make the name out, 333 Montgomery Street.

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(Testimony of Frank A. Bray.)

Q. Is it Bridgeman?

A. Well, something like that.

Q. Was it Bridgeford, C. H., 333 Montgomery Street? A. Yes, it could be that.

Q. What was that item, please?

A. Well, that notation is opposite this pladium ring valued at $122.50.

Q. That could have been replacement of a lost article, is that correct? A. It is possible.

Q. Now is there any other item that has notation that bill should be sent to the insurance broker or company or to a name other than the Remmer name, other than the account name?

A. Well, there is an item here, there is a notation pencilled, one diamond to match stone, diamond and star sapphire ring, $232.75. [715]

Q. That was what date?

A. December 9, 1946.

Mr. Gillen: That is an item that should have been eliminated, then.

Q. Is there any item earlier than that, earlier months or years?

A. No, not with any notation on it.

Q. Now, Mr. Bray, there are other items in addition to the item that has notation to send bill to the insurance agent, Bridgeport, 333 Montgomery Street, there are other items there which show jobs of repair, isn't that so? A. That is true.

Q. More than one?

A. Yes, there is more than one.

Q. How many are there, can you tell us? Not

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(Testimony of Frank A. Bray.)

counting the one in December of 1946, which we have agreed has no place in the record.

A. There are about three items.

Q. Three items of repairs and replacements?

A. Yes.

Mr. Gillen: I think that is all, thank you.

Redirect Examination

By Mr. Thompson:

Q. Mr. Bray, do Shreve & Company send statements showing the cost of articles to insurance companies for any reason other than to obtain payment from the insurance company? [716]

A. Yes, sometimes by reason of the fact that people have insurance policy, they sometimes request a bill for that purpose, to have the value to know if they are entitled to the insurance.

Q. Mr. Gillen called your attention to an item under date of June 7, 1944, pladium ring, in a total charge of $122.50, and with the pencilled notation alongside it, "Insurance bill to C. A. Bridgeport, 333 Montgomery." Did you find a credit in the account in the amount of $122.50?

A. That specific amount is not reflected as an individual item.

Q. You did not receive one payment from any one in the amount of $122.50?

A. That is correct.

Mr. Thompson: That is all.

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(Testimony of Frank A. Bray.)

Recross-Examination

By Mr. Gillen:

Q. Of course, it is within your knowledge, is it not, Mr. Bray, when a person loses a ring, an insurance company might either pay your company direct or might pay the insured a check, is that correct? A. That is true.

Mr. Gillen: That's all.

(Witness excused.)

(Jury admonished, and alternate jurors, and excused at 3:55 p.m.) [717]

Mr. Campbell: May I suggest there is a matter that we would like to take up out of the presence of the jury that will take two or three minutes.

The Court: Very well, we will be in session for a few minutes.

(In the absence of the jury.)

Mr. Pike: Your Honor, I wish to address the Court on any necessary clarification of the Court's decision or ruling on the right of government's counsel to inspect the records that are presently deposited with the clerk.

The Court: The government's counsel may inspect the records now in the custody of the clerk.

Mr. Pike: I understand, of course, that they are likewise accessible for inspection by defense counsel at any time that can be arranged with the clerk.

The Court: That is so understood.

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Mr. Golden: Under the rule, your Honor, as I understand it, it is not necessary to take an exception unless the situation is such where it might be said the Court has not been advised of the action which is taken. We except to your Honor's ruling upon all the grounds heretofore urged, including not only legal grounds, which I will not attempt to repeat at length unless your Honor wishes me to, but also the practical grounds. It hampers our defense, for the reasons pointed out this morning and thus makes it practically impossible, if not impossible, [718] for us to look at these records.

The Court: That is what we have to contend with. We all have to travel back and forth and I can't see how we can avoid it, unless you can prevail upon Congress to build us a decent courtroom in Reno. I would be glad to have you use your influence to that end.

We will be in recess until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:00 p.m.) [719]

December 13, 1951—10:00 A.M.

(Defendant present with counsel.)

(Argument on motion to strike certain testimony.)

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1025 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

LESTER SIMMONS

a witness on behalf of the plaintiff, having been previously sworn, testified as follows on continued

Direct Examination

By Mr. Campbell:

Q. Mr. Simmons, you identified yourself on the stand the other day as being the brother of George Simmons; is that correct? A. Yes.

Q. And you further identified yourself as being the present bookkeeper of Mr. Pechart and Mr. Kessel? A. Yes, sir.

Q. Who were on the stand yesterday and the day before? A. That's right.

Q. And while on the stand you were asked concerning the records of the 21 Club, the San Diego Social Club and the 311 Club, which you have been subpoenaed to produce, and stated, I believe, that they had been delivered to Mr. Remmer on instructions of your employers; that a receipt had been obtained for such records and that the receipt was in the possession of Mr. Remmer; is that [720] correct? A. That is correct.

Q. I show you government's Exhibit 96, which purports to be a receipt from Mr. Remmer for certain records of those three organizations, together

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(Testimony of Lester Simmons.)

with personal tax returns of Joseph Billington, and ask you if that is the receipt to which you refer?

A. It is.

Q. Now was this document written by you?

A. Yes, it was.

Q. Did you personally type it or did you dictate it to a stenographer? A. I typed it.

Q. And at the time you typed it, did you examine each of the records which were turned over to Mr. Remmer, for the purpose of determining whether or not this receipt accurately stated what documents and records were being turned over to Mr. Remmer? A. I did.

Q. Now I call your attention on this document to language appearing immediately above the signature: "Tax returns 21 Club 1943 were not returned with records when picked up from Mr. John Golden." I will ask you whether or not the records referred to in this receipt had previously been delivered and then received from Mr. John Golden?

Mr. Gillen: My objection is that yesterday there was a stipulation offered by the defense, and accepted by the [721] prosecution, regarding certain of these particular records, namely, that they had been put in the hands of an attorney by the name of Kessler of Oakland, California, who is a relative of Mr. Kessel's, who also served as attorney for Pechart and Kessel, and that he had some of those records and turned over certain of them to Mr. Golden for a time and that they were returned.

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(Testimony of Lester Simmons.)

This is simply attempting to accentuate and it is repetitious, has been asked and answered.

Mr. Campbell: I might state, your Honor, I have in mind the examination by Mr. Gillen of Mr. Pechart, where he developed the point and emphasized the point that the records referred to were, after the government's agent's examination, at all times and up until the time they were turned over to Mr. Remmer, in the possession of Mr. Pechart or his accountant.

Mr. Gillen: We have the stipulation, we will show it to you in the record, just a moment, and it was accepted—page 676, yesterday's record.

The Court: It might save a little time if I could have a look at the transcript. (Court examines transcript.) Objection overruled. He may answer the question.

Mr. Gillen: Well, may the record show that it is in the record and your Honor saw it?

The Court: I don't think that is necessary.

Mr. Gillen: Let the record show that we showed your [722] Honor and Mr. Campbell where the stipulation was entered into.

The Court: Let us proceed. Read the question.

(Question read.)

Mr. Gillen: Objected to—it is already in the record by stipulation and accepted by the prosecution.

The Court: The objection has been overruled, and let us just have the question read to the witness so he may understand it.

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(Testimony of Lester Simmons.)

(Question read.)

Mr. Gillen: Now I am going to ask the Court's permission to examine Mr. Simmons on voir dire in regard to any knowledge on the subject.

The Court: Motion denied. Answer the question.

A. The records were at some time previously delivered to an agent of Mr. Remmer's, whom I do not know. They were later returned to the office of Pechart and Kessel by Mr. Golden.

Q. By Mr. Golden, did you say?

A. That's right.

Q. Do you recall what date it was upon which Mr. Golden returned those records?

A. No, I do not.

Q. Calling your attention to the date of that particular document, which is, I believe, April 24, 1951, can you state when it was with relation to the writing of that document that the records were returned by Mr. Golden? [723]

Mr. Gillen: Objected to, may it please the Court, as having been asked and answered. The witness says he doesn't know.

Mr. Campbell: I want to ascertain if this will refresh his recollection.

The Court: Objection overruled. Answer the question.

A. This does not refresh the matter.

Q. Now, Mr. Simmons, when did you first begin employment, so far as the keeping of books and

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(Testimony of Lester Simmons.)

records, in behalf of Mr. Pechart and Mr. Kessel?

A. Approximately around the first part of January of '45.

Q. And was your employment at that time directly by Pechart and Kessel, or was it from your brother? A. It was from my brother.

Q. And how long did that arrangement continue, so far as your keeping books and records in behalf of Mr. Pechart and Mr. Kessel, under the direction of your brother?

A. Until about September of '48 or September of '49.

Q. Now directing your attention again to this receipt, let me ask you this—are the records set forth hereon all of the records that were maintained, so far as you knew, with respect to the operations of the 21 Club, the San Diego Social Club, and the 311 Club, for the years 1943 to 1946?

A. To the best of my knowledge that is the records in its entirety.

Q. Now I call your attention to the fact that under the heading [724] "21 Club," there is listed a general ledger. I will ask you whether or not a general ledger was also maintained for the San Diego Social Club and for the 311 Club?

A. I was not familiar with those two activities, but I don't think there was a general ledger.

Q. Were you familiar with the record keeping so far as the 21 Club was concerned?

A. Yes, I was.

Q. Now will you state just what records were

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(Testimony of Lester Simmons.)

kept for that club, particularly for the years 1943 to 1946?

Mr. Gillen: Objected to, may it please the Court, as having been asked and answered. The exhibit is the best evidence and this witness said that so far as his knowledge was concerned, that they represented all the records pertaining to those activities.

Mr. Campbell: I will withdraw the question.

Q. You referred here to a cash journal for the 21 Club. Will you state the general nature of that record?

A. The cash record is the record that shows the cash receipts and disbursements, daily journal, usually.

Q. Is that what it was in respect to that operation? A. Yes, it was.

Q. Showed the cash receipts and cash disbursements; is that correct? A. Yes, sir. [725]

Q. And you refer there to a general ledger. Will you tell the nature of that book of account, so far as the 21 Club was concerned?

A. This general ledger is double entry usual type ledger.

Q. Now was that general ledger, to your knowledge, brought up to date, so far as the operations of the 21 Club for the years 1943 to 1946 were concerned?

A. The general ledger, so far as I know, was up to date by the end of 1946.

Q. And was up to date at that time?

A. Yes, sir.

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(Testimony of Lester Simmons.)

Q. Now will you state whether or not in that general ledger there were set forth investment accounts or capital accounts, or whatever designation they may have had, accounts showing the contributions and accumulated profits of the partners thereto? A. I got lost on your question.

(Question read.)

A. I don't recall what was in the books on the investment accounts.

Q. Do you recall whether or not there were investment accounts? A. No, I do not.

Q. Do you recall whether or not the general ledger set forth accounts payable of the 21 Club?

A. Yes, sir.

Q. Do you recall whether or not there were drawing accounts of [726] the partners.

A. I do not think there were.

Q. Do you recall whether or not the general ledger set forth the notes payable of the 21 Club?

A. Yes.

Q. Now would those matters to which I have referred, that is to say investment or capital accounts, accounts payable and notes payable, be also set forth in the cash receipts and disbursements journal?

A. Yes, they would.

Q. And were they in the case of the 21 Club?

A. To the best of my knowledge now they were.

Q. And in what form did they appear in the cash receipts and disbursements journal?

A. I do not know.

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(Testimony of Lester Simmons.)

Q. Do you have any recollection of the contents of those books, so far as accounts payable and notes payable at the end of each of the calendar years, 1943 to 1946? A. No.

Q. Do you have any recollection of what those books would show by way of investment or contribution by the partners?

A. Not at that time.

Q. Would your answers be the same as to the San Diego Social Club?

A. I don't know anything about the San Diego Social Club. [727]

Q. Do you know anything about the 311 Club?

A. I know about the 311 Club. I know nothing about the records that were maintained.

Q. Did you, yourself, keep the records or make the entries of the 311 Club with respect to any of the years 1944 to 1946, inclusive?

A. The only times I would have had any occasion to be concerned with either of those two enterprises would be to possibly make up pay rolls in the absence of George.

Q. In the absence of your brother; is that correct? A. Yes.

Q. Now during the years—that is, from the time you commenced your employment with respect to these enterprises, I think you stated in 1945, and up until the end of 1946, were you the authorized signator on any bank accounts maintained by the 21 Club, the San Diego Social Club and the 311 Club?

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(Testimony of Lester Simmons.)

A. I was authorized to sign checks on the 21 Club with a co-signature of Mr. Billington.

Q. And where was that bank account maintained? A. Mechanics Bank at El Cerrito.

Q. What, if any, designation was on that account? What was the name of the account?

A. 21 Club.

Q. Was there any other designation on that account?

A. I don't understand the question. [728]

Mr. Campbell: Well, I will reframe the question.

Q. Was that an account used for any particular purpose?

A. It was used for the purpose of paying the disbursements on the 21 Club.

Q. Was that the only account maintained in the name of the 21 Club at the Mechanics National Bank?

A. It is the Mechanics Bank. There were two accounts; one was general operating account, one was the pay roll account.

Q. And which of the two accounts was it that your signature was authorized? A. Both.

Q. You were authorized on both?

A. That's right.

Q. And was Mr. Billington's signature also authorized on both? A. Yes, he was.

Q. Were you authorized to sign any checks with respect to any bank account of the San Diego Social Club?

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(Testimony of Lester Simmons.)

A. It is possible I was on the account to sign pay roll checks.

Q. Was there more than one account for the San Diego Social Club, if you know?

A. I don't know.

Q. Do you recall the name of the account of the San Diego Social Club?

A. It went under the name of the San Diego Social Club.

Q. Was there any designation on that [729] account? A. None other than that name.

Q. Now with respect to the 21 Club, did you, yourself, handle the deposits of money to that account? A. Yes, I did.

Q. How often was that done?

A. Generally weekly.

Q. And we are referring specifically to the period from when you commenced your employment up to and including December 31, 1946. Now during that period of time from whom did you receive the money with respect to the 21 Club to deposit in the bank? A. Mr. Billington.

Q. And where would you receive it?

A. At the club.

Q. You would visit the club; is that correct?

A. Yes, sir.

Q. Mr. Simmons, who made out the deposit tickets on the deposit of money? A. I did.

Q. I presume the money would be in the form of checks, currency and silver; is that correct?

A. That's right.

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(Testimony of Lester Simmons.)

Q. And at the time you received the money, did you receive any memoranda or account of any kind with respect to that money?

A. Yes, there would be the sales recap of the sales for the week. [730]

Q. And in what form did you receive that recap of sales? A. I don't remember.

Q. Well, do you recall whether it would be a sheet of paper, an adding machine paper or cash disbursed tab?

A. I believe that Mr. Billington prepared a weekly sheet, on which the daily sales totals were noted.

Q. How were those sales broken down?

A. Between the food sales and bar sales.

Q. And was there or was there not included on that sheet the sales, as you refer to, or receipts—they are one and the same thing, are they not? Is that correct? A. Yes.

Q. (Continuing): ——with respect to the operation of the back room known as the San Diego Social Club? A. They had no connection.

Q. So that the money which Mr. Billington handed to you and the weekly recapitulation of the sales referred only to the bar and the restaurant; is that correct? A. That's right.

Q. And was there also set forth upon that recapitulation such expenses as had been paid out in cash during the week?

A. They were covered by actual paid cash invoices he had in his possession.

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(Testimony of Lester Simmons.)

Q. In other words, when the baker would deliver some bread to the restaurant and would receive cash, his paid invoice would [731] show up with the cash; is that correct? A. That is right.

Q. After you received that recapitulation, what did you do with it?

A. It was put in the files of the 21 Club. That was the basis for posting the cash journal.

Q. Both as to receipts and expenditures?

A. Yes, sir.

Q. And after the posting had been done, what was done with those records? What was done with the weekly recapitulation which Mr. Billington gave you, and the paid invoices?

A. The paid invoices were filed usually according to the source of supply and the bill sheets were filed also.

Q. And where are those records?

A. At this time I do not know.

Q. Did you have any means of checking those weekly recapitulation sheets and the amount of cash and paid bills which were handed to you, for the purpose of determining whether or not you were receiving weekly all of the receipts of the 21 Club for deposit or posting?

A. No, I did not check.

Q. I take it then you accepted them for your purposes as being accurate; is that correct?

A. Yes, sir.

Q. And they formed the basis of the records

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(Testimony of Lester Simmons.)

which you kept as [732] to the profits or losses of the 21 Club? A. Yes, sir.

Q. Now did you have anything to do with the deposit of funds in the bank of the San Diego Social Club?

Mr. Gillen: Objected to as asked and answered several times. He said he had nothing to do with it.

Mr. Campbell: He says that he drew checks on the San Diego Social Club.

Mr. Gillen: He said he might have on the bank account for the pay roll at one time.

The Court: You may answer the question.

A. I may have physically carried the money to the bank from the office of my brother, George Simmons.

Q. Was money delivered from the San Diego Social Club to your office?

A. That I do not know.

Q. Did you make out deposit slips in relation to the San Diego Social Club?

A. Not that I recall.

Q. Other than what you have described as possibly signing pay roll checks, did you have anything whatsoever to do with the San Diego Social Club?

A. No, I did not.

Mr. Campbell: You may cross-examine. [733]

Cross-Examination

By Mr. Gillen:

Q. Mr. Simmons, referring to the prosecution's Exhibit 96, which is a receipt—it is really a state-

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(Testimony of Lester Simmons.)

ment by Mr. Pechart as to what he was turning over to Mr. Remmer and a receipt by Mr. Remmer what he received in the way of books of account on April 24, 1951—referring to that exhibit and referring particularly to the language at the bottom: "Tax returns for 21 Club for 1943 were not returned with records when picked up by Mr. John Golden," it is a fact, is it not, that the 1943 tax return which is mentioned in that language, that was merely an office copy of the 1943 return that was made to the government, the original of which was made to the government; isn't that true?

A. I don't know.

Q. Well, was there a return made for the 21 Club, an income tax return, made for the 21 Club in 1943? A. I have no knowledge.

Q. You weren't there at that time?

A. No.

Q. We will get to that another way. It would be earlier than your employment?

A. That is right.

Q. You were there, however, when all of the records of the 21 Club, the San Diego Social Club, and the 311 Club were turned over to agents Gould and Farley, for the purpose of making an audit for a period of three years; is that correct? [734]

A. Yes, sir.

Q. And were most of those records in your possession and under your supervision at the time Messrs. Gould and Farley arranged to look at them?

A. They were in the office of my brother.

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(Testimony of Lester Simmons.)

Q. And did you participate in facilitating their work for them, that is, turning over the records to them and providing whatever they needed?

A. Yes, sir.

Q. And do you have any distinct recollection yourself how long those records were in the hands of Messrs. Gould and Farley?

A. To the best of my recollection, it was about three or four months.

Q. Do you have any distinct recollection of where they worked?

A. Yes, they worked in the office of the El Rancho San Pablo.

Q. And that was across the street from your own office? A. Yes, it was.

Q. And that office was provided for their convenience by Mr. Pechart, is that correct?

A. That's right.

Q. Were you personally present when Messrs. Gould and Farley returned on several separate days the books that had been turned over to them?

A. Well, physically the books were left in the office which they were using. [735]

Q. Over at the Rancho San Pablo office?

A. That is right.

Q. Was it brought to your attention by those gentlemen that they were through with those records?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question.

A. I don't know. There was no direct statement

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(Testimony of Lester Simmons.)

made to me that they were through with them. Just assumption on my part they were through; they left them there and were gone.

Q. They also made audit reports to you, did they not, and gave you copies of their audit reports on various dates?

A. The reports were not made to me personally.

Q. They were mailed to your office, were they not?

A. I think they were mailed to Pechart and Kessel.

Q. Do you have a recollection that agents Farley and Gould sent their audit reports, showing that the 21 Club and San Diego Social Club, for the year 1943, that audit had been completed and the report written on October 21, 1947, and for the year 1944, for the same clubs, the audit had been completed and the report written on April 5, 1948, and for the same clubs for the year 1945 that the audit had been completed and the reports written by the aforementioned agents on July 27, 1948, and that with reference to the 311 Club for the year 1944, the audit had been completed and the report written on April 5, 1948, and for the year 1945 for the same club the audit had been completed [736] and the report written January 27, 1948. Do you have any recollection of those reports coming into your possession from the government, at or about those times?

Mr. Campbell: Objected to, not the best evi-

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(Testimony of Lester Simmons.)

dence. It is a compound question, which is also unintelligible.

The Court: I think it covers several points. Objection sustained.

Mr. Gillen: It is not the best evidence, I agree; then let the government produce the reports.

The Court: That is not the basis of the ruling. The basis of the ruling was it was a compound question.

Q. All right. Do you have in mind now what was contained in the audit reports which you say were mailed to the office of Pechart and Kessel after the revenue agents had left the books and left the place of the Rancho San Pablo, after their three or four months' work?

Mr. Campbell: Objected to as not the best evidence, if the Court please. The evidence here shows that there is in the possession of counsel the matters which he is directing attention to.

The Court: Objection overruled. Answer the question.

A. I do not know the contents of the revenue agents' reports.

Q. Now with regard to the 21 Club, concerning which you testified, do you recall, that Mr. Campbell asked you whether or not the books that were kept showed any capital investment? [737]

A. Yes, sir.

Q. What is your recollection in that regard? Did the books you kept on the 21 Club show any capital investment?

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(Testimony of Lester Simmons.)

Mr. Campbell: Objected to on the grounds the books themselves are the best evidence.

The Court: That is generally a good objection. I am inclined to sustain that objection ordinarily.

Mr. Gillen: I am asking him about something on direct.

The Court: But that is the idea. We had these matters gone into on direct examination.

Mr. Campbell: May I be heard on this objection, your Honor? I notice it is time for the morning recess.

(Jury and alternate jurors admonished and excused for 15 minutes. Recess taken for 5 minutes at 11:07 a.m.)

11:15 A.M.

(Defendant present with counsel.)

(In the absence of the jury.)

The Court: I have a thought I would like to state. The objection would ordinarily be good, but you propounded on direct examination many questions to which the same objection would have been sustained. Now you might say counsel did not make the objection, therefore it was all right to continue to pursue that course of examination, but in asking those questions [738] you evidently expected an answer and you got those answers and I do not think it would be proper to sustain the objection now to some question on cross-examination directed to matters which were referred to on direct examination.

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Mr. Campbell: May I give your Honor the thought I have in mind. I do not believe your Honor would have sustained such an examination on direct examination, because inasmuch as we had shown that the best evidence, that is the books and records of the 21 Club, the San Diego Social Club and the 311 Club, were out of the reach of the government, having been put in the hands of the defendant himself, and the evidence having shown that they were still in the hands of the defendant, then we are entitled to secondary evidence as to his recollection, if he had a recollection, of what was in those books and the source of the information that went in there. We had laid the foundation for that secondary evidence and his testimony was in the manner of secondary evidence, but here we are faced with a different situation on examination by defendant's counsel, inasmuch as the record shows that it is within their power to produce——

The Court (Interceding): Aren't these records all in the clerk's office now?

Mr. Campbell: No, your Honor, these records are not included among those. These records never came within the [739] possession of the government other than, you might say, constructively, as testified to by the witness, when room was provided for them and they worked on them and left them there and subsequently they were turned over to the defendant

The Court: Those records are not now in the possession of the government or the clerk of this court?

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Mr. Campbell: No, your Honor; so we are faced with a different situation. That is why we laid the secondary evidence foundation as to the present custody of those books and records and that was the basis now of my objection.

The Court: Objection overruled.

Mr. Campbell: May I be heard? I would like to show your Honor the absolute fallacy for that objection. We have testimony here introduced, not by the defense, but by the prosecution, that two government agents had all of those records made available to them by Pechart and Kessel for a period of some four months, that facilities were provided for their convenience, that they worked on them for a period of four months, that they got through with the records, that they abandoned and left them, that they made an audit and made a report on their audit. Now certainly the original audit and the original report on the audit was made to the government and the only thing that would be in these records would be a copy of the report on the audit, which would be secondary evidence and the original and primary evidence would be in the hands of the government right [740] now. Now when they worked on these books and records, may it please the Court, for a period of four months, it is not inconceivable and it is not stretching the imagination of the Court or any one else to believe that they must have photostated, examined and exhaustively scrutinized and took copies of everything that they needed to make a complete audit report to their superiors.

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So that all of the primary evidence is in the hands of the government right now.

The Court: Let me ask Mr. Gillen a question. That question that you propounded here, to which objection has been made—read the question.

(Question read.)

The Court: Now I want to ask a question. The subject matter of the question would be included in this audit report?

Mr. Gillen: Absolutely.

Mr. Campbell: May I suggest this, your Honor, I can not follow counsel and I can not believe he is seriously contending——

Mr. Gillen: I am serious, I assure you of that.

Mr. Campbell: May I finish—I can not believe he is seriously contending that a transcript or a report made from books and records becomes primary evidence. The primary evidence is the books and records of original entry, and transcripts of the report, oral or written, are certainly not the best evidence, and certainly if we were to offer such reports here, he would be [741] the first to object that they were not the best evidence, that the books and records themselves were the best evidence.

Th Court: Another point would have been to say this is not proper cross-examination, but you went into these matters on direct examination and I have always thought that under cross-examination the ground covered by direct could be gone into. I am going to overrule the objection. The objection is overruled. Bring in the jury.

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11:23 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

(Last question read.)

Mr. Gillen: The Court says you may answer the question.

A. I do not remember about capital investment.

Q. Is it not a fact, Mr. Simmons, that you recall that the only investment of Mr. Remmer in connection with the 21 Club and the San Diego Social Club was that he made available the land and the building on the land in which those two enterprises were housed?

Mr. Campbell: If he knows.

Mr. Gillen: No, this is cross-examination. I wonder if I may stumble through in my own way? I am not bound by the [742] rules as on direct examination.

The Court: All right.

Q. Do you have the question in mind?

(Question read.)

Mr. Campbell: Objected to, assumes a fact not in evidence, the witness having stated he knew nothing about the San Diego Social Club.

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(Testimony of Lester Simmons.)

The Court: He may answer the question.

A. I do not believe there are any entries on the books reflecting such a condition.

Q. Isn't it a fact, and within your knowledge, that Mr. Remmer made no cash investment in either the 21 Club or the San Diego Social Club and his only investment, if it might be called such, was the avaliability of the building and the land on which it stood?

A. I do not recall anything in the books indicating that he made an investment.

Q. Any cash investment? A. No.

Q. You recall, do you not, that the entire cash investment was made by Messrs. Pechart and Kessel and that the arrangement was that their initial investment was to be returned to them before any profits derived from the enterprises were divided?

A. I do not know what the initial arrangements were.

Q. They were made before your [743] participation? A. Yes, they were.

Q. Now you testified that on weekly occasions you would go to the 21 Club and obtain information concerning the receipts and disbursements for the food, the restaurant, and the bar, is that correct?

A. Yes, sir.

Q. And that you would post that data in the books and any money that was on hand you would take it to the bank? A. Yes, sir.

Q. And any checks which were to be paid either

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(Testimony of Lester Simmons.)

you or Mr. Billington or both of you, as required, signed the checks?

A. Yes, sir, required two signatures.

Q. And that that pertained only to the 21 Club?

A. Yes, sir.

Q. And you stated that you did not check the data that was given to you by Mr. Billington, is that correct? A. Yes, sir.

Q. It is true, is it not, that you were given cash register tickets as well as any statement concerning receipts and disbursements?

A. Those were retained in the office of the 21 Club.

Q. It is true they were made available to you, the cash register tickets, isn't that so?

A. They could have been if I wanted them.

Q. And the cash register tickets would have shown, of course, [744] all the sales that were rung up and any non-sales that were rung up, isn't that true? A. Yes, sir.

Q. You were also provided with bills that came in, such as for bread and commodities, isn't that true? A. Yes, sir, the petty cash accounts.

Q. Well, isn't it a fact that some of those commodities were taken care of by petty cash fund and others were paid by check?

A. Yes, they were.

Q. And whatever those bills were, they were made available for your examination, isn't that so?

A. Oh, yes.

Q. On the occasions of the weekly visits by you

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(Testimony of Lester Simmons.)

to the 21 Club to obtain this information to bring your books up to date and to deposit checks or cash receipts in the Mechanics Bank or to draw checks to cover obligations, was Mr. Remmer ever present on any of those occasions, to the best of your recollection? A. At the time?

Q. When you used to go there to get the information from Mr. Billington?

A. I think I saw him there once or twice.

Q. Can you fix the time? A. No, sir.

Q. Now as I understood your testimony, you had nothing, during that period of time, to do with the San Diego Social Club, except [745] you believe for a time your name may be on the bank account pay roll? A. Yes, sir.

Q. And if you had anything to do with depositing money, it was simply an accommodation to your brother? A. Yes.

Q. You may have been going to the bank at the time and he had a deposit for the San Diego Social Club and you took it along to accommodate him, is that correct? A That is right.

Q. Mr. Simmons, did you participate in the preparation of any of the tax returns from the 21 Club? A. I may have typed the returns.

Q. Do you mean that you may have acted as in a mere clerical capacity? A. Yes, sir.

Q. Now for a time you were keeping the books?

A. Yes, but I didn't prepare any returns.

Q. Did you furnish the data for the returns from the books that you had kept?

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(Testimony of Lester Simmons.)

A. Yes, sir.

Q. To the best of your knowledge and belief was that data that you prepared and furnished for the return to be made from true and correct?

A. Yes, it was. [746]

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

I am going to ask to have marked for identification, as government's next in order, what purports to be a revenue agent's report year 1943 of the 21 Club and San Diego Social Club.

The Clerk: 102 for identification.

Mr. Campbell: And have marked 103 for identification what purports to be revenue agent's report of the 21 Club for the year 1944; as exhibit 104 for identification what purports to be the revenue agent's report of the 21 Club and San Diego Social Club for the calendar year 1945; government's 105 for identification what purports to be revenue agent's report for the 21 Club and San Diego Club for the calendar year 1946.

Mr. Avakian: May I inquire, for convenience in examining them, whether these are copies of reports that we requested the government to furnish the other day during the examination of Mr. Billington?

Mr. Campbell: I do not recall what counsel asked that we produce. The documents speak for them-

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selves and I will ask the witness to identify them in a moment.

(Jury and alternate jurors admonished and recess taken at 11:37 a.m.) [747]

December 13, 1951—1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SIMMONS

resumes the stand on

Redirect Examination

By Mr. Campbell:

The Court: We are on redirect examination?

Mr. Gillen: Yes, your Honor, and we have examined some revenue office audit reports and with regard to those, we are prepared to stipulate that they may be offered in evidence if counsel wishes, as true copies of the original reports that probably are in the hands of the department.

The Court: Will you accept the stipulation?

Mr. Campbell: Yes.

The Court: They will be admitted as, in accordance with the stipulation, as 102——

Mr. Gillen (Interrupting): Your Honor, I should have mentioned a condition to the stipulation. Our stipulation is offered only in the event that the agent who prepared those is produced as a witness, because undoubtedly Mr. Simmons would

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(Testimony of Lester Simmons.)

not be able to answer any questions concerning their handiwork.

Mr. Campbell: We will not accept the stipulation.

Mr. Gillen: Very well, we withdraw the stipulation.

Q. Mr. Simmons, counsel asked you on cross-examination as to the length of time that revenue agents Farley and Gould spent in the examination of the various books and records there at Rancho San [748] Pablo, do you recall that?

A. Yes, sir.

Q. How long did you state that that examination took place?

A. Approximately three to four months, to the best of my knowledge.

Q. Was that examination confined to the books and records of the San Diego Social Club and the 21 Club?

Mr. Gillen: Objected to as calling for opinion and conclusion and speculation of this witness, unless the foundation is established to show that he was over there and participated in their work.

Mr. Campbell: I will reframe the question.

Q. Were you the person who supplied them with books and records which they were examining on?

A. Partially.

Q. And of what enterprises or businesses did you supply the books or records during that time?

A. All the enterprises of Pechart and Kessel partnership.

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(Testimony of Lester Simmons.)

Q. Will you relate what those were?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Any answer would be confined to any one of the organizations or institutions in which the defendant has been identified.

Mr. Gillen: Now in my examination yesterday counsel objected [749] to that as immaterial and your Honor ruled with him and I think it would be just as immaterial today.

The Court: I thought matters that had to do with Mr. Pechart solely, I can't see where they had any connection here, so we would have no interest in them

Mr. Campbell: I think we have a different situation today.

The Court: Very well, if the witness will understand that we are not asking for any businesses or testimony concerning any matters not connected with the defendant.

Mr. Campbell: My point is, your Honor, there may be——

Mr. Gillen: I think the Court has ruled.

(Question read.)

Q. What enterprises, the books and records of which you made available to Mr. Gould and Mr. Farley on that occasion?

A. I don't know if I can give them all to you or not. I will try—Rancho Trailer Court—I can't recall the names of them.

Q. Was there the Wagon Wheel?

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(Testimony of Lester Simmons.)

A. The Wagon Wheel.

Q. Was there a Johnny's Book? A. Yes.

Q. California Novelty Company?

A. I do not recall that.

Q. Consolidated enterprises? [750]

A. Yes, sir.

Q. The Smoke Shop at 2703 San Pablo Avenue?

A. I am not familiar with it.

Q. Sunnyside Club? A. Yes, sir.

Q. The B Club No. 1?

A. That may have been in there.

Q. The Wander Inn? A. Yes, sir.

Q. The Riverside Club?

A. I do not know that one.

Q. In Pittsburg, California? A. No.

Q. Bozo's? A. Yes, sir.

Q. Buddy's Liquor Store?

A. It may be, I don't know.

Q. Were those which you recall among the books and records which you made available to Mr. Gould and Mr. Farley on that occasion?

A. Yes, they were.

Q. And of the books and records that were made available to them, in volume, what part of that volume consisted of the books and records of the 21 Club, the San Diego Social Club, and the 311 Club? [751]

Mr. Gillen: I think that is calling for too gross speculation on the part of this witness, and I think also it——

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(Testimony of Lester Simmons.)

The Court: I think so. Objection will be sustained.

Mr. Campbell: That's all.

The Court: Any further questions?

Mr. Gillen: I have no cross-examination, your Honor, but I may suggest that the exhibits that have been marked for identification, prosecution's 102 to 105, be left in the custody and care of the clerk.

Mr. Campbell: Yes, no doubt they will be.

The Court: They are marked.

(Witness excused.)

GLENARD GOULD

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name please?

A. Glenard Gould.

Q. What is your business?

A. Internal revenue agent.

Q. How long have you been an internal revenue agent? A. Since 1943.

Q. What was your general experience prior to becoming an internal revenue agent?

A. Auditor.

Q. Now in connection with your duties as an internal revenue [752] agent, did you have occasion

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(Testimony of Glenard Gould.)

in the year 1947 to make examination into the affairs of Walter Pechart and David Kessel?

A. I did.

Q. And in connection with such examination into the affairs of Walter Pechart and David Kessel, did you have occasion to examine the books and records of a business known as the 21 Club in El Cerrito? A. I did.

Q. And by whom, if any one, were such books and records as you observed and examined made available to you? A. By Simmons Brothers.

Q. Do you recall when that examination took place?

A. It began in the latter part of 1946 and continued into the first few months of 1947, as the best of my recollection.

Q. And what time was it that you saw the books and records of the 21 Club?

A. Well, that could have happened any time during that period of time.

Q. Do you have a definite recollection?

A. I do not, sir.

Q. During the course of your examination into the affairs of Walter Pechart and David Kessel, did you examine books and records of other enterprises in which they were interested? A. Yes, sir.

Q. And were they numerous or few? [753]

A. They were numerous.

Q. Now with respect to the books of the 21 Club, where physically did you make the examination?

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(Testimony of Glenard Gould.)

A. The examination was all made at the Rancho San Pablo office in El Cerrito.

Q. Whose office was that?

A. That was part of Pechart's and Kessel's.

Q. Is that property, if you know, which was owned by them?

A. No, it is rented property.

Q. And where is that property located with relation to the business office of Pechart and Kessel?

A. Well, it would be catacorner across the street some distance.

Q. And how far is it, where is it in relation to the office of George Simmons and his brother, Lester Simmons, as of that time?

A. The same distance, as the Simmons office was at that time the same as Pechart and Kessel.

Q. They were occupying offices in the same premises with the office of Pechart and Kessel?

A. Yes, sir.

Q. And was your examination of all of those records conducted there at space made available to you at the Rancho San Pablo? A. Yes, sir.

Q. Did you carry away any of the books and records with you? A. We did not, sir. [754]

Q. Now will you describe, if you will, such books and records as you saw with relation to the 21 Club?

A. The 21 Club, as I recall, had a fairly complete set of records, consisting of a general ledger, journal and cash receipts and disbursements.

Q. By a general ledger, referring to general

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(Testimony of Glenard Gould.)

ledger, was that a single or double entry system?

A. It was a double entry set of books.

Q. Will you state whether or not, from your examination, if there was set up in that ledger an investment account? A. Yes, sir, there was.

Q. As a matter of fact, the double entry system requires an investment account?

A. That is correct.

Q. And during the time that you examined such records, did you make a transcript from the general ledger of the 21 Club?

A. I did, for our working papers.

Q. Do you have that transcript with you?

A. Yes, sir.

Q. Will you produce that? A. Yes, sir.

Mr. Campbell: May this be marked for identification as government's next in order.

The Clerk: 106.

Q. Mr. Gould, have you seen the books and records of the 21 [755] Club since you made this transcription? A. No, sir, I have not.

Q. I will ask you whether or not the figures appearing hereon were figures taken by you from those books and records which you examined?

A. They were.

Q. Do the figures appear in this fashion in the books, or do those represent in many instances combined figures?

A. No, as I recall, they were taken from the closing entries at the end of the year, as prepared by the accountants.

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(Testimony of Glenard Gould.)

Q. As set forth in those books?

A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's Exhibit 106.

The Court: I hear no objection. It will be admitted. Exhibit 106 admitted.

Q. Now, Mr. Gould, if you will refer to your working papers, will you state the amount shown in the investment account of the 21 Club as of December 31, 1943?

A. Total amount of $15,353.07.

Q. Will you state the amount shown as investment account as of December 31, 1944?

A. $13,809.87.

Q. As of December 31, 1944, did the books also show any notes payable to Elmer Remmer? [756]

A. Yes, sir, item of $6100.

Q. Did the books, in addition, show any accounts payable to Mr. Remmer as of that date?

A. Not so marked that I see.

Q. Now that note payable, is that a note payable to Mr. Remmer, or by Elmer Remmer?

A. No, it is note payable to Elmer Remmer.

Q. As of December 31, 1945, what was the amount shown in the investment account?

A. $23,027.69.

Q. And where there also——

A. (Interrupting): I beg your pardon—which year?

Q. December 31, 1945.

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(Testimony of Glenard Gould.)

A. I gave you the wrong figure, I gave you '46. The figure 1945 is $3,435.94.

Q. And did the books as of December 31, 1945, show any account payable to Elmer Remmer?

A. Yes, an item of $8700.

Q. And as of December 31, 1945, did the books show any accounts payable to Elmer Remmer?

A. I don't see any, no.

Q. As of December 31, 1946, what was the amount shown in the investment account?

A. $23,027.69.

Q. As of December 31, 1946, did the books show any notes payable [757] to Elmer Remmer?

A. No, they had been closed into the investment account.

Q. As of December 31, 1946, did the books show any accounts payable to Elmer Remmer?

A. There is an item of accounts payable of $1402.37 at the end of '46.

Q. Now did you make an analysis of the investment account as of December 31, 1946?

A. There was an analysis in the records, yes.

Q. You made a transcript of the analysis in the records? A. Yes, sir.

Q. And what did that analysis show to be credited to Elmer Remmer in the investment account of the 21 Club as of December 31, 1946?

A. $11,513.85.

Q. And were there additional amounts as shown on the records as of that date owing to him in that analysis?

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(Testimony of Glenard Gould.)

A. Only this $1402.37. I think all of it had been closed into the investment account. I would say it might have been closed into the investment account.

Q. And had there also been closed into the investment account at that time profit and loss accruing to the credit of Elmer Remmer as of that date? A. Yes, sir.

Q. In what amount? [758]

A. The profit and loss was $4,215.49.

Q. Was that profit or loss? A. A loss.

Q. According to those books as you then saw them, as of December 31, 1946, what was the total amount to the credit of Elmer Remmer, both of investment and accrued profits? A. $15,729.34.

Q. Now at the time you were making the examination of various books and records relative to Walter Pechart and David Kessel, was any other revenue agent working with you in that connection?

A. Yes, Mr. Lester D. Farley.

Q. Did you make some division of the work, and if so, in what manner?

A. Well, the only division of the work was that as we came to the various enterprises, one would take one enterprise and make examination and some other agent would take some other enterprise and do likewise.

Q. And I take it then that the 21 Club was the one which fell to your lot?

A. Only as far as making transcript off the records for our work papers.

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(Testimony of Glenard Gould.)

Q. Now did you examine the records, if any, of the San Diego Social Club?

A. I did not examine them. I may have seen them, but I did not examine them. [759]

Q. Now with regard to the investment account, other than at the end of 1946, when you have referred to the analysis which appeared in the record, was that the only year in which an analysis was set forth?

A. To my knowledge I can't remember, Mr. Campbell. I made it only for balance sheet purposes, inasmuch as we were closing out at the end of 1946 for a net worth statement.

Q. For your examination? A. Yes, sir.

Q. The investment figure you have given as of the end of 1943, 1944, and 1945 included the shares of all the partners, did it?

A. That is correct.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Gould, you stated you have been a revenue agent since 1943, is that correct?

A. Yes, sir.

Q. To what office have you been assigned?

A. Internal Revenue Agent in Charge, at San Francisco.

Q. And do you work out of the San Francisco office?

A. Yes, sir. However, our office is located at

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(Testimony of Glenard Gould.)

709 Financial Center Building in Oakland. We have a branch office in Oakland.

Q. And you work out of the branch office in Oakland, is that correct? A. Yes, sir. [760]

Q. Can you tell us what the duties of an internal revenue agent are?

A. The duties of an internal revenue agent are to make examinations for verification of all returns filed or returns assigned to him, from the books and records of the taxpayer.

Q. I take it not all returns go to the internal revenue agent's office for examination?

A. That is correct.

Q. But when returns are assigned to you, as internal revenue agent, it is then your responsibility to make such investigation as may be necessary to verify the correctness or incorrectness of that return? A. That is correct.

Q. And there were assigned to you, I take it, for such an examination, the partnership returns of the 21 Club for the years 1943 to 1946, inclusive?

A. Not necessarily.

Q. Will you explain your answer?

A. Yes. The assignment would be made on the principal and as such it would be necessary to go into the partnerships but would not necessarily have to have the partnership assignment.

Q. When a return of an individual is assigned to you for examination and verification and you learn that that individual is a member of a partnership, is it then the custom for you to inquire into

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(Testimony of Glenard Gould.)

the correctness of the partnership income as [761] reported? A. That is correct.

Q. And is that what you did in this case in respect to the 21 Club? A. Yes.

Q. In the course of your examination did you also inquire as to the correctness reported for the partnership known as the 311 Club?

A. We did.

Q. You and Mr. Farley together? A. Yes.

Q. And you participated in that examination?

A. Yes, I did.

Q. And does your name appear with Mr. Farley's on the report that was written?

A. Inasmuch as it was a combined report of Mr. Farley and myself, our names appear upon the reports, regardless of who may have written the report.

Q. You worked as a team?

A. That is correct.

Q. And in the course of this examination which you made, did you also inquire into the correctness of the income report for the San Diego Social Club? A. We did.

Q. And were you permitted to examine all of the records of [762] those three businesses which you wanted made available to you?

A. I would say all the available records, yes.

Q. Nothing was withheld from you, is that correct? A. No, sir.

Q. And those were made available to you for as long as you wanted them? A. They were, yes.

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(Testimony of Glenard Gould.)

Q. And you returned them to Mr. Pechart and Mr. Kessel's office voluntarily?

A. They were never taken out of their office.

Q. You had them across the street, is that correct?

A. All the records were across the street.

Q. You did make use of those for as long as you wanted, I take it? A. That is right.

Q. And you wrote your report after you had made such use of those records as you desired?

A. That is the customary procedure.

Q. And that was followed in this case?

A. That is right.

Q. Now you testified, Mr. Gould, as to the investment account which you found in the books of the 21 Club at the 31st day of December, in the years 1943, 1944, 1945, and 1946, and I believe you also testified that you made a copy of the investment account at December 31, 1946, broken down between the partners [763] on that date, December 31, 1946, is that correct?

A. I testified I had made a transcript from the records, that is correct.

Q. And that record contained a breakdown as between three partners on that date?

A. That is my recollection, yes.

Q. Do you know whether the records showed the breakdown as between the three partners at the end of the earlier years, namely, 1943, 1944, and 1945?

A. That I can't recollect.

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(Testimony of Glenard Gould.)

Q. In any event, the copy which you made does not contain such a breakdown?

A. It does not.

Q. Now, Mr. Gould, in computing the income of an individual member of a partnership on the net worth basis, is it necessary for you to have the breakdown of that individual partner's portion of the total investment account at the beginning and the end of each year involved in that investigation?

Mr. Campbell: Objected to as calling for his legal conclusion.

The Court: He may answer the question. Do you understand the question?

A. Yes, I do, sir. If you were attempting to make a net worth basis, it would be necessary to have a starting point and a closing point and if you were attempting to make a [764] reconciliation on a net worth basis between the years, it would be necessary.

Q. So that if you were then attempting to establish the income by the net worth method of any of the partners in the 21 Club during the years covered by your investigation, it would be necessary for you to have the amount of the investment account of that particular individual partner at the beginning and end of each year, is that correct?

A. No, sir.

Q. Then I misunderstood your answer.

A. I answered you that if I were breaking it down into years, it would be necessary. If I was building net worth statement from a given period

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(Testimony of Glenard Gould.)

of time, say 1938, and closing in 1946, and attempting to make a reconciliation, it would not be necessary to make a reconciliation between years.

Q. Let me see if we understand each other. Let us take the year 1946. You testified that you got from the books of the 21 Club the portion of the investment of the 21 Club allocated on those books to Mr. Remmer at the end of 1946. In order for you to compute Mr. Remmer's income for the year 1946, on the net worth basis, would you have to have the amount of the investment allocated to him at the beginning of 1946?

Mr. Campbell: I submit this question is incompetent, in that the witness has not testified he was investigating Mr. Remmer. He was investigating Mr. Pechart and Mr. Kessel. [765]

Mr. Avakian: Do you wish to hear from me?

The Court: He may answer. Read the question.

(Question read.)

The Court: Do you understand the question?

A. I understand the question.

Q. Can you answer it?

A. If I was examining Mr. Remmer's account and building net worth statement for Mr. Remmer for 1946, it would be necessary to have a beginning and closing as the beginning and closing of the year.

Q. Your answer to my question then is yes, is that right? A. Yes.

Q. And the same would be true of each of the other partners, would it not? A. Yes.

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(Testimony of Glenard Gould.)

Q. And the same would be true with respect to the year 1945, would it not? A. That is true.

Q. And with respect to the year 1944, also?

A. Yes.

Q. In your examination of the investment account of the 21 Club, did you find any record in the papers which you examined indicating that Mr. Remmer had ever actually withdrawn any money from the 21 Club?

A. That I can't answer. [766]

Q. You testified that as of December 31, 1946, there had been transferred into the capital account of Elmer Remmer a loss of $4,215.49, is that correct? A. Yes.

Q. Did you find in that capital account any entry showing a withdrawal of any profits by Elmer Remmer?

A. There is nothing in this transcript to that effect.

Q. That transcript covers the investment account, does it not?

Mr. Campbell: Wait a minute—for what period? The question is misleading.

Q. For 1946.

The Court: Read the question.

(Question read.)

Mr. Campbell: I submit the document speaks for itself.

The Court: He may answer the question.

A. There is nothing in this transcript that would

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(Testimony of Glenard Gould.)

indicate any withdrawals because it is only a closing balance sheet at the end of the period.

Q. And your testimony is that you do not know at this time whether or not the records showed anything in respect to any withdrawals by Elmer Remmer? A. I do not.

Q. Do you have any papers here in Carson City from which you could determine whether or not you found such an entry in the records? [767]

A. I do not.

Q. Is there some particular reason why you were not concerned with the matter as to whether or not monies had been withdrawn in the partnership?

A. That is not a consideration in determining income or net worth basis as we would make an examination

Q. In other words, the amount of income which an individual partner has to report as his share of the partnership income is not based on the withdrawals he makes, is that correct?

A. That is correct.

Q. Rather it is simply a portion which represents his percentage? A. That is correct.

Q. And it does not matter whether he withdraws more or less? A. That is correct.

Q. I am going to hand you plaintiff's Exhibit 104 for identification, and without telling me what is on this document, will you state whether or not you recognize the notations in handwriting on page 8 thereof?

A. Do I recognize the handwriting?

Q. Yes. A. No.

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(Testimony of Glenard Gould.)

Q. You do not know whose it is?

A. I do not.

Q. Were you present in the courtroom this morning when Mr. [768] Campbell produced from his files the documents which were marked for identification as prosecution's Exhibits 102, 103, 104 and 105? A. No, sir.

Q. I will ask you to look at these documents and the record will show that they were produced by Mr. Campbell from his files, and will you determine, after you have examined them, whether those are copies of the reports which you and Mr. Farley made? A. They are, sir.

Mr. Avakian: Your Honor, I will request that this now be marked in evidence.

The Court: You offer them in evidence?

Mr. Avakian: Yes, I will be happy to have them marked as defendant's exhibits.

The Court: All right, they will be marked defendant's T.

Mr. Avakian: Are they all four being marked as one exhibit?

The Court: How do you want them marked?

Mr. Avakian: Perhaps it might be better to have each one marked separately.

The Court: Very well, they will be marked separately. No. 102 will now be T, 103 will now be U, 104 will now be V, 105 will now be W. They will be admitted in evidence. [769]

Mr. Avakian: Your Honor, may I hand those exhibits to the witness?

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(Testimony of Glenard Gould.)

The Court: Yes, sir.

Q. Will you refer first to defendant's Exhibit T, which is the report prepared by Mr. Farley and yourself on the operations of the 21 Club and San Diego Social Club for the year 1943, and will you turn to the page entitled "Preliminary Statement." I call your attention to the statement at the bottom of that page, reading as follows: "Other information. The income and expenses of this partnership were reported in error on an individual return under the name of Joseph Billington DBA San Diego Social Club." Can you explain to us, Mr. Gould, what you mean by that statement?

A. This report was not prepared by myself.

Q. Do you know what that statement means?

Mr. Campbell: Objected to. He didn't prepare the report. The statement speaks for itself.

The Court: If he knows what it is, he may answer the question.

A. No, I do not.

Q. Can you state, Mr. Gould, whether the income of this business, as you found it in the investigation which you and Mr. Farley made, was different in any substantial respect from the income of that business reported on the individual return of Joseph Billington? [770]

Mr. Campbell: Which business are you referring to?

Mr. Avakian: The business this exhibit refers to, report denominated 21 Club and San Diego Social Club.

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(Testimony of Glenard Gould.)

Mr. Campbell: That is objected to on the grounds the witness stated he did not prepare this record.

The Court: Read the question.

(Question read.)

Mr. Campbell: And the further objection, it is asking him to attempt to explain without showing him the two exhibits to be compared.

Mr. Avakian: I asked him if he knew, your Honor.

The Court: You may answer.

A. I think the report speaks for itself.

Mr. Campbell: Well, do you know?

A. Yes, I do know. It is shown on Schedule I, net income, after delinquent, was $2,574.94. It was corrected, $3,574.92, which would indicate no change.

Q. Would you refer, Mr. Gould, to defendant's Exhibit U, which is denominated as a report prepared by yourself and Mr. Farley for Joseph Billington DBA 21 Club, for the year 1944. Do you have that before you?

A. Joseph Billington DBA 21 Club, 1944, yes.

Q. If you will refer to the last page of that report, I will call your attention to the Schedule 2, which contains a distribution of income, showing 50 per cent distribution to Elmer [771] Remmer, 25 per cent distribution to Walter M. Pechart, a 25 per cent distribution to David N. Kessel. This does represent an examination of the partnership business which the report describes, does it not?

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(Testimony of Glenard Gould.)

A. Yes.

Q. Now would you refer to the page entitled "Preliminary Statement" to refresh your recollection, and tell us the amount of adjustments which you made on your report with respect to the return that had been filed?

A. May I say again I did not write this report?

Q. This represents the team work of yourself and Mr. Farley, does it not?

A. I can only give you what appears on the report itself.

Q. Will you give us that?

A. That adjustment is up to date with $201.55.

Q. And that was in comparison with a net income disclosed on the return of $3,799.85?

A. That is correct.

Q. Is it customary in your investigations, Mr. Gould, for you to find adjustments in amounts that you just mentioned, namely approximately $200, do you frequently find small adjustments of that kind in your audits? A. Very definitely.

Q. Nothing unusual about that, is there?

A. That's correct. [772]

Q. That $201.55 adjustment represented an increase in the income of the partnership, is that correct? A. That is correct.

Q. I call your attention now to defendant's Exhibit V, is that the report dated July 27, 1948, for the year 1945? A. Yes, sir.

Q. On the business known as the 21 Club and San Diego Social Club? A. Yes, sir.

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(Testimony of Glenard Gould.)

Q. Would you refer to the page in that exhibit which is on the printed form designated "Adjustments to net income," Mr. Gould?

A. Yes, sir.

Q. And that shows net income as disclosed by the return of $43,297.67? A. That is correct.

Q. And as a result of the audit an adjustment was made in this report, increasing that income by $856.78, is that correct?

A. That is correct.

Q. Now would you refer to the next page and explain to us the nature of the items and the amounts of the items making up that net adjustment?

A. May I state also that I did not make this report?

Q. Yes.

A. So I am only reading from the report.

Q. Yes. [773]

A. Item 1 says all expenses of the San Diego Social Club were paid out of income before arriving at the net would have been a loss. In the return the allowable expenses were added back to the net wins and losses in arriving at gross income. However, amounts paid for capital expenditures were omitted. Amounts disbursed for capital expenditures was added to net wins and losses in computing gross income.

Q. And what is the amount of that adjustment?

A. The amount of that adjustment is $6,986.23.

Q. Apparently you and I are not reading——

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(Testimony of Glenard Gould.)

A. Pardon me—Item 1, capital expenditure credit to gross income $8,874.40.

Q. So that we may understand fully what that means, Mr. Gould, will you state to me whether I am correct in this question. Does that mean that you in effect disallowed as a current business expense the sum of $8,874.40, on the ground that it represented capital expenditure which the taxpayer should deduct on a depreciation basis over a period of years?

A. It could be that. Not knowing what it was, I couldn't answer, but it obviously would be a non-allowable deduction which should have been capitalized.

Q. And based on your experience as a revenue agent, would you say that the term "Capital Expenditures" refers to such things as money invested in a piece of machinery, which has a life over a period of several years, or in a building which has a [774] profit over a period of several years? A. It could be.

Q. And expenditures of that kind should not be deducted in the year of expense, is that correct?

A. That is correct.

Q. But rather a proportionate amount should be deducted year to year during the life of the item? A. If it is a depreciable asset, yes.

Q. In your investigation and audits as revenue agents, do you frequently find that taxpayers take as a current expense items which you, as revenue

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(Testimony of Glenard Gould.)

agents, feel should be capitalized as capital expenses?

Mr. Campbell: Objected to as immaterial. We are concerned with one man's income and this man's experience with other taxpayers has no bearing here.

The Court: Objection overruled. Answer the question.

A. Yes.

Q. And then would you state item two of that adjustment?

A. Item 2 says, "Fines and legal expenses, $1,750."

Q. That represented an expenditure by this partnership business by the way of payment of fines and legal expenses which you feel under the law were not deductible?

A. It is not a question what I felt, it is a question of law.

Q. Your understanding of the law was that that was not deductible? [775] A. That is right.

Q. Would you explain the next item, Item 3, entitled, "Bonus to Joseph Billington, 21 Club."

A. Well, it appears that the item says, "Bonus paid to Joseph Billington computed at 5 per cent of net wins of $72,763.34, is allowed as deduction instead of distribution to a partner. Joseph Billington was an employee and not a partner."

Q. So that we may get that clear, Mr. Gould, on the return that had been filed, Mr. Billington had been shown as a partner with a share of $3,638.17? A. Yes.

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(Testimony of Glenard Gould.)

Q. And you determined that instead of treating that as a partnership share it should be treated as a salary expense?

A. Yes, either salary or commission.

Q. Commission would be by way of additional salary, would it not? A. That is right.

Q. Now, Mr. Gould, insofar as the portion of this partnership income which is taxable to Elmer Remmer is concerned, does it make any difference whatsoever whether that amount of $3,638.17 is treated as a salary deduction to Joseph Billington rather than a partnership share of Joseph Billington?

A. You mean would it change the amount that would be reportable by Mr. Remmer?

Q. Yes. [776] A. No.

Q. I call your attention to prosecution's Exhibit 55, which is a partnership return of income of Joseph Billington DBA 21 Club and San Diego Social Club for the year 1945, and I call your attention to Schedule I on the last page, which shows as a partnership share of Joseph Billington the sum of $3,638.17, is that the item to which the adjustment in your report relates?

Mr. Campbell: I am going to make the objection, it seems to me we are going far afield from the direct examination of this particular witness, who was produced simply to produce a transcript which had been taken from the 21 Club books. I am going to make the objection, in the interest of time, that this is not within the scope of direct examination.

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(Testimony of Glenard Gould.)

The Court: May I have the question?

(Question read.)

Mr. Campbell: I object it is not within the scope of direct examination, which simply resulted in the production of transcript made of certain figures appearing in certain books which he was shown, and in the interest of time I make the objection that this is not within the scope of direct examination.

The Court: Objection overruled.

A. It would appear to be the same item.

Q. Did I understand you to say, insofar as that item is concerned, it had no effect whatsoever on the amount of income [777] taxable on Mr. Remmer's return? A. Yes.

Q. Now the next item of adjustment in defendant's Exhibit V, report of 1945, is adjustment of depreciation taken on the return, is that correct?

A. Yes, sir.

Q. Would you explain that adjustment and give us the amount of it? Do you have the page to which I refer? A. I presume it would be page 7.

Q. Well, I was referring——

A. (Interrupting): To get the details, you would have to refer to page 7, which is self-explantory.

Q. Well, I want you to explain it for us, using whatever material you need. Would you explain what that adjustment was?

A. Just simply that the agent determined that

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(Testimony of Glenard Gould.)

the life years was too excessive and gave the items a longer life than had been claimed for the return.

Q. Perhaps I misunderstood you. You mean that the agent felt that the life of the asset was longer than the taxpayer felt it was? A. Yes.

Q. And if the life was longer than the amount of depreciation deducted each year was less, is that correct? A. That is correct.

Q. So this adjustment simply represents a revision by the revenue [778] agents of the estimated useful life of the assets covered by the depreciation schedule? A. Yes, sir.

Q. And Mr. Gould, isn't it customary in your analysis of returns and the auditing of returns, for you to find on many occasions that adjustments of this kind are made as a result of the audit?

A. Yes.

Q. There is nothing unusual about this type of adjustment, is there? A. No, sir.

Q. And that represents the total adjustments that were made in that report, does it not, Mr. Gould? A. Yes.

Q. Now would you refer to defendant's Exhibit W, which is dated September 8, 1948, and represents the reported audit by Mr. Farley and yourself for the year 1946 of the 21 Club and the San Diego Social Club. Would you refer to Schedule No. 1, showing adjustments to net income and tell us the total amount of the net adjustment which was made? A. That adjustment was $3,166.72.

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(Testimony of Glenard Gould.)

Q. And that represented a reduction of the loss shown on the return, is that correct?

A. Yes, sir.

Q. The return showed loss of $9,872.91? [779]

A. Correct.

Q. And by this adjustment you reported $6,-706.19? A. Yes, sir.

Q. Would you explain the items that went into that adjustment, Mr. Gould?

A. (a) Depreciation of $361.98; (b) accounts payable $2,804.74.

Q. Would you explain the depreciation adjustment that was made?

A. Well, the depreciation adjustment was a depreciation of a prior year.

Q. Your explanation would be the same?

A. That is right; and account payable item, (b) closed over the year 1946 was determined that no liability existed for $2,804.74 for the accounts payable which were on the books of account as 12-31-46 the acounts payable were written off and amounts credited to investment account. Again we do not know whether expenses for the prior year were overstated. The amount $2,804.74, which was credited to investment account is included as income for the year 1946.

Q. In other words, you and Mr. Farley found in the investment accounts this accounts payable, $2,-804.74 and you were unable to determine the exact facts in respect to it, is that correct?

A. I would say, yes.

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(Testimony of Glenard Gould.)

Q. And in your experience as a revenue agent, Mr. Gould, would you say that it frequently occurs that when you find items for which you cannot find a complete explanation, if there is some [780] indication that that might have been income, you write it up in your report as income? A. We do.

Q. And there is nothing unusual about that, is there? A. No, sir.

Q. Mr. Gould, are you able to state, either from your personal recollection or from any papers which are here, whether, in the expenses of the 21 Club and San Diego Social Club, there was included any deduction on account of rent paid?

Mr. Campbell: That is a compound question, including both the San Diego and 21 Club.

Mr. Avakian: It is the same real property, your Honor.

The Court: You may answer the question.

A. I could not say.

Mr. Avakian: No further questions.

Redirect Examination

By Mr. Campbell:

Q. Mr. Gould, Mr. Avakian has asked you certain questions as to your recollection of what the books themselves contain, both as to the distribution of the investment account and what the books show as to rent. How long ago was it that you examined those records? A. Close to five years.

Q. If you had the records before you, would you be able to turn to those accounts?

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(Testimony of Glenard Gould.)

A. No, sir; not without looking over and determining what the [781] account would be.

Q. You would have to re-examine the books, is that correct? A. That is correct.

Q. As I understood you to say, you examined no books of the San Diego Social Club?

A. There were not any books, as I recall.

Q. There were no books?

A. That is right.

Q. Now, you were shown this partnership return of income for 1945, Exhibit 55. I believe your attention was addressed to defendant's Exhibit V, changes which were made in the distribution of income from your report. Did you observe on plaintiff's Exhibit 55 Mr. Billington is reported to have received the sum of $3,638.17 as his distributive share and your attention was directed to defendant's Exhibit V to the fact that you had made an adjustment by deducting the amount of $3,638.17, not as a partnership distribution, but as a bonus paid to Joseph Billington and therefore an expense, is that correct? A. Yes, sir.

Q. Now, if it appeared, Mr. Gould, that Mr. Billington received no part of that $3,638.17, that in turn would increase the distributive share of the partners Remmer, Pechart and Kessel by that amount, would it not?

Mr. Avakian: Objected to on the ground it assumes a fact contrary to the evidence. There is no evidence in this case [782] that Mr. Billington received no part of that amount.

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(Testimony of Glenard Gould.)

The Court: Objection overruled. You may answer the question. I did not take it that the question assumes that this is in evidence, it merely asked if it appeared.

Mr. Avakian: May we have the question read first?

(Question read.)

Mr. Avakian: That is not the evidence in this record.

The Court: I know, there is no implication it is in evidence.

Mr. Avakian: Then it is a hypothetical question. He says "if it appears."

The Court: It is an explanation of counsel, as I see it, is all. Objection overruled. Answer the question. Let us have the question read. I think the witness is in doubt.

A. No, I know the question.

Mr. Campbell: I will reframe the question.

Q. If, in preparing this report, it had come to your attention that the sum of $3,638.17 was not in fact paid to Joseph Billington, how then would you have treated that in your adjustment?

Mr. Avakian: We wish to object to that on the ground this is a hypothetical question, which is speculative and has no basis in the evidence. If the prosecution can show that the assumption which the witness is being asked to make is a fact, [783] then at that time, and at that time only, would it be proper to ask this question.

The Court: We have to have items mentioned

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(Testimony of Glenard Gould.)

here and this question, it would seem to me, was maybe the effect of the item or the absence of the item, that is my understanding. I do not consider that it is intended, and if it is intended I believe the jury should be informed now, that there is no evidence in the record to that effect.

Mr. Campbell: No, your Honor, I think the record should speak for itself. I think the record is clear in that connection.

The Court: Let us go on with this. I am going to overrule the objection.

Mr. Avakian: May I call your attention to the record——

The Court: Let us not do it now.

Mr. Avakian: May I continue the statement of my objection?

The Court: Yes, you may.

Mr. Avakian: My point is this, your Honor. We are already engaged in the third week of this trial and it is very apparent it is going to be very lengthy——

The Court (Interceding): That has nothing to do with it. If we are here ten years it would make no difference. [784]

Mr. Avakian: May I complete my statement?

The Court: Yes, but do not make a speech.

Mr. Avakian: I do not intend to make a speech. I want to state the record should not be encumbered, particularly in a long trial, with immaterial matter.

The Court: That is a matter for the Court to

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(Testimony of Glenard Gould.)

determine. The objection is overruled. The witness may answer the question.

A. Inasmuch as this venture was on a cash basis, the item would not be allowed under those circumstances.

(Jury and alternate jurors admonished and 15-minute recess taken at 2:20 p.m.)

2:35 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. GOULD

resumes the witness stand.

Mr. Campbell: If the Court please, I wish permission to reopen on direct for one or two questions.

The Court: Very well.

Direct Examination

By Mr. Campbell:

Q. Mr. Gould, I show you plaintiff's Exhibit 107 for identification. Do you recognize that letterhead as the official letterhead of the United States Treasury Department? [785] A. I do.

Q. I call your attention to the signature of the gentleman attached thereto. Do you know what position he occupies with the Bureau of Internal Revenue? A. I do.

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(Testimony of Glenard Gould.)

Q. What is his position?

A. Deputy Commissioner.

Mr. Campbell: This will be offered in evidence as government's Exhibit 107.

Mr. Avakian: Your Honor, we wish to make an objection to the offer of this document in evidence upon several grounds and after I have stated my position with respect thereto, I would like to hand it to your Honor so your Honor can evaluate the argument accordingly. First of all, we object on the ground that this document is entirely hearsay and extra-judicial statement submitted by a man in Washington, not under oath, and not present here in the court room. Secondly, the introduction of this document in evidence would deprive us of the opportunity of cross-examination of the man who wrote it to determine what steps he took and the search he made, what records are in existence and how diligently he attempted to find the document that is mentioned in this letter. Your Honor will observe, from reading it, that this letter is being offered for the purpose of proving the truth of the statement made in the letter. It is a fundamental proposition. The facts, if they [786] are going to be introduced in evidence, must be introduced judically under oath by the man whose knowledge of them should be subject to cross-examination by the opposition. I know of no exception to the hearsay rule which would authorize the receipt in evidence of this document.

Mr. Campbell: May I suggest to the Court that

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(Testimony of Glenard Gould.)

as the Court examines it, it recalls the manner and circumstances under which the defendant offered in evidence Exhibit M, which the Court received over the government's objection at that time.

Mr. Avakian: May I state to your Honor, in response to that, that the letters to which the prosecution refers were letters written to us by the prosecution, that is, by an agent of the representative of the Treasury Department. We were not offering them as our self-serving statements, but offering them as statements made by them to us and that comes within the well recognized exception of the hearsay rule. This is offered on the part of the prosecution as self-serving statement by one of its representatives, and not under oath, and not subject to cross-examination.

Mr. Campbell: Also Exhibit K.

The Court: Do you recall on whose examination Exhibits M and K were offered?

Mr. Campbell: Yes, Mr. Weisz.

Mr. Gillen: Your Honor will readily see the distinction [787] there, I am sure.

Mr. Avakian: May I make a further observation after your Honor has examined those documents?

The Court: Yes, you may.

Mr. Campbell: I ask in examining the proffered government exhibit the Court also examine the attachment to that letter.

Mr. Avakian: I believe Exhibit K also is similar, your Honor.

The Court: I will sustain the objection.

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(Testimony of Glenard Gould.)

Mr. Campbell: I wish to disengage from this exhibit that portion which has heretofore been certified, the attachment, and ask it be marked 107-A for identification. I will offer 107-A in evidence as a duly and properly certified public document.

Mr. Avakian: Your Honor, we are willing to stipulate that these two documents which have just been offered as Exhibit 107-A, may be received in evidence.

The Court: You consent that 107-A be admitted in evidence.

Mr. Avakian: Yes, that is right.

The Court: It will be admitted.

Mr. Campbell: That is all.

Mr. Avakian: Your Honor, at this time I would like to read to the jury these two letters which have just been received in evidence as prosecution's Exhibit 107-A. This document [788] consists of the certification by the Secretary of the Treasury that the two documents attached are correct photostatic copies. There are two letters and I will read them in chronological order. The first is a letter on the letterhead of John R. Golden, Mills Building, San Francisco, October 11, 1951, which bears the stamp of the Bureau of Internal Revenue, Naval Room, 1951 October 13 a.m. 11:40, and the further stamp, "Received Photostat Unit October 13, 1951, Records Division." The body of the letter, which is entirely in typewriting except for the signature, is as follows: (Reads letter.)

The second letter bears date October 22, 1951. It

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does not contain any letterhead. It has typewritten designation "IT:REC:P" and underneath that the letters, "ODJ." All that in typewriting, as well as the body of the letter, which is as follows: (Reads letter.)

No further questions.

(Witness excused.)

OGDEN MONAHAN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Ogden Monahan.

Q. Where do you live?

A. 807 Dolores, San Francisco.

Q. What is your business? [789]

A. Presently employed Pacific Turf Club, Golden Gate Fields.

Q. Mr. Monahan, are you acquainted with the defendant in this case, Elmer F. Remmer?

A. I am acquainted with Mr. Remmer by sight only.

Q. In the year 1937 did you have occasion to bring an action against Mr. Remmer in the Superior Court, State of California, in and for the County and City of San Francisco?

A. It is my recollection that the incident that brought about the action took place in 1938.

Mr. Gillen: Just a moment. I wish to offer

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(Testimony of Ogden Monahan.)

an objection; the answer is not responsive, so far as it has gone, to the question.

The Court: It may go out. Let us have the question read and please just make your answer in accord with the question.

(Question read.)

The Court: That can be answered yes or no.

A. Well, your Honor, I am confused as to what is termed an action.

The Court: Well, maybe counsel can reframe the question.

Mr. Gillen: I will stipulate counsel means lawsuit.

Q. That is right—did you bring a lawsuit against Mr. Remmer? A. Yes, I——

The Court: You have answered.

Q. Was that lawsuit filed in the Superior Court of the State [790] of California, in and for the City and County of San Francisco?

A. I believe it was.

Q. Did you obtain a judgment in that action?

A. Yes, sir.

Mr. Thompson: If the Court please, we offer in evidence plaintiff's Exhibit 109 for identification.

Mr. Gillen: To which we have the objection it is incompetent, irrelevant and immaterial.

The Court: You have seen it?

Mr. Gillen: Yes, your Honor, back in 1937. That was beyond the period of time involved in the indictment.

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(Testimony of Ogden Monahan.)

Mr. Thompson: If your Honor will also examine plaintiff's 108 for identification, I think the materiality will become apparent.

The Court: Have you seen both these exhibits?

Mr. Gillen: Yes, your Honor. Was the other offered also?

The Court: I have not heard of the offer here. Do you offer the other?

Mr. Thompson: I offer both, your Honor.

Mr. Gillen: To which offer we must object. It is an incident arising back in 1937, long prior to the starting point in this action, which is the year 1944.

The Court: I do not think the objection would apply to 108. [791]

Mr. Thompson: Well, if your Honor please, the judgment itself must be proved in order to show the amount of the obligation.

The Court: It may be admitted in evidence. They could very well be admitted as one exhibit.

Mr. Thompson: Well, I handed that to the clerk together, your Honor, and they were inadvertently marked as two exhibits. I would like to read plaintiff's Exhibit 109. (Reads Exhibit 109.) I would like also to read plaintiff's Exhibit 108. (Reads Exhibit 108.)

Q. Mr. Monahan, you are the Ogden F. Monahan named as plaintiff in that action?

A. I am.

Q. And the defendant here, Elmer F. Remmer, is the defendant in the action just referred to?

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(Testimony of Ogden Monahan.)

A. He is.

Q. Did you, prior to September, 1945, receive any payment on account of the judgment for $1800?

A. None whatever.

Q. And full payment was finally made in September of 1945, as shown by the satisfaction of judgment?

A. Full payment was made to me by my uncle at a little later date. He had full authority to act for me.

Q. The money you received, in any event, was received after September, 1945? [792]

A. Yes.

Q. And during the year 1945?

A. That is correct.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. You say your uncle acted for you?

A. My uncle acted in all particulars in this.

Q. Now, I notice that the judgment here says that on the blank day of October, 1938—it doesn't show what date in October of 1938—that you were present in court with your attorney, Joseph E. Durham, is that correct? A. I was.

Q. And I notice that it says that just an attorney was present in court for the defendant, is that correct? A. That is my recollection.

Q. Mr. Remmer wasn't in court, isn't that true?

A. That is correct.

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(Testimony of Ogden Monahan.)

Q. What is your job at—where did you say you worked?

A. Presently employed as a mutuel seller.

Q. Where? A. Golden Gate Fields.

Q. That is a race track?

A. The race track.

Q. In Albany, California?

A. That is correct. [793]

Mr. Gillen: I think that is all.

(Witness excused.)

SYLVAN LANDO

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Sylvan Lando.

Q. Where do you reside?

A. 611 Marina Boulevard, San Francisco.

Q. What is your business or occupation?

A. I have no business.

Q. What was your former business or occupation?

A. Well, I raced horses practically all my life.

Q. Are you acquainted with the defendant, Elmer Remmer? A. I am.

Q. How long have you known him?

A. To the best of my recollection about thirty years.

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(Testimony of Sylvan Lando.)

Q. Have you ever been in business with Mr. Remmer? A. I have.

Q. And what was the first date that you became interested in a business with Mr. Remmer?

A. I just don't recollect the date, but it was in the month of December, I think, in 1941.

Q. What was the name of that business?

A. The B & R Smoke Shoppe. [794]

Q. And where was the B & R Smoke Shoppe located?

A. 50 Mason Street, San Francisco.

Q. And who else, if any one, was associated in that business?

A. Willie Kyne and Mr. Remmer.

Q. What was your relationship to that business, that is to say, was it a corporation, a partnership or what? A. It was a partnership.

Q. And who were the partners?

A. Willie Kyne and Mr. Remmer.

Q. And yourself? A. And myself.

Q. And were any formal papers of partnership drawn up? A. Not that I know of, no.

Q. What was it, simply an oral understanding?

A. It was an oral understanding.

Q. Now, what were the respective shares of the partners in that business?

A. I had 25 per cent, Willie Kyne 25 per cent, and Mr. Remmer 50 per cent.

Q. Now, at the time you entered into that business at 50 Mason Street, known as the B & R

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(Testimony of Sylvan Lando.)

Smoke Shoppe, was that a going business operated by someone else? A. Yes, it was.

Q. By whom had it been operated?

A. I just don't know the person's name. [795]

Q. Was his name Silverman?

A. Not to my recollection.

Q. Now who, if any one, put up the money to buy that business? A. Mr. Remmer.

Q. Did you put any money up for that purpose?

A. I did not.

Q. To your knowledge did Mr. Willie Kyne put up any money for that purpose?

A. No, he did not.

Q. Do you know the purchase price of that business?

A. I think it was either seven thousand—no, the purchase price, I think it was two thousand dollars.

Q. And to the best of your recollection that was 1941, is that correct? A. That is right.

Q. Now, after 1941, how long did that business continue to operate, or when did you leave the business?

A. I left the business in April, 1947.

Q. And was the business still operating at that time? A. I expect it was.

Q. Now, let me ask you this, what was the business of the B & R Smoke Shoppe?

A. Booking on horses.

Q. Will you describe the premises which were used for that purpose at 50 Mason Street? [796]

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(Testimony of Sylvan Lando.)

A. Well, it was a large room with a counter in it. There was an open pool room.

Q. By open pool room, you are using a term applied to a bookmaking establishment, are you not?

A. That is right.

Q. Where any one can go in and make a bet?

A. That's right.

Q. Was there not a front room which you had to enter in order to reach what you call the pool room?

A. It was just a small enclosure. There was a cigar store there.

Q. Were there any cigars in the cigar stand?

A. I don't think so.

Q. There were, however, dummy boxes?

A. That is right.

Mr. Gillen: May we have the witness testify and not Mr. Campbell?

The Court: Try to avoid leading questions.

Mr. Campbell: Very well.

Q. You say there was a cigar stand there. Was there any merchandise in the cigar stand for sale?

Mr. Gillen: Objected to, calling for opinion and conclusion.

The Court: Objection overruled.

A. I didn't get the question. Repeat it, [797] please.

Q. Was there any merchandise for sale at the cigar stand portion? A. I do not think so.

Mr. Gillen: I think I should move the answer

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(Testimony of Sylvan Lando.)

be stricken because it is an uncertain answer. He said, "I don't think so."

The Court: It may stand.

Mr. Gillen: He should either say he does know or he doesn't know.

Q. You refer to it as a pool room. Was there any pool tables in the establishment?

A. No, there wasn't.

Q. Was there business conducted on those premises other than what you have referred to as the booking of horses? A. No.

Q. Now, in connection with the operation of the business of booking horses, was it necessary that there be a supply of cash or a bank roll on hand? A. That's right.

Q. And who supplied that, Mr. Lando?

A. Mr. Remmer.

Q. And what was the amount of the bank roll?

Mr. Avakian: May we have the time of that particular question fixed?

Q. Very well. When was a bank roll initially supplied? [798] A. When we opened up.

Q. And what was the amount of the bank roll?

A. It was either seven thousand or seventy-five hundred.

Q. And who supplied that?

A. Mr. Remmer.

Q. Did the amount of the bank roll vary or change during the period of time you were there?

A. I don't know. That wasn't my department.

Q. Who handled that part of the business?

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(Testimony of Sylvan Lando.)

A. Willie Kyne.

Q. And who was it, in connection with the partnership, who handled the money, that is, both the receipts at the end of the day and such payments or expenses as had to be made?

A. Willie Kyne.

Q. Was Mr. Remmer himself active in the operation of the business? A. He was.

Q. Was he active in the operation of the business in the years 1944 to 1946, inclusive?

A. He was.

Q. And how often was he there during business hours?

A. Oh, he was in and out of there.

Q. Now, what were your duties in connection with that business?

A. I was the price maker.

Q. Will you state what you mean by price maker? [799]

A. There was three changes of races a day on three different tracks, about four or five hours' work to make the price, and then we had an open room and we would put the prices up in the open room.

Q. By prices do you refer to the odds which would be bet by the business to the bettor in a bet on horses on which he wagered won the race?

A. That is right.

Q. And I take it it was your job to establish in advance of the races the prices which would be offered by your establishment, is that right?

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(Testimony of Sylvan Lando.)

A. That is right?

Q. And during the course of the day and before running of a particular race, would the odds change on a particular horse?

A. Well, that all depends. Yes, sir, it would.

Q. What were the circumstances that affected that?

A. Well, the amount of money that would be wagered on the horse.

Q. Would that be the amount of money wagered only in your place, or would it include taking into consideration wagers made in other booking establishments? A. No, just in our house.

Q. Now, in addition to the odds which you made and posted, will you state whether or not, when you were operating as an open pool room, the business also paid pari mutuel or track odds?

A. That's right. [800]

Q. Now, throughout the period of time which you were there, did the business continue to be operated as an open pool room; that is to say, where a person could walk in off the street and make a bet? A. It did up until the end of 1944.

Q. And was there a change in the manner of conducting the business toward the end of 1944?

A. There was.

Q. And was there some event or events that brought about or caused some change in that opera-operation?

Mr. Gillen: I think——

A. Yes, there was.

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(Testimony of Sylvan Lando.)

Mr. Gillen: Just a moment—I think that is calling for conclusion and opinion.

The Court: It is answered yes. We will see what the next question is.

Q. You understand if I hold up my hand you are not to answer, is that correct? A. Yes.

Q. What was the nature of the event or events that caused the change in the method of operation of your business?

A. We just followed suit. Every other book room closed and we closed.

Q. How long were you closed at that time?

A. To the best of my recollection not very long, maybe a month [801] or two.

Q. Who determined, that is in your partnership, if any one did, that you close at that time?

A. Mr. Remmer.

Q. In regard to such matters of operation in the conduct of the business, who determined the policy? A. Mr. Remmer.

Q. Now, when you reopened, after this short closing toward the end of 1944, what was the method of the conduct of the business?

A. We operated over the telephone.

Q. Did your so-called open pool room, that is, where the bettor could walk in off the street and into your establishment, type of operation then cease? A. That's right.

Q. Did your telephone type of operation then continue up until the time you left the business?

A. That's right.

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(Testimony of Sylvan Lando.)

Q. Now, in connection with the operation of the business, Mr. Lando, did you receive what are known as lay-off bets from other bookmakers?

A. We did.

Q. Was that the situation both during the open pool room operation and during the telephone type of operation?

A. I don't quite understand. Will you repeat?

Q. Yes, I will reframe the question. Did you receive lay-off [802] bets from other bookmaking establishments during all of the time that you were connected with the business?

A. At times, yes.

Q. And were those lay-off bets received from both bookmakers in San Francisco and bookmakers in other cities? A. They was.

Q. Will you state, Mr. Lando, what is known as a lay-off bet?

A. Well, sometimes a bookmaker wants to bet on the race track if he takes an order from the owner of the horse in some city, build the odds up and protect, that is one way, and another way if a man has too much money on a horse and he doesn't want to stand to lose a big amount of money.

Q. Let me see if I get that right. You have given two instances, one is where it is desired to place money with a number of bookmakers in different cities, so as to not disturb the odds, is that correct? A. That is right.

Q. And the second is where the bookmakers feels he has too much risk on one horse, so he sort

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(Testimony of Sylvan Lando.)

of shares the risk around with other bookmakers?

A. That's right.

Q. Now, in the conduct of your business did you also lay off bets yourselves? A. We did.

Q. And were those bets laid off with other bookmakers in San Francisco? [803]

A. They was.

Q. And were they laid off with other bookmakers throughout the country? A. They was.

Q. Now, who handled that part of the business?

A. Willie Kyne.

Q. Both the acceptance and the laying off of the bets? A. That's right.

Q. Did you have any duties other than the fixing of odds to be offered? A. I did not.

Q. Now, in the first phase of your business, that is to say while it was still operating as an open pool room, how many employees did you use?

A. I don't know how many we used.

Q. Do you recall how many paid writers were utilized?

A. No, but the social security should take care of that.

Q. Who handled the hiring of help?

A. Willie Kyne.

Q. Did you, yourself, participate in the writing of bets? A. When we started in I did, yes.

Q. How long did that continue?

A. Just for about a week.

Q. In other words, until you got organized and rolling? [804] A. That's right.

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(Testimony of Sylvan Lando.)

Mr. Gillen: Just a moment—I move Mr. Campbell's voluntary testimony, not under oath, "until you got organized and rolling," be stricken from the record.

The Court: That was precipitated by the other answer. Read the question.

(Question read.)

The Court: It was induced by the witness' answer.

Q. Are you acquainted with a man by the name of Pritchett? A. I am.

Q. Was he active in the business of the B & R Smoke Shoppe? A. He was.

Q. What was his first name? A. Pat.

Q. What duties did he perform?

A. Well, he wrote tickets.

Q. Now, there was a period of time, was there not, Mr. Lando, when Mr. Willie Kyne was in the service? A. That's right.

Q. Do you recall what period that was?

A. 1945.

Q. Do you recall what months?

A. No, I don't.

Q. Do you recall when he returned from the service?

A. Yes, he returned in June, 1946. [805]

Q. Now, during the period of time that Mr. Kyne was in the service, who handled the financial end of the business? A. Pat Pritchett.

Q. After Mr. Kyne returned from the service in

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(Testimony of Sylvan Lando.)

June of 1946, who then handled the financial end of the business?

A. He took over when he came back, Mr. Kyne.

Q. Will you state in what manner Mr. Pritchett was compensated for his services?

Mr. Gillen: I am going to object to that as calling for opinion and conclusion of this man, who has already stated his only duties there were the fixing of prices on odds.

The Court: Objection overruled. He may answer the question.

Q. Do you understand my question?

A. No, I do not.

(Question read.)

A. I don't know. He might have been paid at the end of the month.

Q. Well, how was he paid; was he paid a percentage or salary or how?

A. He was paid a salary.

Q. Do you recall what that salary was?

A. No, I do not know.

Q. Was Mr. Pritchett ever given a percentage in the business? A. Not that I know of.

Q. Now, during the war, Mr. Lando, there was a period, was there [806] not, when all of the race tracks were closed down? A. That's right.

Q. Do you recall when that was? A. 1945.

Q. And do you recall what part of 1945?

A. From the first of January until up until May 15th.

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(Testimony of Sylvan Lando.)

Q. And did the B & R Smoke Shoppe conduct business during that period?

A. They did not.

Q. If you recall, was Mr. Kyne in the service during that period? A. I believe he was.

Q. Now, in connection with the operation of the business, how often, if at all, would the partners have an accounting as to the profits or losses?

A. At the end of each year.

Q. By the end of each year, do you refer to the calendar year? A. That's right.

Q. Now, in addition to your partnership share, did you also draw salary or compensation of any kind?

A. I didn't draw no salary, now.

Q. Do you know if Mr. Remmer drew any salary? A. I do not know.

Q. Do you know if Mr. Kyne drew any salary?

A. Yes, he did. [807]

Q. Do you recall the amount of Mr. Kyne's salary, if you know? A. It was ten dollars a day.

Q. Did that continue during the period of time that Mr. Kyne was in the service?

A. To my knowledge, yes.

Q. To the best of your knowledge?

A. That's right; to the best of my knowledge.

Q. Now, Mr. Lando, in the event you, or the other partners, required money to be drawn from the business during the course of the year, was some method worked out for that purpose?

A. That's right.

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(Testimony of Sylvan Lando.)

Q. And what was the method used?

A. Well, if I wanted to draw any money, I would just put a marker in.

Q. What do you mean by a marker?

A. The same as an IOU, along those lines.

Q. And to whom would you give that marker?

A. Willie Kyne.

Q. Now, what would occur—assuming, for example, that you drew $200 and gave a marker, what would next occur in relation to that? What would you do next? A. Just get the money.

Q. And from whom would you get the money?

A. I didn't understand.

Q. Who would give you the money? [808]

A. Willie Kyne.

Q. He handled the money?

A. He handled the cash, yes.

Q. And when he was away, Mr. Pritchett handled it? A. That's right.

Q. Prior to the end of the year, would you pay the amount of that marker back to the money keeper?

A. Well, I have at times and other times would carry it along, might carry it over.

Q. So that, I take it, there would be——

Mr. Gillen: Pardon me—I wonder if counsel would not take it and let us get the evidence from the witness.

The Court: All right.

Mr. Campbell: I just frame my questions in my own way.

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(Testimony of Sylvan Lando.)

The Court: Go ahead and frame your question.

Q. At the end of the year, when you had your accounting period, would all of the money in the bank roll, plus accumulated profits, be represented by cash or by cash and markers?

A. By cash and markers.

Q. And when the accounting of profits were had, would it be had upon that basis of a division based upon the amount that might be owed by any of the partners to the bank roll? Do you understand me?

A. No, I don't. I would like to have the question repeated.

Mr. Campbell: I will withdraw the question. I will ask [809] you another.

Q. Mr. Lando, did you have anything to do with the preparation and filing of partnership tax returns for the B & R Smoke Shoppe?

A. I did.

Q. And what did you have to do with the preparation of the returns?

A. Maybe I don't understand you right.

Q. Did you have anything to do with the preparing the partnership returns of income, the income tax return?

A. No, I didn't; I misunderstood the question. I was referring to my own.

Q. No, I am referring to the partnership return.

A. I understand now; no, I didn't.

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(Testimony of Sylvan Lando.)

Q. Who, if you know, did have that duty for the partnership? A. I don't know.

Q. Do you recall whether or not you ever saw the returns?

A. No, I don't believe I ever did.

Q. I am going to show you government's exhibits 77, 78, and 79, which are the partnership returns of income of the B & R Smoke Shoppe for the calendar years 1943, 1944, and 1946, and ask you if you have ever seen those documents before? A. No, I never saw them before.

Q. I call your attention, however, to the fact that each of these documents is signed William E. Kyne, and ask you if you are familiar with his signature? [810] A. I am.

Q. And is that his signature?

A. It appears to be, yes.

Q. Now, I call your attention, Mr. Lando, to the fact that the partnership returns which I show you does not include a partnership return for the calendar year 1945, which return would have been due for filing not later than March 15th of 1946. Now, who was it that had financial charge of the business in March of 1946?

A. You say there was none filed, did I understand you to say?

Q. I am asking you who had financial charge of the business in March of 1946?

A. Why Pat Pritchett.

Q. Do you yourself know whether or not any 1945 partnership return for the B & R Smoke

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(Testimony of Sylvan Lando.)

Shoppe was prepared? A. I know I filed.

Q. You are referring to your personal return?

A. That's right.

Q. But do you know whether or not any partnership return was prepared? A. No, I do not.

Q. Mr. Lando, are you acquainted with a business known as the 186 Club? A. I was.

Q. And where was that located? [811]

A. 186 Eddy Street, San Francisco.

Q. And what was the nature of the business conducted there?

A. The 186 Club was a card room in back and in front was the wholesale liquor store and cigar counter.

Q. Was that the Day and Night?

A. Known as the Day and Night, yes.

Q. Now, did you yourself have anything to do with the operation of the 186 Club?

A. I did not.

Q. Are you familiar with the fact that the 186 Club was a corporation? A. Yes, I was.

Q. When did you first learn that?

A. About a year after it opened.

Q. Now, when did it open?

A. I think it was opened in '43, if I am not mistaken.

Q. Were you an officer of the corporation?

A. I was.

Q. When did you first become an officer of the corporation?

A. When it started; when it opened.

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(Testimony of Sylvan Lando.)

Q. When did you first learn that you were an officer of the corporation?

A. About a year after it was opened.

Q. Do I understand you had been an officer for a year without knowing it? [812]

Mr. Gillen: I object to the form. It is cross-examination; it is argumentative and it is the characterization and assumption of the examiner.

The Court: Perhaps you could change the form of the question.

Q. How did you learn that you were an officer of the corporation? A. From Willie Kyne.

Q. Now, you say that the 186 Club started in 1943. When was it that Willie Kyne told you that you were an officer?

A. Well, after it was changed from a partnership to a corporation.

Q. When was that, do you recall?

A. It was opened in '43. It was in '44.

Q. That it became a corporation?

A. To my knowledge, yes.

Q. Had you been a partner?

A. I had been.

Q. When? A. When it started.

Q. What was your partnership interest?

A. In the 186 Club?

Q. Yes. A. I had one-sixth interest.

Q. Did you contribute any money or capital toward the 186 Club? [813] A. I did not.

Q. At any time? A. No, I didn't.

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(Testimony of Sylvan Lando.)

Q. When did you first learn that you were a partner in the 186 Club?

A. As I said, after it was changed from a partnership to the corporation—I am all confused now.

Mr. Gillen: I am going to offer the objection it has been asked and answered. He said he became a partner when it opened and then changed.

The Court: The objection will be overruled. I don't think the witness quite understood the question.

Q. I will repeat the question. When did you first learn that you were a partner in the 186 Club?

A. When it opened.

Q. Who were the other partners?

A. Mr. Remmer and Mr. Kyne, Bert Pistanio, Attilio Cassilini, Carl Nellus, Jess Kopstick.

Q. What interest did each of the partners have?

A. To my knowledge—one-sixth apiece.

Q. How did you obtain that knowledge?

A. Mr. Remmer.

Q. Did you ever receive any salary from the 186 Club?

Mr. Gillen: Just a moment—objected to as incompetent, irrelevant and immaterial, whether he received a salary as a [814] partner or as an officer of the corporation.

The Court: Objection overruled. You may answer the question.

Mr. Avakian: Your Honor, may we add to the grounds of that objection, I think your Honor is aware of the fact the 186 Club was a corporation

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(Testimony of Sylvan Lando.)

and the question as to whether an officer of a corporation, such as the witness, received a salary, I submit could have no bearing on this case, which is a matter of Mr. Remmer's personal income.

The Court: I understand he was a partner.

Mr. Avakian: But the question was, did you receive a salary as an officer.

Mr. Campbell: No, I said, did you receive a salary from the 186 Club?

(Question read.)

Mr. Avakian: May I make the further objection, the question is uncertain because——

The Court: You may answer the question.

Q. Did you receive any salary from the 186 Club? A. I did not.

Q. Did you receive any share of profits from the 186 Club? A. No, I did not.

Q. At the time, Mr. Lando, that it was changed from a partnership to a corporation, did you receive any shares of stock? A. No.

Mr. Gillen: I think, may it please the court, that I [815] will have to offer an objection and move that the question be stricken upon this grounds, counsel, I am sure, knows when he asks the question in the State of California, when it is a so-called membership corporation, there is no stock.

The Court: Well, the motion will be denied. The answer will stand.

Mr. Gillen: I mean the law does not provide for any stock.

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(Testimony of Sylvan Lando.)

The Court: Let it stand and you can clear it up on cross-examination.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [816]

Friday, December 14, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Campbell: May it please the Court, in view of the argument here before the jury yesterday, I would like to read briefly from the record of the testimony of Joseph Billington given on December 5, 1951, in this court room.

Mr. Gillen: I don't have in mind what argument he is talking about.

The Court: I can't see any purpose in reading it now.

Mr. Campbell: As I recall, there is some misunderstanding as to just what the testimony was.

The Court: You might just call counsel's attention to it, but it would be better not to read it again.

Mr. Campbell: Very well, I will.

(Conference between counsel.)

Mr. Gillen: We don't mind whether he reads that or not if he reads the entire testimony of Mr. Billington at that point.

The Court: I do not think it should be read.

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SYLVAN LANDO

having been previously sworn, testified as follows on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Lando, at the time of the recess yesterday afternoon I had been questioning you concerning the 186 Club. I believe [817] you testified that you were first a partner in that Club and then an officer of the Club, is that correct?

A. Correct.

Q. And did you take any active part in the operation of the Club? A. I did not.

Q. How often did you visit the Club?

A. I used to go down there early in the morning maybe a couple of times a week on the way down to my place of business. It was only a block.

Q. Did you, on those occasions, inspect the records of the Club? A. I did not.

Q. Who kept the books and records of the 186 Club? A. I do not know.

Q. Who handled the money that was taken in or paid out with respect to the 186 Club?

A. I do not know.

Mr. Campbell: At this time I am going to ask to have marked for identification certain sheets entitled "Poker" as government's Exhibit 110 for identification as the first group, and the others to be marked 110(a), (b), (c), (d), (e), and (f) for identification, respectively.

Q. Mr. Lando, I am going to show you govern-

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(Testimony of Sylvan Lando.)

ment's exhibits 110 to 110(f), inclusive, and ask you if you recognize those sheets?

A. Yes, I do. [818]

Q. And what are those sheets?

A. Well, I imagine they are sheets pertaining——

Mr. Gillen: Well, now, just a moment. If the witness imagines, may it please the Court, it is inconclusive and speculative answer. I move it be stricken.

Mr. Campbell: No objection.

The Court: It will be stricken.

Mr. Campbell: I will reframe the question.

Mr. Gillen: It isn't the question, it's the answer.

Mr. Campbell: I am going to reframe it.

Q. What are those sheets used for?

A. I think they have, I am not sure, reference to players in the club.

Mr. Gillen: I move the answer be stricken for the same reason—"I think—I am not sure."

The Court: Yes, you had better explain that to Mr. Lando.

Mr. Campbell: Mr. Lando, it is necessary that you give a direct answer, if you know. If you don't know, you should say so. You can't state that you think or what you may believe, anything of that kind. Confine your answer to your knowledge. Will you read the question again?

(Question read.)

A. I am in doubt.

Q. You are in doubt? A. Yes, sir. [819]

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(Testimony of Sylvan Lando.)

Q. Mr. Lando, who was the active manager of the 186 Club during the year 1944?

A. To my knowledge, Bert Busterno.

Q. Was he known by some nickname?

A. Bert the Barber.

Q. Who was the active manager during 1945?

A. To my knowledge Bert the Barber.

Q. And in 1946? A Bert the Barber.

Q. He was the manager throughout that period, is that right? A. That's right.

Q. Were you familiar with the type of game, that is to say, the kind of game, that was played at the 186 Club? A. I was not.

Q. Were you acquainted with the method or manner by which the management derived its profit from the operation of the 186 Club?

A. I was not.

Mr. Gillen: Just a moment, may it please the court, there is no foundation laid that this man had anything to do with the operation.

Mr. Campbell: The record shows he was a partner.

Mr. Gillen: The record shows he was a member of the corporation.

The Court: The answer is evidently satisfactory to all concerned. [820]

Mr. Gillen: Yes, your Honor.

Q. Now, in connection with the same premises, with the 186 Club was there conducted another enterprise? A. There was.

Q. And what was the name of that enterprise?

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(Testimony of Sylvan Lando.)

A. The Day-Night Cigar Store.

Q. Now, will you describe briefly the physical set-up of the premises there as to the conduct of the Day-Night Cigar Store and the 186 Club?

A. Well, in front was the Day-Night Cigar Store, cigar stand, magazines and cigars and wholesale liquor store, and in the back room was the 186 Club.

Q. How did you enter the 186 Club?

Mr. Gillen: I don't know as those things are material to a net worth theory.

The Court: That is probably preliminary. The objection will be overruled.

Q. How did you enter the 186 Club?

A. There was a door to the right of the cigar counter as you came in. You went in through there.

Q. You went in through the cigar store?

A. That's right.

Q. Now, I am going to ask you, Mr. Lando, if you were acquainted with one Joe Leonard?

A. I was not. [821]

Q. Were you acquainted with one Bob Burgess?

A. I was not.

Q. Were you acquainted with an individual known as Sacramento Sam? A. I was not.

Q. Were you acquainted with an individual known as Crying Mac? A. I was not.

Q. Referring again to plaintiff's Exhibit 110 for identification, I will show you first Exhibit 110

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(Testimony of Sylvan Lando.)

and ask you if you know whose handwriting that is? A. No, I don't.

Q. I will show you Exhibit 110-A and ask you if you know whose handwriting that is?

A. No, I don't.

Q. I will show you Exhibit 110-C and ask you if you are familiar with the handwriting?

A. No, I am not.

Q. I will show you 110-D for identification and ask you if you are familiar with that handwriting?

A. I am not.

Q. And I will show you 110-F for identification and ask you if you are familiar with that handwriting? A. I am not.

Mr. Gillen: May it please the Court, for the reason that I do not want to offer unnecessary objections, I refrained from [822] objection to the questions concerning the foreign names that were put to the witness on the witness stand of the four people who were named here. At this time, may it please the Court, I ask the Court to strike from the record those names, for this reason—this witness is a government witness who undoubtedly has been interviewed numerous times and statements taken by the government. The prosecutor knows, when he asks the question, that this man did not know these people and I am sure the questions were asked, not for the benefit of this case or to establish any net worth basis, but were asked for the purpose of bringing some ridicule by use of nicknames.

The Court: I can't assume counsel would do

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(Testimony of Sylvan Lando.)

anything of that kind. I anticipated your present argument and have been thinking it over and my thought is if it were to appear a little later, or at some time later in the trial, that it was an improper thing to do, I will then strike those references to those names from the record and give instructions to the jury on the point, but at the present time it will stand.

Mr. Gillen: The reason I didn't object——

The Court (Interceding): I am not ruling because you did not object, but that is my thought and I am not going to impute to counsel any such charge.

Mr. Campbell: And I assure your Honor the questions were asked in good faith. [823]

The Court: If it should appear improper later, then, of course I will strike it.

Mr. Gillen: Yes, your Honor, if they are not connected up.

Mr. Campbell: And I assure the Court they will be connected up.

Mr. Gillen: Well, I think that should remain to be seen. I charge——

The Court: Just a moment, counsel, I will take care of that.

Q. Now, Mr. Lando, did you have any interest in the Day-Night Cigar Store? A. I did.

Q. And when did you acquire that interest?

A. When the place was purchased.

Q. When did you first learn of your interest?

A. From Mr. Remmer.

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(Testimony of Sylvan Lando.)

Q. When? A. I think it was 1943.

Q. Did you invest any money in the Day-Night Cigar Store? A. No, I did not.

Q. What was the amount of your interest in that? A. I had one-third interest.

Q. And what, if anything, did you pay for that one-third interest? [824]

Mr. Gillen: Objected to as asked and answered. He said he invested no money in there.

The Court: Objection overruled.

Q. What, if anything, did you pay for that one-third interest? A. I didn't pay anything.

Q. Did you, during the year 1944, receive any portions of any profits that were made?

A. I did not.

Q. I call your attention to plaintiff's Exhibit 84, the partnership return of income of the Day-Night Cigar Store for the year 1944, and Schedule I, the distribution of income, showing Sylvan Lando, 611 Marina Blvd., San Francisco, one-third, $1092.51, and I will ask you if you received that money?

Mr. Avakian: Just a moment, your Honor. We object to that question on the ground that any taxation of partnership income, as the government's own agent, Mr. Gould, testified on the stand yesterday, the income is taxable to the partners——

Mr. Campbell: I object to a speech——

The Court: What is your objection?

Mr. Avakian: We object on the ground it is incompetent, irrelevant and immaterial to this case, because the taxation of partnership income is based

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(Testimony of Sylvan Lando.)

not on money the partners may or may not withdraw from the partnership, but rather on their particular share of whatever the partnership income may be, the [825] share they are entitled to. Mr. Gould himself testified to that effect on the stand yesterday. He testified profits were immaterial in determining the taxation of partnership income and I believe counsel well knows that to be the law.

The Court: Objection is overruled. You may answer the question.

Q. Do you have the question in mind?

A. I have not. Will you repeat it?

(Question read.)

A. I did not.

Q. Did you receive it any time, Mr. Lando?

A. No, I didn't.

Q. Incidentally, who was the manager of the Day-Night Cigar Store? A. I do not know.

Q. Do you know who kept the records of the Day-Night Cigar Store? A. No, I don't.

Q. Did you, yourself, take any part in the operation of the business? A. I did not.

Q. Were you advised by any one at the end of 1944 as to whether or not the operation of the Day-Night Cigar Store had been profitable or not?

A. Not that I can recall.

Q. I call your attention to plaintiff's Exhibit 85, partnership [826] return of income of the Day-Night Cigar Store for the calendar year 1945, to Schedule I, showing Sylvan Lando, 611 Marina

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(Testimony of Sylvan Lando.)

Blvd., San Francisco, $897.61, and ask you if you received that amount of money?

Mr. Avakian: We make the same objection as to the same question as to the prior year on the same grounds.

The Court: It will be the same ruling.

A. I did not.

Q. Did you ever at any time receive that money set forth here? A. I did not.

Q. I show you plaintiff's Exhibit 86, the partnership return of income for the calendar year 1946 of the Day-Night Cigar Store, and direct your attention to Schedule I, Sylvan Lando, 611 Marina Blvd., San Francisco, 33⅓, $652.96, and ask you if you received that money?

Mr. Avakian: We make the same objection as we made with respect to the same question for the year 1944 and for the same reasons.

The Court: It will be the same ruling.

A. I did not.

Q. I call your attention to Schedule H on this exhibit, under the heading "Partners Capital Accounts," Sylvan Lando, beginning of taxable year $8,492.53, end of taxable year, $8012.15. Are you familiar with those figures? A. I am [827] not.

Q. Do you know whether or not at any time there were records kept showing a capital account of that amount in your name?

A. I do not know.

Q. Mr. Lando, I call your attention to govern-

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(Testimony of Sylvan Lando.)

ment's Exhibit 87-A, the corporation income and declared valuation excess profits tax return of the 186 Club for the fiscal year beginning July 1, 1943, and ending June 30, 1944, and I call your attention to the language respecting annual salaries for officers, Sylvan Lando, treasurer, $4,000, and ask you if you received any such salary?

A. I did not.

Mr. Avakian: Your Honor, we were unable to locate our copy of this exhibit in time to make an objection. May I ask the Court's permission——

The Court: You may make the objection.

Mr. Avakian: Your Honor, we object to the question on this ground, that it is an inquiry into the matter of the net income of a corporation, namely, the 186 Club, rather than an inquiry into the matter of net income of the defendant in this case. The evidence of the prosecution itself shows, and Mr. Campbell has repeatedly stated, that the 186 Club was a corporation. The taxpayer may have been a shareholder in any number of corporations, but his net income is not affected by what the net income of that corporation is and unless the prosecution shows that Mr. Remmer received income from this corporation, [828] either by way of a salary or by way of dividends, is completely immaterial and this inquiry into whether or not the net income of the 186 Club was one figure and paid certain salaries or not to another witness, not the defendant, is completely immaterial in this case and we submit it is introduced simply for the purpose

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(Testimony of Sylvan Lando.)

of trying to confuse the jury and mislead them and we object to any inquiry that is related to net income of a corporation, as distinguished from net income of Mr. Remmer, the defendant in this case.

The Court: Objection overruled and the answer may stand.

Q. Mr. Lando, I am going to show you government's Exhibit 88-A, the corporation income and declared value excess profits tax return of the 186 Club for the fiscal year beginning July 1, 1944, and ending June 30, 1945, and direct your attention to the fact that in this return the annual salaries for the officers were set forth, including Sylvan Lando, treasurer, three thousand dollars. I will ask you if you received any such salary, Mr. Lando?

Mr. Avakian: Same objection, your Honor.

The Court: Same ruling.

A. I did not.

Q. One further question. I may have asked this yesterday but I do not recall, so it may be repetition of the question asked yesterday. Mr. Lando, with regard to the B & R Smoke Shoppe, who kept the records of that business? [829]

A. A Mr. Slater.

Q. And do you know what type of records were kept? A. No, I don't.

Q. Mr. Slater is now deceased, is that correct?

A. That's right.

Q. Mr. Lando, you testified yesterday that at the end of each year the partners in the B & R Smoke Shoppe, that is to say, yourself, Mr. Willie

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(Testimony of Sylvan Lando.)

Kyne and Mr. Remmer, had an annual accounting, is that ocrrect? A. That's right.

Q. Do you recall at this time the status of your own account with the B & R Smoke Shoppe as of December 31, 1946? A. I do not.

Q. Do you recall at this time as to whether or not, at the end of 1946, December 31st, the business owed you money or you owed the business money?

A. I don't recall.

Mr. Campbell: I believe that is all. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Lando, the gentleman you named as the man who kept the books of the B & R Cigar Stand, Mr. Slater, now deceased, he was a public accountant, was he not? A. That's right.

Q. By the way, Mr. Lando, did you ever receive a gift of any [830] Sulka neckties from Mr. Remmer?

Mr. Campbell: Objected to as not within the scope of the direct examination.

The Court: Objection sustained.

Mr. Gillen: May I be heard on that, your Honor.

The Court: I will excuse the jury.

Mr. Gillen: Well, I won't deter the jury at this time. We will take it up at another time. I would like to argue the matter before Mr. Lando is excused.

The Court: You can call it to my attention.

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Mr. Gillen: Mr. Lando has been around here quite a while and I don't want to bring him back.

Mr. Campbell: I object to the remarks of counsel.

The Court: We will get along.

Mr. Gillen: Well, don't try to hide material matters.

The Court: Just a minute. I will excuse the jury. Ladies and gentlemen of the jury, there are legal matters that we must take care of and you will be excused for about 15 minutes. In the meantime, please bear in mind the admonition of the Court.

(Jury and alternate jurors admonished and excused at 10:45.)

(In the absence of the jury.)

The Court: I am somewhat at a loss just how to approach this present situation. Now I have tried cases in [831] Los Angeles, I have tried cases in San Francisco, Portland, Seattle, Sacramento, not just one case, but I have been to each one of those cases for more than a month at a time, and I have had the most pleasant relations with lawyers in all those cities, always in Nevada pleasant relations with lawyers, but I notice a tendency, and I think it is your purpose, to ride this Court, Mr. Gillen.

Mr. Gillen: No, it is not my purpose to ride the Court.

The Court: Let me finish what I think your purpose is.

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Mr. Gillen: Do you want to bawl me out for the press?

The Court: I am not bawling you out for the press, no, but I am telling you what I think.

Mr. Gillen: I would like to be permitted to tell you respectfully my position.

The Court: I know you are a very competent lawyer, you have demonstrated that, you are ably handling this case, but you do not stay within the rules. Now that remark that you made in the record there just illustrates certain types of remarks you have made during the hearing. Now I do not want to have to put up with any more and I am not going to listen to any more of it, and as far as the press is concerned, this courtroom is open all the time and I will not be influenced by their presence or wouldn't be by [832] their absence. It wouldn't make any difference, but I am reluctant to punish anyone for contempt. I do not want to do it; I don't think I have ever done it but once in nearly nine years I have been on the bench, and I don't want to do it. I am not the kind of man who wants to get even with anybody and my attitude in this case, whether you recognize it or whether you don't, I am trying to be fair to this defendant and to the government and I am going to continue to do that, so let's not have any more of these things.

Mr. Gillen: May I be heard?

The Court: Just let me finish. I am doing the talking here. There is no necessity of that remark. Your remark in making that objection to these nicknames received here, imputing something

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against government's counsel—Mr. Campbell has not conducted himself in any way to merit that kind of treatment. That isn't fair treatment of one lawyer to another. This isn't a contest between counsel for the defendant and counsel for the plaintiff. Now we will call in the jury.

Mr. Gillen: You are not going to let me say a word?

The Court: We are going to call the jury.

(Off-the-record remarks by counsel.) [833]

The Court: I will direct the reporter not to put your remarks in the record. Sit down. I will make a finding that your conduct, the remarks made this morning, are in contempt of this court and I will fine you $100 and you are committed to the custody of the marshal until the fine is paid.

Mr. Gillen: I will pay it right now.

The Court: We will be in recess.

Mr. Avakian: Can't we have what was said here in the record?

The Court: No. We will be in recess for five minutes.

(Recess taken at 10:50 a.m.)

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10:55 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. LANDO

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Lando, you testified yesterday that you had devoted your life to running horses and interesting yourself in horse racing, is that correct?

A. That's right.

Q. You had at one time, I believe you stated, owned a stable of horses yourself?

A. That's right. [834]

Q. That was some years ago, was it?

A. That is right.

Q. Let me ask you whether or not you, in the horse racing fraternity, are known as an expert on horse racing? A. Known as what?

Q. An expert on horse racing?

A. That is right.

Q. And in regard to horse racing and your expertness, that pertains to odds on horses and fixing prices for betting purposes, is that right?

A. That is correct.

Q. And are you well known in the racing fraternity and the sporting fraternity? A. I am.

Q. By people who interest themselves in racing, fighting, and things of that sort? A. I am.

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(Testimony of Sylvan Lando.)

Q. Now when the B & R Smoke Shoppe was opened, I understood you to testify that you had been given a one-third interest in a partnership in that, is that correct, the B & R?

A. The B & R, no.

Q. No, a 25 per cent interest, I beg your pardon.

A. That is right.

Q. And I believe you stated as to actual cash, you had made no investment? [835]

A. That is right.

Q. What was it that you were expected to contribute to the partnership?

A. What was I to contribute to the partnership?

Q. Yes, what was it you were expected to contribute to the partnership if it was not money?

A. Well, my knowledge of the game and ability to make prices.

Q. And is that what you did in connection with the partnership, work out odds and make prices?

A. That's right.

Q. And when would you do that, with relation to the hours of the day, when would you do that?

A. From eight in the morning up until around 12:30 and one o'clock.

Q. And then was your work, insofar as your participation of the partnership business, finished for the day? A. Practically was, yes.

Q. I understood you to say at the outset, for a week or two, that you also assisted in writing up bets. A. Yes, when it first started.

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(Testimony of Sylvan Lando.)

Q. And after that you just devoted yourself to the matter of making prices from about eight o'clock in the morning and working until around noon? A. That is right.

Q. And for that you were given a 25 per cent interest? [836] A. Right.

Q. Now, with regard to your interest in the 186 Club and in the Day-Night Cigar Store, which was part of the 186 Club property, I understood you to say that you made no actual cash investment in either of those enterprises? A. That's right.

Q. But you were given originally a one-sixth partnership interest in the 186 Club, is that correct?

A. That is correct.

Q. And you were given an interest share in the Day-Night Cigar Stand? A. That is right.

Q. What was that interest, one-third?

A. That's right.

Q. And you testified that you put no actual cash into either of those enterprises by way of investment, is that correct? A. Yes.

Q. What were you expected to contribute to both of those or either of those enterprises in lieu of any cash investment?

A. Well, I had a big following amongst sportsmen in the city. They would call me up in the morning 10 or 15 times, where I was working, for tips on the horses, my opinion as to prices, along those lines.

Q. Were you expected, by reason of your following, to bring business to the 186 Club? [837]

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(Testimony of Sylvan Lando.)

A. That is right. I sent them up there, quite a few.

Q. Those people of the sporting fraternity knew you were interested in this place and followed you over to this place and gave you their business, is that correct? A. That is right.

Q. Now, the B & R Cigar Shoppe, you stated that there were empty boxes in the cigar store?

A. To my knowledge, yes.

Q. Did you ever tend the cigar store; was that part of your work? A. No.

Q. Was there a man who did tend the cigar store there? A. Not that I know of.

Q. Was there a man at the front there at the cigar counter? A. I do not recall.

Q. At all events, you never tended the cigar store? A. No.

Q. Now, you were asked by Mr. Campbell regarding the amount of time that was devoted by the defendant, Mr. Remmer, to the B & R cigar store and you said he was active in the business, is that correct? A. That is right.

Q. Let me ask you, isn't it a fact that during the time that you were connected with the B & R Cigar Store and with the other enterprises, that Mr. Remmer spent five months of the year [838] managing and operating Cal-Neva Lodge in Nevada?

A. That's right.

Q. Isn't it a fact that he went up there in April or May of each year and didn't return until some

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(Testimony of Sylvan Lando.)

time in October, with the exception of possibly short trips to San Francisco?

A. To my knowledge that is correct.

Q. So for five months of the year, each year that you were there Mr. Remmer wasn't around there to be active in the business, was he? A. Right.

Q. And then I believe you stated in the year 1945 for the first five months of the year no tracks were running at all? A. That is right.

Q. And the B & R Cigar stand was closed up?

A. Right.

Q. And Mr. Remmer was at Lake Tahoe all the time when the tracks opened until October of that year? A. That's right.

Q. So that that year he was there practically at no time during the year 1945, is that correct?

A. That is correct.

Q. And that was the year, was it not, that the other partner in that business, Mr. Willie Kyne, went into the armed forces services, is that correct?

A. Correct. [839]

Q. And he was away until 1946, isn't that true?

A. That is true.

Q. And immediately after Mr. Willie Kyne went away, it is true, is it not, that you for a period of time did handle the funds, for a short period of time? A. I did.

Q. And you were mistaken yesterday when you said Mr. Pritchett had handled them?

A. He did.

Q. He did, but you had handled them for a brief period of time, is that correct?

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(Testimony of Sylvan Lando.)

A. Repeat it, please.

Q. Yes. I said Mr. Pritchett had handled the funds when Mr. Kyne went away into the service, but there was a brief period of time immediately after Mr. Kyne went away that you handled the funds, isn't that correct? A. That is right.

Q. Now, Mr. Campbell asked you yesterday questions regarding what is known in the fraternity of the racing world as laying off of bets; do you recall those questions? A. That is right.

Q. And you explained to Mr. Campbell yesterday that there were two reasons for laying off bets; one was to keep the odds on a horse and the other was if a man who was making a book felt he had too much of a gamble, he would lay off part of it, that [840] is right? A. That is right.

Q. He would ask some other bookmakers if they would take part of the bets that were available, is that correct? A. Correct.

Q. Now, is it not a fact that frequently and most times that laying off, or accepting of laying off bets, or assisting in laying off bets, is done as an accommodation? A. At times it is, yes.

Q. Just explain how it is done as an accommodation and doesn't bring anything in the way of a profit or emolument to the person who lays off the bet?

A. Well, a man may call up from New Orleans, around the country around post time, which gives you 10 or 15 minutes, and say, "I am in bad"——

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(Testimony of Sylvan Lando.)

Q. He means he has too much money on a horse?

A. Yes, he has too much, for example two thousand on a horse, and he has taken this order and wants to execute it and get rid of it, so I would say, "Wait, hang on and I will see what I can do for you." So if you get rid of the money, or part of the money, whatever you got rid of, then it would be around post time——

Q. Let me see if I can break that down so I understand a little better. If A felt he had too much to cover bets placed on one horse and wanted to rid himself of that obligation, he [841] might call B and ask if he would take part of the order for him? A. That is correct?

Q. So Mr. B, might as accommodation, ring up C, D, E, and F and ask them if they were interested in taking some of that?

A. That is correct, or fill the order or try to fill the order.

Q. And in that regard Mr. B, who was first appealed to, would be merely acting as middle man, trying to accommodate the man who was wanting to get rid of the obligation?

A. That is correct.

Q. Was there much of that done at the B & R?

A. Over a period of time lots done.

Q. If you make a long-distance call to another person to lay off a bet, you then incur a telephone bill? A. That is right.

Q. And got nothing out of it?

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(Testimony of Sylvan Lando.)

A. That is all merely an accommodation.

Q. And that was done for the reason that on other occasions those same people who had appealed to you might have accommodated you in taking some lay-off money, that is correct?

A. Right.

Q. Now, that money would sometimes pass through your hands without any profit, isn't that correct? A. That is right.

Q. Now, you stated that you do not recall any man tending the [842] B & R cigar stand. Do you remember a man called John the Door Man?

A. Yes.

Q. Didn't he tend the cigar stand?

A. Well, he may have, but I don't remember.

Q. Now, Mr. Lando, to your knowledge was there not also a bookkeeper to whom was turned over the financial accounts from the various enterprises? A. I don't think so.

Q. Well, you mentioned here the public accountant who had died, Mr. Slater. It was within your knowledge, was it not, that the report of profits and losses were ultimately turned over to Mr. Slater and he worked at the books and made up the income tax returns, isn't that true? A. That is right.

Q. Now, in the year 1945, which we have referred to here in your testimony, was that a so-called loss year, that is, when the B & R Smoke Shoppe lost money?

A. I don't recall. That's a matter of record from the tax returns, would show it.

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(Testimony of Sylvan Lando.)

Q. Well, wasn't that the year the race tracks were closed down all over the country for a period of five months? A. Yes, they were.

Q. Do you have any recollection now whether that was a loss year or a profitable year? [843]

A. I am not sure, but I think it was a loss year.

Q. Mr. Lando, do you recall that on your own individual income tax return for the year 1945 you showed it as a loss year? A. I think I did.

Q. And you attribute that, do you not, to the fact that there was no business for the first five months of that year, insofar as the racing game was concerned? A. That's right.

Q. Now, Mr. Lando, with regard to the 186 Club, which was described by you as a card room adjoining or related to the Day-Night cigar stand, you had an interest of one-sixth in that 186 Club, is that correct? A. That is correct.

Q. And you stated at the outset you were informed that you had a one-sixth partnership interest, is that correct? A. That is correct.

Q. And that some little time later—I believe you fixed the time as approximately a year after the place opened—that you were informed that it had become a corporation and that you were an officer of the corporation? A. That's right.

Q. Now, do you recall what other information you obtained regarding how and in what manner it was converted from a partnership to a corporation? A. I don't know. [844]

Q. Does it refresh your recollection that a Mr.

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(Testimony of Sylvan Lando.)

Mooser, an agent of the Internal Revenue Department, in auditing the accounts and returns of the 186 partnership, decreed that it was a corporation rather than a partnership and that a return should be made as a corporation?

Mr. Campbell: I am going to object unless the foundation is laid, unless he had a conversation with Mr. Mooser regarding the subject matter. Otherwise it is hearsay.

The Court: Let me have the question.

(Question read.)

The Court: Will you lay a little foundation, Mr. Gillen, on that question?

Mr. Gillen: I think perhaps I can.

Q. Mr. Lando, I am going to ask you whether or not, by way of refreshing your memory, whether or not it came to your attention that in the return of the 186 Club for the fiscal year commencing July 1, 1943, and ending June 30, 1944, that this information was contained in Schedule I—and I am reading now from plaintiff's Exhibit 87-A in evidence——

Mr. Campbell: Pardon me, before you read that, Mr. Gillen, I am going to make an objection to the question in this form. I think the document should first be shown to the witness as to whether or not he has ever seen the statement he referred to. It is quite a lengthy statement.

Mr. Gillen: I think, may it please the Court, since it [845] is an exhibit put in by the prosecu-

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(Testimony of Sylvan Lando.)

tion in evidence, that it is evidence and I am entitled to read any part of it and ask him if that refreshes his recollection as to what were the facts in the matter.

Mr. Campbell: Oh, yes.

The Court: Very well.

Mr. Gillen: I am going to read you, Mr. Lando, from plaintiff's Exhibit 87-A in evidence, and ask you whether or not this notation in the return of the corporation, in which you were an officer, refreshes your recollection on the subject matter of my last question. Schedule I: (Reads.)

Q. Does that refresh your recollection on the subject matter, Mr. Lando, or are you familiar with that?

A. I recall there was a Mr. Mooser and he changed from the original partnership to the corporation and that is as much as I am familiar with. I am not familiar with the transaction.

Q. Now, Mr. Lando, you say that the active manager of the club was Mr. Bert Busterno, who was also known by the nickname of Bert the Barber, is that correct? A. Yes.

Q. And so far as you know, he was the man who kept track of the accounts and ultimately turned them over to the public accountant, is that correct? A. That's right, yes.

Q. Was the 186 Club, during the time that you were connected [846] with it, making money or losing money?

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(Testimony of Sylvan Lando.)

A. Well, I don't know whether it was or it wasn't.

Q. You don't remember whether it was making money or losing money?

A. No, all I know it was mostly in the red around there. That is what I was told, on account of the markers.

Q. What do you mean by that, Mr. Lando? Is that that people who owed money to the club put in their markers instead of putting in cash, is that correct? A. That's right.

Q. In other words, instead of the club getting a lot of money, it was getting IOUs?

A. Correct.

Q. Which in the racing fraternity are referred to as markers? A. That's right.

Q. When were you informed about this? Were you informed about this when you asked whether or not you had money coming from the 186 Club?

A. That's right.

Q. Now, in regard to the income tax returns of the corporation which Mr. Campbell read to you at the close of your direct examination, on which it is shown that you during one year, according to the return, received four thousand dollars' salary and another year that you drew three thousand dollars' salary. Let me ask you, Mr. Lando, whether or not on your individual income [847] tax return you reported receiving such salary?

A. The monies I received——

Q. (Interrupting): First of all, let me ask you

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(Testimony of Sylvan Lando.)

if you remember, then you can give any explanation you wish. Do you remember whether or not you reported in your own income tax return you had received any salary? A. I do not remember.

Q. You don't know whether you did or not?

A. No, I do not.

Q. Were you ever given any money to cover any tax for any salary that was chargeable to you on the books of the corporation? A. Yes, I was.

Q. By whom were you given that money?

A. Willie Kyne.

Q. And who was it that made out your individual tax return? A. The tax man.

Q. Who was that? A. Mr. Hubner.

Q. Is that Conrad Hubner, the tax lawyer in San Francisco? A. Yes.

Q. And the money Mr. Kyne gave you to pay your tax for the salary that was supposed to have been given to you, did you pay that to the government on your income tax? A. I did. [848]

Q. Who did you turn that over to, Mr. Hubner?

A. Mr. Hubner.

Q. How did you happen to pay that tax? Were you told by Mr. Kyne that you were chargeable with having received such a salary and therefore would be taxable for it, would have to pay a tax on it? A. That is right.

Q. So that, if we may attempt to boil this all down to an understandable statement of your testimony, summarizing what you have testified to, you were supposed to receive a salary by way of re-

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(Testimony of Sylvan Lando.)

ward for your participation in the corporation——

Mr. Campbell: Just a minute—I am going to object to counsel characterizing or summarizing or giving his summary of the testimony. I think the testimony speaks for itself. I object to this question as incompetent.

The Court: Let me have the question.

(Question read.)

The Court: You may answer the question.

Mr. Gillen: I didn't complete the question, your Honor.

Mr. Campbell: I thought you had.

Mr. Gillen: No. Mr. Lando, I will start over again. Let me withdraw that. It will be simpler and I will start over again.

Q. The fact of the matter is, regarding the money situation, Mr. Lando—and correct me if I am misquoting your testimony— [849] the fact of the matter is that you were supposed to receive and were put down on the corporation's books, as having received a certain fixed salary, is that correct? A. Correct.

Q. And you did not receive that salary and in inquiring about why you did not receive it, you learned that the 186 Club had its coffers filled with markers or IOUs rather than cash, is that correct?

Mr. Campbell: That is objected to as assuming a fact not in evidence.

The Court: I understood it to be a question. You are not stating he testified to that effect?

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(Testimony of Sylvan Lando.)

Mr. Gillen: I am asking if that was the sense of his testimony and if I am in error he can say so.

The Court: I will sustain the objection to the form of the question.

Q. And it is a fact that you testified, in inquiring why you did not receive any money from the corporation, learned it was because the 186 Club was not making any money, due to the fact that it was receiving so many IOUs or markers?

Mr. Campbell: Objected to as assuming a fact not in evidence.

The Court: Objection sustained.

Mr. Gillen: I would like the record referred to, may it please the Court. If your Honor will recall, the reporter [850] started to read back and Mr. Lando elucidated on his answer and said the place was losing money because of markers. Your Honor will recall that.

The Court: My opinion of this question is you are summarizing the testimony of this witness.

Mr. Gillen: I am asking him on cross-examination, which I always understood was permissible, if this is the sense of his testimony.

Mr. Campbell: That is asking him to characterize or summarize his testimony.

The Court: I think counsel has the right to inquire what the witness meant when he gave certain evidence.

Mr. Campbell: But I think if he is referring to testimony he has given, the question must refer exactly to the testimony which was given.

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(Testimony of Sylvan Lando.)

Mr. Gillen: Let us read it out of the record.

The Court: Let us have the question.

(Question read.)

The Court: You may answer the question.

Q. Do you have the question?

A. That is right.

Q. Is that the fact? A. That is correct.

Q. Now, is it also the fact that regardless of your not having received any money, your income tax lawyer told you that because [851] you were put down for a salary, you would have to pay a tax on the amount of money that was due you, is that correct? A. That's correct.

Q. And is it a fact that you went then to the corporation, or Mr. Kyne, or whoever it was and advised them that you were going to have to pay taxes on the money you did not receive because the corporation did not have the money to give you, and asked them what you would do about the tax you would have to pay, is that correct?

A. That is correct.

Q. And they advanced you the amount of tax you would have had to pay on the salary that was owing to you, is that true?

A. That is correct.

Q. Now, then, you still have that credit on the books of the corporation known as the 186 Club, isn't that so? A. I have.

Q. Now, with regard to the Day-Night cigar

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(Testimony of Sylvan Lando.)

stand which was attached to the 186 Club, I understood you to testify that you did not receive any money out of that enterprise either, is that correct? A. That is correct.

Q. And that regardless of the fact that the income tax return for the Day-Night cigar stand showed there was a profit? A. Right.

Q. But you did not receive any of that [852] profit? A. I did not.

Q. Now, it is a fact, is it not, Mr. Lando, that the profit that was made by the Day-Night cigar stand was put right back into the business and used for purchasing of merchandise?

A. That's right.

Q. Are you familiar with the partnership return of the Day-Night cigar stand for the year 1944 and the Day-Night cigar stand for the year 1946 and for the year 1945, and I will identify it in the record as prosecution's Exhibits 84, 85, and 86, and with the Court's permission, I will hand these exhibits to the witness. Are you familiar with those?

A. No, I am not familiar with it.

Q. Well, will you look at the first one I handed you, the year 1944, prosecution's Exhibit No. 84. You will note, do you not, that this is income tax return for the partnership known as the Day-Night Cigar Store, 186 Eddy Street, San Francisco 2, California, and that the business conducted there is cigars, liquors and periodicals, that was correct, was it not? For the year 1944 I am referring to.

Mr. Campbell: I am unable to understand the

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(Testimony of Sylvan Lando.)

question as to what he is directing his attention to as being correct.

Mr. Gillen: What I read appears on the exhibit.

Mr. Campbell: The exhibit speaks for itself, I submit, the witness having testified he has never seen the exhibit. I make the objection the document speaks for itself. [853]

The Court: See if you can answer the question.

Q. Have you the question in mind?

A. I have the question in mind, yes, but I am not familiar with it.

Q. Well, you stated, did you not, that the money that was made by the Day-Night cigar stand, instead of being paid out in profits to the partners or salaries, was put back into the business for the purchase of merchandise? A. That is true.

Q. It is true, is it not, that the 1944 returns shows that the inventory for the beginning of the year is put down as $11,889, is that correct?

A That's what is here.

Q. And then if you will look at plaintiff's Exhibit 85 in evidence, you will note, will you not, that the inventory—and that is for the year 1945, the next year—that the inventory for that year increased from $11,889 to $24,747.27, isn't that what appears there? A. That is right.

Q. And then if you will look at plaintiff's Exhibit 86 for the year 1946, you will note that the inventory shows for that year as $22,466.44, or twice as much as at the beginning of the period, namely, the year 1944, is that correct?

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(Testimony of Sylvan Lando.)

A. Yes.

Mr. Campbell: The same objection, the documents speak [854] for themselves.

The Court: The answer may stand.

Q. Now, with regard to the Day-Night cigar stand, let me ask you whether or not your income tax lawyer advised you that you would also be chargeable in your individual income tax with the profit that you were shown to have made at the Day-Night cigar store partnership, is that correct?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Gillen: That is the same question as your Honor permitted with regard to obtaining money to pay tax on money that was credited to him.

The Court: Isn't that hearsay, Mr. Gillen?

Mr. Gillen: I don't think so. If I may have the question read.

(Question read.)

Mr. Gillen: Do you mean about his lawyer?

The Court: Yes.

Mr. Gillen: I will withdraw the question. It is very definitely, I suppose, hearsay.

Q. Let me ask you this, did you obtain from the Day-Night cigar stand sufficient money from that partnership to pay the individual income tax obligation of your own to the government for any profit that was due you out of it?

A. I did. [855]

Q. Now, did you know, Mr. Lando—you have

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(Testimony of Sylvan Lando.)

the original up there, would you take a look at the year 1946 return, which is on the desk there before you, and it is prosecution's Exhibit 86, and if you will turn to the last page—did you know that there was for the taxable year of 1946 credited to you a partner's capital account credit of $8,491.53? You see under Schedule I where it says "Partner's Shares of Income and Credits." A. I see.

Q. And you see your name there, Sylvan Lando, 611 Marina Blvd., Schedule H, Mr. Lando, line 13, it says, "Partners Capital Accounts."

A. I see it.

Q. Sylvan Lando, $8,491.53, do you see that?

A. I do.

Mr. Campbell: May we have the question?

Q. I will put the question again. I will ask you, were you acquainted with the fact that that capital investment credit was credited to you in the return of the partnership?

A. I really don't understand. Will you repeat it, please?

(Question read.)

A. I get that much credit. It was put back into the business, that is what I was told.

Q. Well, you had put no money into that business? A. No, I didn't.

Q. And you had been given one-third of that business, as you [856] stated, by reason of your following in the sporting fraternity, is that correct?

A. Yes.

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(Testimony of Sylvan Lando.)

Q. And were you aware of the fact that you had built up an equity, so to speak, in that business in that amount? A. That is correct.

Mr. Gillen: We are reaching the matter not determined over the last recess, and that is in regard to the Sulka tie question.

The Court: We will take our recess now.

(Jury and alternate jurors admonished and recess taken at 11:45.)

December 14, 1951—2:10 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. LANDO

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Lando, shortly before the close of the noon session, I asked you about the money that you still had on the books in those enterprises; do you recall that? A. Yes.

Q. Now, were you ever called upon to make up any of the losses of the B & R Smoke Shoppe, of which you were a 25 per cent partner? [857]

A. I was not.

Q. You were not? A. I was not.

Q. Now, in direct examination this morning, Mr.

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(Testimony of Sylvan Lando.)

Campbell asked you, or perhaps it was yesterday afternoon, Mr. Campbell asked you what you did in connection with any of those enterprises in the way of work or active participation, do you recall the question? A. Yes, I do.

Q. Did you, among other things that you did in and about the enterprises, did you ever recommend what customers of any of the enterprises might be given Christmas gifts of Sulka ties or other gifts?

A. I did.

Q. Did you ever participate in preparing or wrapping Sulka ties for customers?

A. Yes, I did.

Q. You got some ties yourself?

A. That is one there.

Q. You have a Sulka tie on now?

A. That's right.

Q. By the way, was that a gift by Mr. Remmer to you? A. That's right.

Mr. Gillen: That is all. [858]

Redirect Examination

By Mr. Campbell:

Q. Mr. Lando, in response to Mr. Gillen's question, you stated that when you inquired about the profits of the 186 Club you were told that they were represented in markers, is that correct?

A. That is right.

Q. Now, do you know whose markers those were? A. No, I have no idea.

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(Testimony of Sylvan Lando.)

Q. Do you know whether or not they were the markers of Mr. Remmer? A. I do not know.

Q. Did you, yourself, ever see the markers?

A. No, I never did.

Mr. Campbell: I think that is all.

(Witness excused.)

WILLIAM E. KYNE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. William E. Kyne.

Q. Where do you reside, Mr. Kyne?

A. Christmas Tree Inn, Mt. Rose Highway, near Reno.

Q. You are presently the manager of that establishment? A. Part owner.

Q. Did you formerly reside in San [859] Francisco? A. Yes, I did.

Q. And over what period of time?

A. For 42 years.

Q. And up until what time, Mr. Kyne?

A. A year ago last July.

Q. What is your present business or occupation?

A. Part owner of the Christmas Tree Inn.

Q. Are you acquainted with the defendant here, Elmer Remmer? A. Yes, I am.

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(Testimony of William E. Kyne.)

Q. How long have you known Mr. Remmer, Mr. Kyne? A. Over 20 years.

Q. Have you in the past been associated with him in business? A. Since about '41.

Q. Are you presently associated with him in business?

A. Well, I have my name on two licenses.

Q. Well, aside from having your name on two licenses, do you presently have any business interests in common with him? A. No.

Q. And when did you cease to have business interests in common with Mr. Remmer?

A. About February 4, 1949.

Q. Now you stated, I believe, that your association began in 1941? A. Correct.

Q. Do you recall the month of the year? [860]

A. December 1, 1941.

Q. And continued, as I understand you, until 1949? A. That's correct.

Q. Now what was the first business in which you became associated with Mr. Remmer?

A. First business was B & R Smoke Shoppe at 50 Mason Street.

Q. In San Francisco? A. That is right.

Q. What was the nature of that business?

A. Book making.

Q. By book making do you refer to book making on horse races? A. Horses, strictly.

Q. You say "strictly." In other words, it was entirely confined to that type of wager?

A. That's right.

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(Testimony of William E. Kyne.)

Q. What was the next enterprise that you became associated with him?

A. 110 Eddy, a tavern.

Q. When did you become associated with him in that enterprise?

A. I believe it was, oh, it was either '42 or '43.

Q. And what was the next enterprise you became associated with him in?

A. The 186 Club and the Day-Night Cigar Store.

Q. Do you recall the date that you became associated with him in those enterprises? [861]

A. No, I can't remember the exact date. I believe it was shortly after the 110 deal.

Q. What was the nature of the business of the 186 Club?

A. 186 Club was a social club and card room.

Q. And what was the nature of the Day-Night Cigar Store?

A. A cigar store, running 24 hours a day.

Q. Was it also a liquor store? A. Yes.

Q. And what was the next business that you became associated with him in after that?

A. Menlo Club.

Q. Where is it located?

A. 33 Turk Street.

Q. What was the nature of its business?

A. Card room.

Q. And what was the next business you became associated with him? A. That was it.

Q. Do you recall the Transit Smoke Shop?

A. Oh, I am sorry, yes, the Transit Smoke Shop.

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(Testimony of William E. Kyne.)

Q. Now have you completed the list?

A. That's it. I missed the Transit Smoke Shop.

Q. Do you recall when you became associated in the Transit Smoke shop?

A. 1946, November. [862]

Q. Were you at any time associated with Mr. Remmer in the operation of Cal-Neva?

A. No, I was not.

Q. Were you at any time associated with Mr. Remmer in the operation of the 21 Club or San Diego Social Club? A. No.

Q. Were you and Mr. Remmer at any time associated together in a venture relative to the purchase of Gallagher and Burton whiskey?

A. I think I bought the check to make the payment for it.

Q. Now turning first to the B & R Smoke Shoppe, which you say was located at 50 Mason Street, in the City of San Francisco, and which I believe you testified to be engaged in the business of booking horses, now what was the ownership of that business, that is to say, was it a partnership, a corporation, or sole proprietorship?

A. It was a partnership, Remmer 50 per cent, Lando 25 per cent, and Kyne 25 per cent.

Q. Did you contribute any of the investment in that business, Mr. Kyne? A. No, I did not.

Q. At the time that business was acquired, was it operated by some one else?

A. Yes, it was operated by a man called Sherwood.

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(Testimony of William E. Kyne.)

Q. Sherwood? A. A. Sherwood. [863]

Q. Was any consideration or money paid to Mr. Sherwood at the time the business was acquired?

A. I believe the purchase price was $2,500.

Q. By whom was that paid? A. Remmer.

Q. Did you or Mr. Lando contribute any of that purchase price? A. Nothing.

Q. Now in connection with the operation of that business, was it necessary that there be a bank roll?

A. Yes, sir.

Q. And what was the amount of the bank roll used in the operation of the B & R Smoke Shoppe?

A. Seventy-five hundred.

Q. Who contributed that? A. Remmer.

Q. When was that originally put up?

A. December 1, 1941.

Q. Now how long did that business continue to operate?

A. I operated it until February 14, 1945.

Q. You went into the service at that time?

A. Yes, sir.

Q. When did you return from the service?

A. Went back to work June 8, 1946.

Q. And when you came back to work June 8, 1946, was the B & R Smoke Shoppe [864] operating? A. At the time I don't think it was.

Q. Was it subsequently reopened?

A. Yes.

Q. And do you recall when?

A. I can't recall. At times we closed down for

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(Testimony of William E. Kyne.)

a month or two, due to different things. On my return I don't think it was operating.

Q. How soon after you returned, if you recall?

A. Well, my books will show that.

Q. Did you keep the records of the B & R Smoke Shoppe? A. Yes, sir.

Q. Of what did those records consist?

A. They consisted of one entry each day, whether we lost or won.

Mr. Campbell: At this time, if the Court please, I wonder if certain of the records in the clerk's possession can be produced. I am referring to certain books and records. I wonder how physically we can do that? I am referring to certain records which are in the clerk's office.

(Clerk produces box of records.)

Q. I am going to show you——

Mr. Golden: Just a minute—we object to the opening of this material to the witness, whether or not it is offered in evidence, and move to suppress its use by the government, on the ground it is illegally obtained and violates the defendant's [865] constitutional rights, for all the reasons heretofore stated in our many motions, and we again offer to adduce evidence to show the circumstances of the original obtaining of these books by the government.

Mr. Campbell: I think that matter has been thoroughly covered.

The Court: Yes. The objection will be overruled.

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(Testimony of William E. Kyne.)

Q. I am going to show you a volume with the imprint on the outside, "Daily Reminder 1942," and ask you if that is one of the books to which you refer? A. That is right.

Mr. Campbell: I ask that this be marked for identification as government's next in order—111 for identification.

Q. I show you a similar volume with the imprint on the outside, "Daily Reminder," and the year 1943, and ask you if that is also a book which you maintained relating to that business?

A. Yes, sir.

Mr. Campbell: I will ask that this be marked 111-A for identification.

Q. I show you a volume with the imprint, "Standard Daily Journal 1945," and direct your attention to the first page and ask you if that is a record which you made?

A. It looks like my writing.

Q. Is that a volume which you kept in connection with that business? [866] A. Yes, sir.

Mr. Campbell: I will ask that this be marked 111-B for identification, 1945.

Q. I show you a plain leather bound volume, upon which on the first page appears date January 1, 1946, and ask you if that also is a record maintained by you in the conduct of the B & R Smoke Shoppe? A. Those are my figures; yes, sir.

Mr. Campbell: I will ask that this be marked Exhibit 111-C.

Q. Mr. Kyne, was a similar book kept for the

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(Testimony of William E. Kyne.)

year 1944?

A. I believe you have it here.

Q. Could you step down and examine these books and see if you can identify it?

(Witness examines box.)

A. It isn't there.

Mr. Golden: May we offer the same objection to that procedure and the further objection there is no showing that has been brought into the court room all the material deposited with the clerk.

The Court: I wish you would make your objection before the procedure was carried out.

Mr. Golden: It was such an unusual procedure I couldn't see what it was.

The Court: If there is anything wrong, I don't see how [867] it could be cured now.

Mr. Golden: We could do it this way. I move your Honor to advise the jury that the inability of the witness to find in one box a certain book has no significance.

The Court: I so advise the jury, the inability of the witness to find a certain record in a box has no significance.

Mr. Campbell: May I inquire if the clerk has brought in all the records?

The Clerk: No, your Honor, there are other records.

The Court: Did you ask the clerk to bring them all in?

Mr. Campbell: That is what I understood. Possibly we can pass this matter until the recess and those records can be examined at that time.

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(Testimony of William E. Kyne.)

The Court: Very well, all right.

Q. Now so far as the years in question which are represented by these four volumes, 1942, 1943, 1945, and 1946, are these the only records maintained with respect to the B & R Smoke Shoppe?

A. That's correct.

Q. And were they maintained by you as part of your duties as a partner there? A. Yes, sir.

Mr. Campbell: I am going to offer these in evidence.

Mr. Golden: To which we object upon all the grounds heretofore stated. [868]

The Court: Does counsel desire to examine them?

Mr. Golden: Well, yes, perhaps we had better. Of course, your Honor, the further objection as to 111 and 111-A that they cover the years 1942 and 1943, which are not years covered by the indictment. Pardon us just a moment. Your Honor, while we are going over these proffered exhibits, may I have permission to question the witness on his voir dire concerning the exhibit which Mr. Campbell had him come down and look for, the potential exhibit he had him look for, namely, a diary for the year 1944?

The Court: There is nothing before the Court in regard to that now, Mr. Golden.

Mr. Golden: I know there isn't, but I would like to request it.

The Court: I will deny your request.

Mr. Golden: Now then, if the Court please, I wish to assign as misconduct on the part of the

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(Testimony of William E. Kyne.)

prosecution the procedure whereby the witness was asked to look through these records for diary for the year 1944, on this ground, your Honor, that it was not included in the material which the government turned over to Mr. Semenza, it is not included in the subpoena directed to Mr. Semenza, it was therefore not deposited with the clerk, although it appears in the record here, and having the witness search for it in the presence of the triers leaves an inference the defendant is withholding something. The [869] government knew they were not here.

The Court: The record will show the assign and the Court again instructs the jury not to draw any inference from the circumstance where the witness left the stand and went down with counsel to look at the records. Have you finished your examination of the books?

Mr. Golden: Yes, we have looked at them.

The Court: You have stated your objections on all the grounds heretofore stated?

Mr. Golden: Yes, your Honor. Does your Honor feel the record is quite clear as to what the grounds are?

The Court: You may state them if you want to, if you are not satisfied with the record. Of course, the Court is. Just state your grounds if you are not satisfied with the record.

Mr. Golden: I have, in mind this matter, we were going to take up further with the Court when these things were offered in evidence. Your Honor will recall that. In other words, we were protesting

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(Testimony of William E. Kyne.)

originally with the deposit and the Court said when they were offered in evidence we will take it up further.

The Court: Yes, yesterday we had an argument and I suggested some question and we had quite a discussion, which I think satisfies the Court.

Mr. Golden: We object to all four, that is 111, 111-A, [870] 111-B, and 111-C, on the grounds that they were illegally obtained and retained by the agents of the prosecution and that their acquisition and retention and use at this trial violates the constitutional rights of the defendant; namely, the fourth and fifth amendments of the Constitution of the United States; that the agents of the prosecution promised to return them to the persons from whom they got them at the time they got them and did not keep their promises, and we offered, of course, as your Honor knows, to show a factual basis for those objections by evidence of witnesses, and we further object to the proffered Exhibits 111 and 111-A on the grounds they are incompetent, irrelevant and immaterial, in that they apparently cover years which are not within the scope of this indictment, and we move to suppress the same and for their return to us and suppress their use in evidence and for their return to us, as well as objecting to their introduction in evidence.

The Court: Objection overruled and the motion will be denied and the Exhibits 111, 111-A, 111-B, and 111-C, will be admitted in evidence.

Mr. Campbell: May I ask your Honor that the

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(Testimony of William E. Kyne.)

jury be advised to disregard the factual statements made by counsel?

The Court: Yes, I think the jury will understand from other matters which have occurred here. I want to remind the jury once more—and it seems unnecessary to do it—that this case is to be decided entirely [871] upon testimony from the witnesses and documents which are admitted in evidence and any remarks of the Court or counsel, exchanges back and forth, are not evidence and are not to be considered; just the evidence of the witnesses and contents of the documents which are admitted. So the jury will disregard any evidence other than testimony of witnesses and contents of the documents admitted.

Q. Mr. Kyne, in regard to the operation of the B & R Smoke Shoppe, in addition to your personal interest of 25 per cent, did you draw any salary?

A. Ten dollars a day.

Q. And was that throughout the period until you went into the army and after you returned from the army?

A. Before I went to the army.

Q. After you returned from the army, did you continue to draw that amount?

A. No, I didn't.

Q. Did you draw any salary after that?

A. No.

Q. Now at all times when you were present, that is to say excluding the period of time that you were in the army, at all times that you were present and

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(Testimony of William E. Kyne.)

while the business was in operation, so that we are excluding periods of a month or so being closed for various reasons, who was in charge of the [872] business? A. I was.

Q. And who handled the money?

A. I did.

Q. Who paid the expenses of the business?

A. I paid the expenses.

Q. Were you here in court when Mr. Lando testified? A. Yes, sir.

Q. Now you will recall that he testified there were two phases of the operation of that business, first it operated as an open pool room, is that correct? A. Yes, sir.

Q. Do you recall over what period of time that was? A. Until about the end of '44.

Q. And will you describe what is meant by open pool room operation?

A. It is where any one can walk in from the sidewalk and walk through the door and place a bet.

Q. Incidentally, this enterprise was called the B & R Smoke Shoppe. Will you state whether or not there was any merchandise by way of smokes or tobacco for sale there?

A. We had some boxes out in front on different shelves.

Q. Will you state whether or not there were cigars in those boxes?

A. They were dummy boxes.

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(Testimony of William E. Kyne.)

Q. Did you have any merchandise for sale there at all in the [873] front part of the store?

A. No, sir.

Q. There is reference made here to one John, the Doorman. Do you know him?

A. Yes, sir.

Q. What is his name, if you recall?

A. I forget his name. The social security will show.

Q. What were his duties?

A. Well, we couldn't allow every one in; for instance, if a person was drinking or something, we didn't want them in there and it was up to him to keep them out.

Q. In other words, I take it his duties were somewhat as his name implies, John, the Doorman? He watched the door, is that correct?

A. That is correct.

Q. Now I am going to call your attention to Plaintiff's Exhibit 111, the daily reminder of 1942, as an example, and calling your attention to the first entry therein of Thursday, January 1, 1942, $7,300 cash BR, will you state to what that refers?

A. That would mean bank roll.

Q. The figure is repeated below the line, $7,300, then appears $19.25 win, to what does that refer?

A. That was the day's winnings.

Q. And the final figure, $7,319.25, what would that then represent? [874]

A. That is what was there.

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(Testimony of William E. Kyne.)

Q. Would you state whether or not that would represent the bank roll at the end of the day?

A. Yes, sir.

Q. Will you glance through here and see if that same method of accounting is used throughout the year? A. That seems to be it.

Q. Now referring to the figures for "Win" or "Lose," there are, are there not, certain days on which there was a loss, isn't that correct?

A. Yes, sir.

Q. Will you state whether or not the figure of "Win" or "Lose" for the day as set forth in this Government's Exhibit 111, is a net or gross figure?

A. Net.

Q. And will you state whether or not that figure is arrived at before or after expenses had been paid? A. After.

Q. And will you state whether or not that included all expenses of doing business?

A. Yes, sir.

Q. For example, did that include salaries?

A. Yes, sir.

Q. And the expenses that were deducted before the figure was arrived at? [875] A. Yes, sir.

Q. Did that include your daily salary?

A. Yes, sir. What year was that?

Q. This happens to be 1942 that I show you.

Mr. Gillen: I think we ought to offer an objection concerning the details as being incompetent, irrelevant, and immaterial and not within the time in the confines of the indictment, which commenced

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(Testimony of William E. Kyne.)

in the year 1944, and ends in the year 1946, those are the three years concerned.

The Court: It is part of the same discussion we had early in the trial on the question of the starting point, pertaining to the same ideas.

Mr. Avakian: I don't believe so. These questions are not directed to establishing net worth at the end of any particular year, but rather are details of the transactions that occurred during the year and I do not see that they would have any relevancy on the question of net worth at the end of the year.

Mr. Campbell: I might state I am asking these questions as to operation of business and how the figures were arrived at and it is material to the net worth of this defendant and to the starting point, as will be developed.

Mr. Avakian: Your Honor, that is a simple statement of conclusion. There is no explanation offered as to the manner in which he kept books in 1942 would throw any light on net [876] at the end of any particular year, or more specifically at the beginning of this indictment period. Now if the materiality will develop later, the proper foundation should be laid. If this is simply an example, then one of the years of the indictment period should be used.

Mr. Campbell: I think the materiality will develop.

Mr. Avakian: Your Honor, in fairness to all, shouldn't there be a statement how this would become material?

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(Testimony of William E. Kyne.)

Mr. Campbell: Possibly I can shorten the argument by asking another question.

Q. I call your attention to the entry shown of December 31, 1942, the final figure $14,872.80, do you observe that? A. Yes.

Q. What does that figure represent?

A. That was what was left.

Q. Was that what you have termed the bank roll? A. Bank roll, yes.

Q. And before arriving at that figure, had all of the expenses of doing business during the year been deducted? A. Yes, sir.

Q. And with respect to the win or lose figure as set forth below, did that figure represent then a net figure after expenses had been deducted?

A. Yes, sir.

Q. Now I call your attention to Government's Exhibit 111-A, [877] which purports to be the record for 1943, and I call your attention to the first entry under January 1, 1943, $15,000 BR, what does that figure represent? A. Bank roll.

Q. I call your attention to the fact that the last entry on December 31, 1942, was $14,872.80, so that there is a difference of some $27.20 in the opening bank roll of 1943, do you recall the circumstance?

A. Some one may have paid a marker.

Q. Now in connection with the operation of the business, were all of the bets which you accepted cash bets? A. No, sir.

Q. Was or was not credit given to some of the customers?

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(Testimony of William E. Kyne.)

A. On the phone and also at the counter.

Q. I call your attention in Government's Exhibit 111-A to two pages, the last two pages in the book, under the heading "Memoranda," with certain names and amounts and ask you to what that refers? For example, on the back page here is an entry, "Dugan, $80.00"? A. That is correct.

Q. To what does that refer?

A. He has a marker.

Q. Will you explain what you mean by marker?

A. One who bets and does not pay in this respect.

Q. In connection with the obligation of $80, were you holding [878] any document of any kind representing that obligation?

A. You mean a note?

Q. Yes. A. No, sir.

Q. Or an IOU? A. No, sir, just his word.

Q. Now I notice there is quite a column of those notations there opposite names, running in amount from $5 to $80, I believe is the highest, is that correct? A. Yes, sir.

Q. Do they all represent what you call markers or obligations of those who have not paid you?

A. Yes, sir, the IOUs are still in the book.

Q. Were those ever paid, if you know?

A. There are two items which have been paid and marked paid, Aleck, the barber, and Eddie Woods.

Q. And can you tell when those items were paid?

A. Aleck, the barber, paid February 22nd and Eddie was paid on March 29th.

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(Testimony of William E. Kyne.)

Q. Of what year?

A. It must have been '44.

Q. Well, these were outstanding markers at that time? A. Yes, sir.

Q. I call your attention to the preceding page, where there are certain amounts and names set forth in red ink, running from [879] $5 to the amount appears $1,527.25.

A. That is the total, isn't it?

Q. Isn't that a subtotal?

A. Total, yes. I think that also includes the preceding page. No, that does not include the preceding page.

Q. What are these in red ink?

A. Those are markers, also.

Q. Now the fact that only one of these is scratched out, what would that indicate to you?

A. Evidently it was marked up.

Q. As to the others, were they outstanding at the end of the year? A. Yes, sir.

Q. I call your attention to a page in the memorandum in which appears the following language: "Total winnings $7,796.15," is that in your handwriting?

A. No, sir, that is not in my handwriting.

Q. Do you know in whose handwriting that is?

A. I wouldn't have any idea. That is a copy of that amount on that page there.

Mr. Avakian: Can Mr. Campbell identify the page on which that appears so the record may be clear?

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(Testimony of William E. Kyne.)

Mr. Campbell: First page, Memorandum 1943. This is 111-A.

Q. As I understood your testimony, the character of the business changed in 1944? [880]

A. Toward the end of '44; yes, sir.

Q. What was the method of operation of the business after that change? Do you recall the date of that? A. No, I do not.

Q. What was the nature of the method of operating the business after that change?

A. A phone business.

Q. After you returned from the army, when you became associated with the business again, what was the nature of the business, that is, by phone or by open pool? A. Phone business.

Q. You went into the army early in 1945?

A. February 14th.

Q. And you returned when?

A. The end of May. I went to work June 8th.

Q. And as I recall your testimony, you said it was closed for a while after you returned?

A. I believe it was. It was on a month and then off.

Q. Now I call your attention to Plaintiff's Exhibit 111-C, which purports to be a record for the year 1946, and I call your attention to the date of September 30th, upon which appear, I believe, the first entries in that book. You might examine the book to make sure that is correct; beside the date 1946 appearing on the first page, is that correct?

A. I believe so, yes. [881]

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(Testimony of William E. Kyne.)

Q. I believe you stated that this record is kept in your handwriting? A. Yes, sir.

Q. Now I call your attention to the fact that apparently this is a little different type of record than the preceding one, is that correct?

A. That is the way the government wanted it.

Mr. Gillen: I move to strike that as not responsive.

Mr. Campbell: I agree, it is not responsive.

The Court: It may go out.

(Question read.)

A. That is correct.

Q. I call your attention to the first item, $19,936 pay, what does that represent?

A. That is what we paid out.

Q. The next item, $12,698T, what is that?

A. The take.

Q. And the final, $7,248 L? A. Loss.

Q. So those were the losses for that day, is that correct? A. Yes, sir.

Q. Now for the next day, October 1st, first item is $16,050 T? A. Take.

Q. And 12,413.75 P? A. Play. [882]

Q. And 3,636.25 W? A. Win.

Q. When you refer to "play," that refers to the gross amount of bets accepted for that day?

A. Yes, sir, that is the handle.

Q. By "handle" you refer to the amounts of bets that were handled?

A. The money that we handled; yes, sir.

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(Testimony of William E. Kyne.)

Q. And by "pay," you refer to the amount that is paid out to those that were fortunate enough to bet a winner? A. Yes, sir.

Q. And by subtracting one from the other you then determine your winnings or losings for that day? A. Correct.

Q. Now will you state whether or not in the figure "pay" as set forth in this volume, Government's Exhibit 111-C, are the expenses of the business taken out? A. Yes, sir.

Q. So they then become a part of pay-out?

A. Correct.

Q. For example, if on a given day you paid your rent—incidentally, were those premises rented?

A. Yes, sir.

Q. And do you recall the rent that was paid?

A. $275, that included a warehouse and storeroom. [883]

Q. Was that a month? A. Yes, sir.

Q. And was that paid monthly?

A. Yes, sir.

Q. And was that paid, if you recall, by cash or by check?

A. I don't remember. Usually cash. The agent for the Wilson estate used to come around. I am pretty sure it was cash.

Q. On the day that that was paid, will you state whether or not that was added to the "pay" figure as set forth in these records?

A. That would be taken out; yes, sir.

Q. So that included in the figure of "pay-out"

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(Testimony of William E. Kyne.)

here is not only the payments which you made to winners of bets, but also the expenses of the business? A. Yes, sir.

(Jury and alternate jurors admonished and recess taken at 3:12.)

3:20 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now in further explanation of this record, I call your attention to Plaintiff's Exhibit 111-A, book relative to 1943, and call your attention to the fact that, for example, on [884] January 19, 1943, there appears some four figures with names opposite them in amount, middle of the page: 250—Johnny; 525—Fisher; 200—Switzer; 3050—Gus. To what does that refer?

A. It is in reference to our accounts. I don't know whether it was a carry-over or what it was, but that is what it refers to.

Q. Does that refer to money owed to the B & R or by the B & R? A. Right now I forget.

Q. Do you know who any of these individuals are? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. For example, 3050 Gus, who is that?

A. Greenbaum.

Q. And your answer, I presume would be the same where other such notations appear?

A. Yes, except it paid out or something going out.

Q. I see notation 250 here?

A. Abdo, Tony Abdo.

Q. Now in relation to the B & R Smoke Shoppe, Mr. Kyne, did you maintain a bank account?

A. I believe we did; yes, sir.

Q. And do you recall in what bank that was maintained?

A. That would be the Bank of America, No. 1 Powell.

Q. I show you Government's Exhibit 29, photostatic copy of a commercial account in the name of B & R Smoke Shoppe, 50 Mason Street, Bank of America, Day and Night Office, together [885] with signature cards thereof, and ask you if these are the records of the bank account which you refer to as being maintained by the B & R Smoke Shoppe? A. Yes, sir.

Q. And were you the only authorized signator on that account? A. Yes, sir.

Q. Now during the time that you were in the service, do you know who handled the financial business of the B & R Smoke Shoppe?

A. No, I don't.

Q. I will ask you whether or not there was also opened an account in the Crocker First National

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(Testimony of William E. Kyne.)

Bank in the name of the B & R Smoke Shoppe, and for the purpose of refreshing your recollection, I will show you Plaintiff's Exhibit 23, containing the commercial account ledger sheets and signature card on that account.

A. I opened it up. I forgot it.

Q. Do you recall that account, Mr. Kyne?

A. July 17, 1946—I may have opened this account and I left it down there and got a safe deposit box also, probably at the same time.

Q. Do you recall opening that account now?

A. I really don't.

Q. That is your signature on the signature card?

A. Yes. I remember going down there and getting a safe deposit [886] box but I don't remember opening up this account.

Q. Now in connection with the operation of the B & R Smoke Shoppe, was a safety deposit box maintained? A. Yes, sir.

Q. Where was that safety deposit box?

A. No. 1 Powell Street, Bank of America.

Q. That is the Day and Night office of the Bank of America? A. Yes, sir.

Q. And do you recall the number of that box?

A. Forty-eight.

Q. Over what period of time did you maintain that box? A. I still have it.

Q. Do you recall approximately when you opened that box?

A. It was opened since we have been in business.

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(Testimony of William E. Kyne.)

Q. Since 1941? A. Yes, sir.

Q. And who, in addition to yourself, had access to that box? A. Elmer Remmer.

Q. Did any one else have access to it?

A. No, sir.

Q. In connection with your association with Mr. Remmer and these various businesses, was more than one safety deposit box maintained?

A. By myself?

Q. Yes, by yourself and in connection with the business? [887]

A. I had two other boxes directly with the business.

Q. And where were they located?

A. One was at No. 1 Powell and the other was at the Crocker Bank.

Q. I am going to show you Government's Exhibit 25 for identification, which has heretofore been identified by a representative of the Crocker National Bank, with relation to safety box No. 730, and ask you if that is your signature?

A. Yes, sir.

Q. Does that relate to the box to which you refer in the Crocker National Bank?

A. Yes, sir.

Q. I call your attention to the signature, "Henry Clay."

Mr. Gillen: The defense will stipulate the signature, "Henry Clay," is in the handwriting of the defendant, Elmer Remmer.

Q. Is that correct, Mr. Kyne?

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(Testimony of William E. Kyne.)

A. Yes, sir.

Q. It would appear here that the box was opened on February 29, 1944, and was surrendered on March 5, 1947, does that coincide with your recollection, Mr. Kyne?

A. I don't remember the exact date.

Q. You do recall that the box was given up?

A. That's correct.

Q. I call your attention to the fact that the address given [888] under the signature of Henry Clay is St. Francis Hotel. Did Mr. Remmer maintain a residence in the St. Francis Hotel?

A. He lived there at the times when he was in town.

Q. What business was this particular box under the name of William E. Kyne and Henry Clay used for?

A. Well, we took that box out because we had an account there with the Menlo Club.

Q. And was that box used in connection with the Menlo Club business? A. No, it was not.

Q. Was it used in connection with any particular business? A. No, sir.

Q. Now in regard to the operation of the B & R Smoke Shoppe, there has been some testimony here relative to what is known as layoff bets. Will you state whether or not it was the practice of the B & R Smoke Shoppe, during the time that you were in active management, both to receive and place layoff bets? A. Yes, sir.

Q. And did that practice continue throughout

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(Testimony of William E. Kyne.)

the time of operation from the beginning and up until the end of 1946?

A. It would happen almost every race.

Q. Now with regard to the acceptance of layoff bets, Mr. Kyne, will you state whether or not it is customary for a commission to be paid?

A. No, sir. [889]

Q. Did either the acceptance or the placing of layoff bets by the B & R Smoke Shoppe involve a payment or receipt of commissions?

A. Will you repeat that question?

(Question read.)

A. We received commission in one spot. We used to have access to the mutuels at the California Jockey Club and they paid us, I believe, 2½ per cent commission. That was the only place that we received money during our layoff operations.

Q. Were bets which you had accepted then placed directly with the Jockey Club?

A. Well, the only time we used to take advantage of it was when we were loaded on horses.

Q. And in placing bets with the Jockey Club, do you refer to placing bets which would go then to the pari mutuel machine at the track?

A. Yes, sir.

Q. And over what period of time was that practice followed?

A. It was a very short period. The California Racing Commission objected to it.

Q. Do you recall in what year that method was followed?

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(Testimony of William E. Kyne.)

A. You have the checks, the photostat of the checks.

Q. In that connection and in connection with all of your layoff business, either where you were accepting or where you were laying off bets yourself, what was the method of settlement [890] used?

A. Mostly cashier's checks.

The Court: I think we will take a recess now until Monday morning at 10:00 o'clock.

(Jury and alternate jurors admonished and recess taken at 3:45 p.m.) [891]

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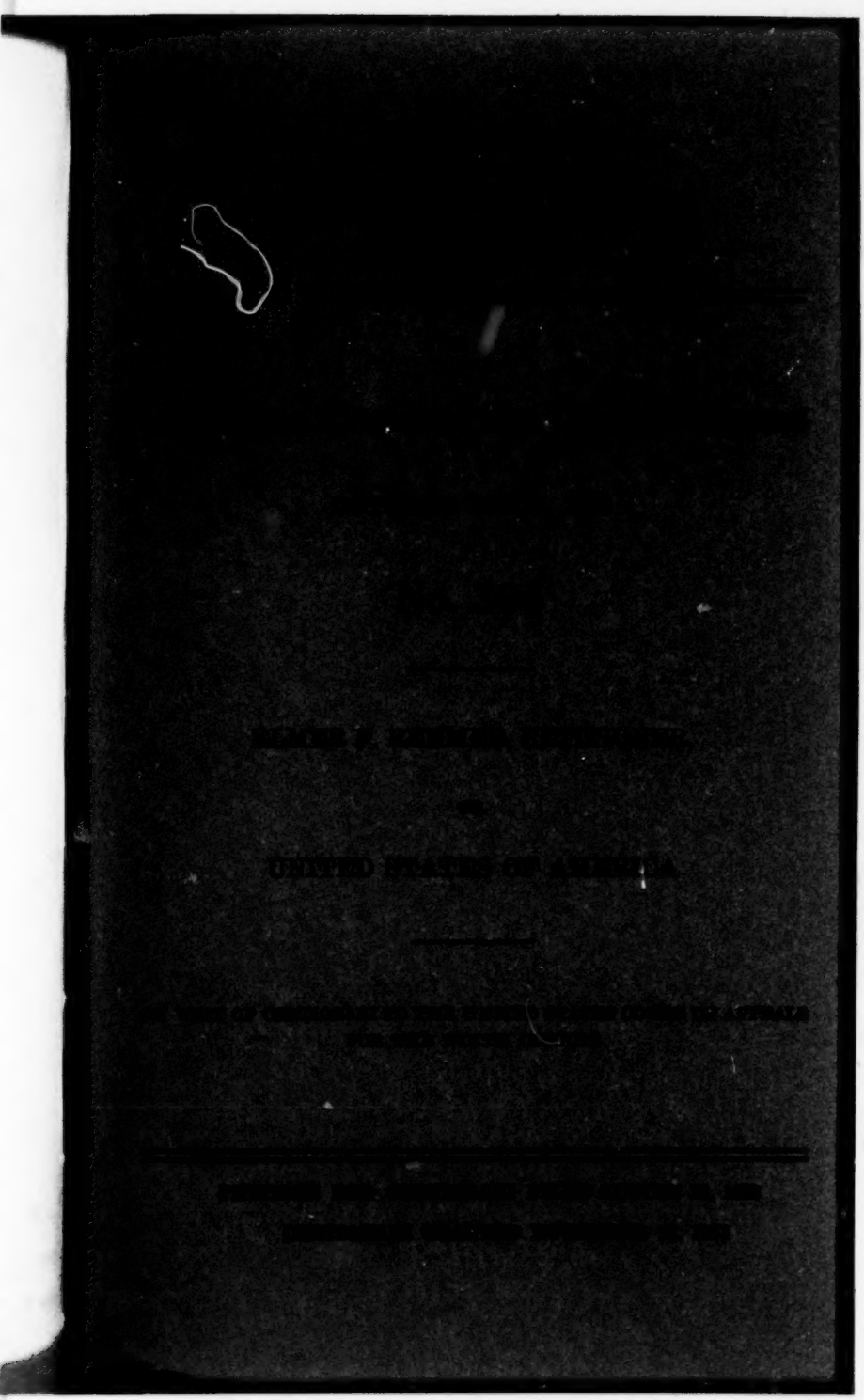

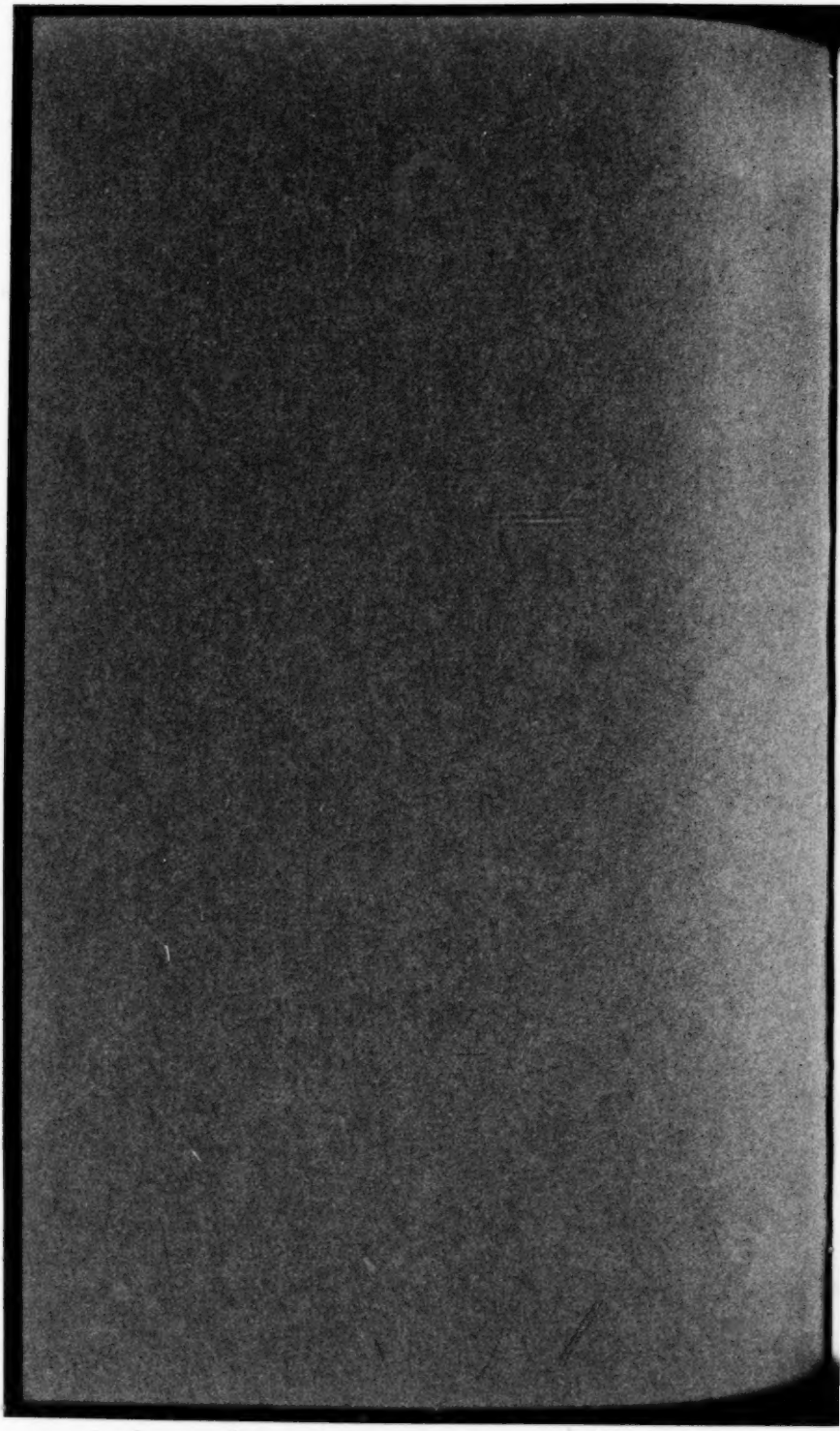

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes
Volume IV
(Pages 1373 to 1848)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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December 17, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

WILLIAM E. KYNE

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Campbell: At the close of the session Friday the witness had identified Plaintiff's Exhibit 25 for identification, the signature card and certain slips relative to safety deposit box at the Crocker National Bank, as being jointly held by himself and the defendant under the name of Henry Clay. At this time I wish to offer this exhibit in evidence as government's 25.

The Court: Exhibit 25 may be admitted in evidence.

Mr. Campbell: With the Court's permission, I will read briefly from this exhibit. There is written on the document "Access to either." Bears the signature of William E. Kyne and signature of Henry Clay. (Reads Exhibit 25.)

Q. Now, Mr. Kyne, in addition to the safety deposit box, box No. 48, which you had at the Day and Night branch of the Bank of America and this box at the Crocker First National Bank, did you also maintain other safety deposit boxes with relation to Mr. Remmer's business?

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(Testimony of William E. Kyne.)

A. Had one at the Bank of America, a box that belonged to Pat Pritchett and myself. [892]

Q. Is Pat Pritchett the individual you have described as being an employee at the B & R Smoke Shoppe? A. Yes, sir, he is employed there.

Q. And is he the same individual described as handling the financial affairs of the B & R Smoke Shoppe during the period of time it was in operation and you were in the service?

A. That is correct.

Q. Now other than the type of daily diary record which you identified Friday, were any other books and records maintained by the B & R Smoke Shoppe? A. No, sir.

Q. Were there any books of the nature of general ledgers or journals? A. No, sir.

Q. Now will you state whether or not it was the practice for the partners in that enterprise, Mr. Remmer, yourself and Mr. Lando, to withdraw money from time to time during the years it might be needed? A. As they needed it, yes.

Q. And what record, if any, was maintained of those withdrawals?

A. Just put in a marker for whatever they needed.

Q. And what was the practice with relation to repaying those markers?

A. Well, they would pick the marker up whenever they could.

Q. As of the year ends, while you were there, did there still [893] remain markers?

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(Testimony of William E. Kyne.)

A. Usually on a settlement there was markers.

Q. And did or did not those markers enter into the final settlement at the end of each year?

A. They were considered as cash.

Q. Now as of the end of 1944, do you recall whether or not any of the partners were overdrawn, so far as their share of the profits were concerned?

A. No, I don't know.

Q. Do you recall, as of the end of 1946, were there any of the partners overdrawn so far as their share of the profits were concerned?

A. No, I don't.

Q. Aside from markers, which I believe you have identified as being similar in character of an IOU, was any book record kept of those amounts?

A. No, sir.

Q. Now with regard to the layoff bets which you accepted from others, did or did not the bets so received become a part of your regular business for the particular day?

Mr. Gillen: We offer the objection, first it is a confusing question, and secondly, to call for the conclusion of the witness.

Mr. Campbell: This man was a partner in that business.

The Court: You may answer the question. Do you [894] understand the question?

A. I wish you would repeat it.

Mr. Campbell: I will reframe it.

Q. For example, Mr. Kyne, on a particular day when you received layoff bets from other book-

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(Testimony of William E. Kyne.)

makers, did or did not that become a part of and was that entered into your business for that day?

A. Yes, sir, that would be considered as part of the handle.

Q. And was or was not such money treated as other bets which you received from local people phoning in a bet?

Mr. Gillen: Just a moment. I am going to offer the objection that the question is confusing because as I recall there were two types of layoff bets, one where you would obtain somebody, other bookmakers to take up some of the bets, another where you take some of the bets yourself by way of layoff, and third where you lay off some money which you had to somebody else, so I think it should be broken down to what particular layoff bet counsel refers to.

The Court: I will inquire if the witness was confused by the question?

A. No, the question is clear.

The Court: You may answer.

Mr. Gillen: I wonder if counsel would clear it for me which type he is pertaining to?

The Court: Perhaps the answer would clear up the [895] confusion. If not, you can take it up on cross-examination.

(Question read.)

A. That is correct. It was just considered as handle.

Q. With regard to layoff bets received from other bookmakers and accepted by you, if the bet

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(Testimony of William E. Kyne.)

was a losing bet, so far as the customer was concerned, who received the profit?

A. Who we laid to?

Q. No, I mean when you received the bet.

A. Who received the profit?

Q. Yes. A. The fellow you laid it off.

Q. No, I think you misunderstood my question. I am referring to bets which you have accepted of other bookmakers and placed with you, their laying off to you, and it is a losing bet, so far as the person putting up the money is concerned, who received the profit?

A. Are you talking about layoffs to us?

Q. To you.

A. If we accepted a bet, naturally that would be our profit.

Q. And in converse, if a bet won, you would suffer a loss, is that correct?

A. You refer to layoff from another bookmaker? We would consider that as a bet.

Q. The other bookmaker would consider that as layoff but you would consider it as bet? [896]

A. That's right.

Q. And if that bet won, you would have to pay the loss? A. The loss.

Q. If the bet lost, you would receive the profit, is that right? A. Correct.

Q. Now so far as lay-off bets which you made, did you assume either profit or loss on such bets?

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(Testimony of William E. Kyne.)

A. Just the way it went—we just handled the money.

Q. So that if the person who placed the money with you and which you laid off with another bookmaker, won his bet, the other bookmaker would have to pay it, is that correct?

A. That's correct.

Q. If he lost his bet, that bookmaker would receive the profit, is that correct? A. Correct.

Q. Now reference was made to the fact that layoff bets are ordinarily for two purposes, namely, to spread the money around so that the odds will not be affected, or, secondly, where a given bookmaker has assumed what he considered too great a risk on a particular horse, is that correct?

A. That is correct.

Q. Now so far as layoff bets from other bookmakers which are received by you, come bets to you, does it make any difference to your operation for what purpose the bets were placed with [897] you by other bookmakers?

A. Will you repeat the question?

(Question read.)

A. It is just a courtesy to move money off other bookmakers.

Q. But it is a fact, is it not, that such money is handled as other bets which you receive from your regular customers? A. Same way, yes, sir.

Mr. Gillen: I move to strike the question as leading and suggestive, assuming something not in

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(Testimony of William E. Kyne.)

evidence. I think it is confusing because the witness had answered it was a matter of courtesy, which I take it would mean there was no profit involved in the matter and then counsel in the last question said something as to the same as other customers placing bets, which would indicate there was a profit.

The Court: The motion will be denied.

Mr. Gillen: May I have the question and answer read?

(Question and answer read.)

Q. Now I believe you stated, Mr. Kyne, that you were in the service from February, 1945, until approximately June of '46? A. Yes, sir.

Q. Now during the period of time that you were in the service did you happen to be in New York City at any time? A. Yes, sir.

Q. Do you recall approximately when that was?

A. Whenever I could get a leave. [898]

Q. You were there from time to time?

A. That's right.

Q. Where were you stationed, Mr. Kyne?

A. Fayettville, North Carolina.

Q. Now do you recall an occasion when you were in New York City on leave when you were in contact with Mr. Remmer in New York City?

A. No.

Q. Do you recall an occasion when you were in New York City when you were in telephonic communication with Mr. Remmer?

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(Testimony of William E. Kyne.)

A. I used to talk to him on the phone, yes, sir.

Q. I will ask you whether or not on any occasion you learned that you had an interest in a New York night club? A. Yes, sir.

Q. Now do you recall when that was?

A. I don't remember.

Q. Well, can you place it this way——

A. Well, it was winter—I believe it was towards the end of the year. It was quite cold there.

Q. You were in the service at that time?

A. Yes, sir.

Q. And you stated you were in the service between February, 1945, and June, 1946—would that be toward the end of 1945?

A. That would be it.

Q. Now will you relate the conversation, the telephonic [899] conversation, that you had with Mr. Remmer in that regard?

A. He suggested that I go to this certain address and I asked him, I said, I didn't want to go there in the first place, I just had my own friends to entertain.

Q. And what did he say?

A. So he suggested I go up and take a look at it because I had a piece of the place.

Q. Was that the first information you had on that subject matter? A. Yes, sir.

Q. What was the name of the place, if you recall? A. I don't remember.

Q. Did you follow his suggestion and go to the place? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Will you describe the place and business conducted there? A. Just another night club.

Q. Do you recall its location?

A. No, I don't.

Q. Do you know how large a place it was?

A. No, I don'.t

Q. Do you recall who the managers or operators of the night club were?

A. Lew Brice, I believe.

Q. Is that the brother of Fanny Brice?

A. Fanny Brice's brother, yes, sir. [900]

Q. Do you recall whether or not there was a second operator there? A. No, I do not.

Q. Do you recall the name of Mattie Silverman?

A. I do not believe I recognize it.

Q. Now had you invested any money in that enterprise? A. No, sir.

Q. Did you at any time? A. No, sir.

Q. Upon the occasion of your visit to that night club, did you learn whether or not you purportedly owned a portion of it?

Mr. Gillen: Just a moment. That would be hearsay. Objected to on that ground.

The Court: Answer that question yes or no.

A. Will you repeat the question?

(Question read.)

A. No.

Q. You had no discussion of that matter with any one? A. No, sir.

Q. Was that the only occasion upon which you visited that place? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Did you at any time receive any profits from the operation of that night club? A. No, sir.

Q. Or did you at any time receive any profits or distribution [901] of capital from that operation?

A. No, sir.

Q. Now, Mr. Kyne, are you familar with a business known as 110 Eddy Street? A. Yes, sir.

Q. What is the nature of that business?

A. Tavern.

Q. That is the sole business that is conducted there? A. Yes, sir.

Q. Did you, yourself, have any interest in that business? A. Yes, sir.

Q. What was the extent of your interest?

A. A working interest.

Q. And will you describe what you mean by a working interest?

A. I think I received 25 per cent interest for keeping the books and whatever was necessary to do around the place.

Q. When did you first become interested in the 110 Eddy Street?

A. I think it was about 1942.

Q. Did you have any agreement with any one relative to your working interest? A. No, sir.

Q. Who else had interests in that operation?

A. Well, to start off there was Clarence Bent, Arthur Pratt, Kyne, Remmer, Turner and Cavani.

Q. Were they all at the same time? [902]

A. No, not at the same time.

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(Testimony of William E. Kyne.)

Q. Now before the business was taken over, who operated it?

A. Clarence Bent. The place was known as the Crystal Tavern.

Q. Do you recall when it was taken over?

A. No, I don't.

Q. Could you state whether or not, or does the year 1942 refresh your recollection?

A. I believe it was in 1942.

Q. And do you recall the circumstances under which it was taken over?

A. Clarence Bent owed Remmer about over four thousand dollars, I guess it was, and to protect his money he took the tavern over.

Q. And at the time he took it over, as you say, to protect his money, who then became interested in it? A. Arthur Pratt had one-third of it.

Q. Do you recall what Mr. Pratt paid for it?

A. I believe $3500, I am not sure.

Q. To whom did he pay that money, do you know? A. I think to me.

Q. What, if anything, did you do with the money? A. Probably paid bills.

Q. Well, what is your recollection?

A. Well, we put quite a bit of money into the place.

Q. When you say "we put quite a bit of money into the place," [903] to whom do you refer?

A. Mr. Remmer.

Q. Did you, yourself, put any money into the place? A. No, sir.

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(Testimony of William E. Kyne.)

Q. Did any one else, other than Mr. Pratt, who bought his interest you say for $3500, did any one else put any money into the place other than Mr. Remmer? A. No, sir.

Q. And aside from Mr. Pratt's $3500, as expenditures there, by way of improvements or money to operate the business or purchasing stock, stock-in-trade, did any one other than Mr. Remmer pay any money? A. No, sir.

Q. Now how long did Mr. Pratt remain interested in the business?

A. I don't remember. The books should show.

Mr. Campbell: If the Court please, at this time we desire certain records of 110 Eddy Street which are in the clerk's office. I have asked one of the agents to step out with the clerk so they can be readily identified.

The Clerk: I have them right here.

Q. I will ask that these two bound account books be given one number for identification.

The Clerk: 112.

Q. I show you two bound volumes, Mr. Kyne, and ask you to examine those and state if you recognize them? [904]

A. I believe that is Slater's writing.

Q. By Slater, to whom do you refer?

A. The bookkeeper.

Q. Bookkeeper for whom? A. 110 Eddy.

Q. Mr. Slater is now deceased?

A. Yes. He was also bookkeeper for the Day-Night Cigar Store.

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(Testimony of William E. Kyne.)

Q. And do you recognize these as being the books maintained for the 110 Eddy Street?

A. Yes, sir.

Q. Now in whose name were the liquor licenses at 110 Eddy Street?

A. I think they were in my name.

Q. Over what period of time?

A. Oh, about a year, I guess.

Q. What year was that?

A. I don't know whether it was '42 or '43.

Q. And in whose name were they after that?

A. Remmer, Kyne, Cavani and Turner.

Q. How long did they continue in those names?

A. Until the place folded.

Q. When was that?

A. I believe it was '47.

Q. What was Turner's first name? [905]

A. Clarence, I think.

Q. And it is Frank Cavani?

A. Frank Cavani, yes, sir.

Q. Now during the years 1944, 1945, and 1946, did Cavani and Turner continue throughout that period to be active in the conduct of the business?

A. Yes, sir.

Q. What were their duties in respect to the business?

A. I believe that Cavani was there in the day time and Turner used to be there at night time.

Q. What duties did they perform there?

A. Manager.

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(Testimony of William E. Kyne.)

Q. And what share of the business, if you know, did Cavani have? A. One-fourth.

Q. And what share of the business did Turner have? A. One-fourth.

Q. Now did you receive at any time any of the profits from the operation of that business?

A. No, sir.

Q. Did you at any time report as income to you profits of that business? A. Yes, sir.

Q. And in what years? A. Since '42.

Q. Now with regard to income taxes accruing on such profit as [906] you reported, from what source, if any, did you obtain money to pay taxes?

A. From Slater.

Q. And Slater you refer to the bookkeeper?

A. Yes, sir.

Q. Will you state whether or not on the profit of the 110 Eddy Street which you reported on your return, if you paid out of your personal funds that part of the tax which accrued by reason of reporting that profit?

A. I received the money from 110 Eddy, from Bob Slater, to pay on my interest.

Q. Now I call your attention to government's Exhibit 80, the partnership return of income for the calendar year 1943 of 110 Eddy Street, and ask you if that is your signature attached thereto?

A. Yes, sir.

Q. I call your attention to the "Partner's Share of Income," the ordinary net income having been

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(Testimony of William E. Kyne.)

reported $10,275, which is divided, W. E. Kyne, $6,850 and Arthur R. Pratt, $3,425?

A. That is correct.

Q. Will you state what the division of profits for the year 1943 from 110 Eddy Street was?

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial. It is a year prior to the starting point of the indictment. [907]

The Court: Objection will be overruled.

A. The reason we filed this way, we run into quite a bit of difficulty——

Mr. Campbell: No, that is not responsive to my question. Read the question again.

(Question read.)

Mr. Gillen: I think the books speak for themselves, if the Court please. You have a set of books there and the return also speaks for itself. I object on those grounds.

The Court: I think the objection is good. The record will speak for itself.

Mr. Campbell: Yes, your Honor, but I am asking an explanation of that return, which shows two-thirds to one and one-third to another partner.

The Court: What is the question?

(Question read.)

The Court: Objection sustained.

Q. Did you yourself receive the sum of $6,850 set forth on that account? A. No, sir.

Mr. Gillen: Just a minute——

The Court: The answer may go out.

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(Testimony of William E. Kyne.)

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial. Involves the year 1943 and certainly Mr. Campbell knows the taxation of partnership income is based on not what [908] is withdrawn by the partners, but rather on their proportionate interest in the profits of the business and therefore the question is immaterial in determining the correctness of a report of the income. That is the law and I think counsel knows it and I think your Honor is well aware of it too.

The Court: Objection overruled. Answer the question.

(Question read.)

A. No, sir.

Q. Mr. Kyne, does that amount of $6,850 which is set forth as your share, does that include the share of profits accruing to the benefit of any one other than yourself?

A. That was credited to me on the books.

Mr. Campbell: Will you read the question?

(Question read.)

A. No, sir.

Mr. Gillen: Just a moment—that would be assuming something not in evidence—it is already answered.

The Court: Objection overruled. The answer may stand.

Mr. Gillen: I withdraw the objection.

Q. In order that I may understand the situation then, Mr. Kyne, do I understand the only persons

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(Testimony of William E. Kyne.)

interested in the partnership in 1943 were yourself and Mr. Pratt?

Mr. Gillen: We offer the objection to counsel calling for Mr. Kyne's opinion and confusion of Mr. Campbell's understanding. I think a direct question would be who was interested, [909] would cover the situation.

The Court: Objection sustained.

Q. During the year 1943 who were the partners in 110 Eddy Street?

A. Remmer, Kyne, Pratt and Clarence Bent.

Q. In what amounts were they interested?

A. One-third, each had a third.

Q. You have enumerated four people.

A. I was included with Remmer.

Q. Did you have one-half of one-third interest, then Mr. Kyne? A. Yes, sir.

Q. Would you explain the circumstances under which on the partnership return two-thirds of profit are shown as being your distributive share?

A. At that time Clarence Bent died and things were very upset around there, so we just put it in my name.

Q. Now did the two-thirds which is shown there on that return, which you signed in your name, did that belong to you? A. No, sir.

Q. To whom did it belong? A. Remmer.

Q. The entire amount? A. Yes, sir.

Q. The entire two-thirds?

A. That's right. [910]

Q. I will ask you whether or not, however, for

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(Testimony of William E. Kyne.)

that year you reported the entire amount of $6,850 on your own personal return?

A. Will you repeat the question?

(Question read.)

A. I did.

Q. As I understand you, that full amount belonged to Mr. Remmer, is that correct?

Mr. Gillen: Objected to as asked and answered. It is only asked for the purpose of emphasis and I think, may it please the Court, that counsel is proceeding along a line of questions that is going to result in an argument. It has been pointed out, may it please the Court, that in a partnership, whatever is charged to the partner by way of profit, under the income tax law that partner is chargeable in his income tax, whether he receives the money or not. Counsel knows that and we do not want to be placed in the position of persistently offering objections to something that counsel knows.

The Court: I have an idea there may be another point involved in that statement, so the objection will be overruled. You may answer this question.

A. Will you repeat the question.

(Question read.)

Mr. Gillen: Objected to as asked and answered several times.

The Court: Objection overruled. Answer the question. [911]

A. Yes.

Q. Incidentally, who prepared that partnership return? A. Slater.

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(Testimony of William E. Kyne.)

Q. And that is the bookkeeper that you referred to? A. Yes, sir.

Q. And who prepared the personal return which you signed? A. Slater.

Q. And I believe you stated, did you not, that Mr. Slater was the person that gave you the money from 110 Eddy to pay your income tax?

A. Yes, sir; he kept the books.

Q. Did you receive any salary from 110 Eddy Street? A. No, sir.

Q. Did you ever, other than money which was given to you in regard to paying income tax on the funds which you reported, or profits which you reported accruing from the 110 Eddy Street, did you ever receive any money from that business operation?

Mr. Gillen: Objected to as having been asked and answered several times.

The Court: Objection overruled. Answer the question.

A. No, sir.

Q. I am going to show you plaintiff's Exhibit 81 for identification, partnership return of income for 110 Eddy Street for the year 1944, and ask you if that is your signature? A. Yes, sir. [912]

Q. And by whom was that return prepared?

A. Slater.

Q. I show you plaintiff's Exhibit 82, partnership return of income for the year 1945, which was filed March 15, 1946, you were in the army at that time?

A. Yes, sir.

Q. Do you, however, recognize the signature

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(Testimony of William E. Kyne.)

which is attached thereto, signature purportedly to be that of Frank Cavani, do you recognize that?

A. No, I do not.

Q. Do you recognize the signature of Harold Maundrell? A. No, I do not.

Q. Do you know Harold Maundrell?

A. He is in court.

Q. What connection, if any, did he have with this, or any of the other organizations in which you and Mr. Remmer had an interest?

A. He was Mr. Remmer's bookkeeper.

Q. Do you recall approximately when it was that Mr. Slater died? A. No, I do not.

Q. Can you state whether or not Mr. Maundrell replaced Mr. Slater as bookkeeper in the various enterprises? A. Yes, he did.

Q. I call your attention to Exhibit 83, 1946 partner's return of income for 110 Eddy Street and signed Frank Cavani, and call [913] your attention to the signature on the return of the person who prepared the return, C. D. Ayton, P.A., and ask you if you know who Mr. Ayton is?

A. Yes, I do know Mr. Ayton.

Q. Who was he?

A. He was a certified public accountant.

Q. Was he a certified public accountant or public accountant? A. I am pretty sure he was.

Q. That was your understanding?

A. Yes, sir.

Q. What relation, if any, did he have with these businesses?

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(Testimony of William E. Kyne.)

A. He was bookkeeper for the Menlo Club.

Q. Do you know over what period of time?

A. I believe he was bookkeeper for Joe Baily, who owned the Menlo Club before Mr. Remmer had it.

Q. Did he continue to work in connection with the Menlo Club books?

A. He used the same bookkeeper, yes, sir.

Q. During the years 1945 and 1946 by whom, if you know, was Mr. Ayton employed?

A. By Remmer.

Q. Can you state whether or not he was employed simultaneously with Mr. Maundrell?

A. Yes, he took care of the income tax returns.

Q. Who? [914] A. Mr. Ayton.

Q. Did he maintain any of the records himself, that is to say, as to making records therein?

Mr. Gillen: In 1945 and 1946?

Mr. Campbell: 1944, 1945 and 1946.

Mr. Gillen: Just a moment. It has been established Mr. Kyne was in the army for over a year, so that would certainly be asking for conclusion.

Mr. Campbell: I asked if he knew, and during such periods from 1944, 1945 and 1946 when he was there.

The Court: He may answer if he knows.

A. I believe Mr. Ayton made the returns starting with 1945.

Q. Do you know if that was his only employment, or did he also keep books and records?

A. That I don't know.

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(Testimony of William E. Kyne.)

Q. Is Mr. Ayton alive today?

A. No, he is not.

Q. Do you recall when he died?

A. No, I do not.

Q. Now with regard to Mr. Pratt's association with this business, do you recall where Mr. Pratt resided? A. Where he resides now?

Q. No, where he did in 1943? A. Vallejo.

Q. Do you recall how long Mr. Pratt continued to be connected [915] with the business after it was taken over by Mr. Remmer in 1942?

A. No, I don't.

Q. I call your attention to government's Exhibits 80 and 81, upon both of which you have identified your signature, and to the fact in 1943 return the partners are listed as yourself and Mr. Pratt, while in the 1944 return, Exhibit 81, the partners are listed as yourself, Cavani, Turner and Remmer. Does that refresh your recollection as to when Mr. Pratt ceased to be connected with the business?

A. I don't know the exact date that Mr. Remmer bought him out.

(Jury and alternate jurors admonished and short recess taken at 11:00 o'clock.)

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Campbell: At this time I am going to offer these two exhibits in evidence.

Mr. Golden: To which we object upon all the grounds of illegality as heretofore urged. I think the record is clear.

The Court: Yes. The objection will be overruled and Exhibit 112 is admitted in evidence. [916]

Q. Now, Mr. Kyne, I call your attention to the fact that in the books which have heretofore been introduced in evidence as Exhibit 112, the account of W. E. Kyne is listed as W. E. Kyne, Trustee. Do you know to what that refers?

A. Well, I was in charge of the place, the money end of it.

Q. And is that the meaning of the term "trustee" which is used there?

Mr. Gillen: Objected to as calling for opinion and conclusion of the witness. It has been established here that this set of books was kept by a bookkeeper named Slater and apparently whatever Mr. Slater chose to set Mr. Kyne up, whether he

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(Testimony of William E. Kyne.)

chose to call him trustee or what, would be Mr. Kyne's conclusion. Bookkeepers, we all know, have their own way of setting up accounts, and it is calling for conclusion.

The Court: Objection overruled. Answer the question.

Q. What is your answer, Mr. Kyne?

A. I was in charge of the place, trustee or whatever expression you want to use.

Q. Did you take any active part in the management of the bar? A. Yes, sir.

Q. To what extent?

A. You mean at the time of going in there?

Q. During the period set forth in that account, which runs from December 31, 1942, to the last entry in here, May 31, 1944?

A. Well, at first I was responsible for the bills and everything, [917] and after it got rolling I just let it roll.

Q. Will you state whether or not you maintained a bank account in connection with that business? A. Yes, sir.

Q. And where was that bank account maintained? A. Day and Night Bank.

Q. Under what name was it maintained?

A. 110 Eddy, I believe; I am not sure.

Q. And who were the authorized signators on that account? A. I signed the checks.

Q. Was anyone else authorized to sign the checks on that account? A. I do not remember.

Q. I call your attention to government's Exhibit

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(Testimony of William E. Kyne.)

32, which consists of the ledger sheet of account with the Bank of America for 110 Eddy, 110 Eddy Street, San Francisco, California, and to the signature cards attached thereto, and ask you if that is a record of the bank account to which you refer?

A. I believe that is it; yes, sir.

Q. I call your attention to the fact that the authorized signatures at various times upon that account show signatures of Frank Cavani, T. C. Turner, William E. Kyne, and Slater; does that refresh your recollection as to the various signatures that were authorized on that account?

Mr. Gillen: I think the exhibit speaks for [918] itself.

The Court: Objection will be overruled. Answer the question.

A. This is the time I am speaking of. I was the only one that had a bank account.

Q. You are referring to this card which is dated September 23, 1942, when you were the only authorized signator; is that correct? A. Yes, sir.

Q. Now subsequently were other signatures authorized on that account, if you know?

A. Yes, sir.

Q. And they included the individuals to whom I referred? A. Yes, sir.

Q. Now do you know whether or not any other bank accounts were utilized in connection with that operation? A. I do not believe so.

Q. Will you state whether or not any safety deposit box was utilized in connection with the 110

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(Testimony of William E. Kyne.)

Eddy Street? A. No, they had a safe.

Q. That safe was located on the premises?

A. Yes, sir.

Q. Now directing your attention to the fact that the books which have been produced here bear no entries of any date subsequent to 1945, will you state, if you know, whether or not records were maintained for the year 1946? [919]

A. I do not know.

Q. Do you know who the bookkeeper was for the enterprise in 1946? A. Harold Maundrell.

Q. Can you state whether or not you ever saw books and records pertaining to the 110 Eddy Street for the year 1946? A. No, sir.

Q. Now after that business was acquired, Mr. Kyne, were certain improvements made?

A. Yes, sir.

Q. Do you recall when those improvements were made? A. 1942.

Q. And who, if anyone, supplied the money for those improvements? A. Mr. Remmer.

Q. Now can you state whether or not those premises upon which the 110 Eddy Street business was conducted were leased from anyone?

A. I forget the name of the estate we leased it from.

Q. Do you recall the amount of the rent?

A. No, I don't.

Q. Did you have anything to do with the payment of the rent? A. No, sir.

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(Testimony of William E. Kyne.)

Q. Do you recall whether or not you signed checks in payment for rent? [920]

A. I think I would have in the course of business.

Q. Who, if anyone, prepared the checks for the rent? A. I imagine Slater would.

Q. In regard to the bank account upon which you were the only signator, who prepared the checks relative to expenses or other operating costs which you signed? A. Slater.

Q. Who, if anyone, would present the checks to you for your signature? A. Slater.

Q. Will you state whether or not, after the 110 Eddy Street operations were acquired by Mr. Remmer, if additional premises were secured for the purpose of enlarging the business?

A. Yes, sir; we leased the store next door to 110 and broke the wall through and made a large circular bar.

Q. Do you recall the cost of this improvement?

A. No, I do not. I think the books will show.

Q. What is your best recollection?

A. I do not remember.

Q. I believe you stated Mr. Remmer advanced the money for that purpose? A. Yes, sir.

Q. Do you know whether or not salaries were paid to Turner and Cavani?

A. Yes, sir. [921]

Q. What was the amount of those salaries?

A. Either $75 or $100 a week; I am not sure.

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(Testimony of William E. Kyne.)

Q. You identified them, I believe, as one the day manager and the other the night manager?

A. Yes, sir; that's correct.

Q. During that portion of the years 1944 to 1946, inclusive, when you were in San Francisco, do you recall how many bartenders were utilized in that business?

A. I believe night time there was two bartenders.

Q. And in the daytime? A. One.

Q. Did either Turner or Cavani serve in that capacity? A. No, sir.

Q. Were you familiar with the operation known as the Menlo Club? A. Yes.

Q. When, if you know, was that acquired?

A. I don't remember — the year 1945 — I was away at the time.

Q. Was that acquired, if you know, while you were in the service? A. Yes, sir.

Q. Now when you returned from the service were you advised by anyone that you had an interest in that establishment? A. Yes, sir.

Q. By whom? [922] A. Mr. Remmer.

Q. And I will ask you whether or not you were given some written agreement with relation to the interest Mr. Remmer told you had? A. I was.

Q. You have that? A. Yes, sir.

Q. Will you produce it?

A. I haven't it.

Q. I beg your pardon?

A. It is in the bank.

Q. Now, Mr. Kyne, you were served with sub-

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(Testimony of William E. Kyne.)

poena, were you not, to produce any records of any partnership you had with Mr. Remmer?

A. Yes, sir.

Q. But you did not produce that record?

A. I did not think it necessary. I believe I gave the agents photostats of it.

Q. You did not think it necessary to produce the original document? A. No.

Q. In what bank is that document located?

A. I think it is in the safe deposit box here in Reno.

Mr. Gillen: Mr. Kyne stated he thought he gave the agents photostatic copies. We have no objection, to facilitate [923] the examination, if Mr. Campbell will use the photostatic copies.

Mr. Campbell: Yes, I will do that, but I wish to explore this situation further.

Mr. Gillen: I don't know what there is to be explored.

The Court: There is nothing before the Court.

Mr. Gillen: May I make this statement?

The Court: There is nothing before the Court.

Mr. Gillen: Counsel is going to explore——

The Court: There is nothing before the Court.

Q. Mr. Kyne, you were requested to produce in the subpoena all records of any description relating to the income tax liabilities of either Elmer F. Remmer or Helen L. Remmer for the years 1944 to 1946, inclusive, records of any partnership or other businesses in which Elmer F. Remmer was engaged. Have you produced any records in response to that subpoena?

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(Testimony of William E. Kyne.)

A. Since 1946, Mr. Campbell, I have given the government agents every record they asked for.

Q. I understand, but have you in your possession at this time any such records?

A. Not on me, no; it is in the safe deposit box.

Q. Can you produce those original records, Mr. Kyne? A. Yes, sir.

Mr. Campbell: I do not mean to infer that this witness has not been cooperative. [924]

Mr. Gillen: Oh, no. We have no objection to the photostatic copy being used.

Q. I am going to show you a photostatic copy of a document and ask you if that is the photostatic copy of the document to which you refer, relative to your interest in the Menlo Club?

A. Yes, sir.

Mr. Campbell: I will offer this in evidence as government's Exhibit 113.

The Court: It may be admitted in evidence.

Mr. Gillen: No objection.

Q. Mr. Kyne, can you identify the two signatures on there? A. Yes, sir.

Q. Whose signatures are they?

A. Remmer and Kyne.

Q. And by Kyne you refer to yourself?

A. Yes, sir.

Q. And by Remmer you refer to Elmer Remmer? A. Yes, sir.

Q. Do you know by whom this document was prepared? A. Joseph Haughey.

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(Testimony of William E. Kyne.)

Q. That is the Joseph Haughey who appeared here? A. Yes, sir.

Mr. Campbell: At this time I should like to read plaintiff's Exhibit 113. (Reads Exhibit 113.)

Q. Mr. Kyne, did you at any time invest any money in the [925] Menlo Club? A. No, sir.

Q. Did you at any time draw any money by way of salary or profit from the Menlo Club?

Mr. Avakian: Your Honor, we again object to that question on the ground it is incompetent, irrelevant and immaterial in this case involving income tax of Mr. Remmer, whether one of the partners actually withdrew his profit or left it in the business to build up his equity. It is immaterial for income tax purposes whether a partner draws his profits or leaves it in the business. He still has to pay tax. It may draw it out or build up his equity, it is immaterial; he still has to pay taxes. He has to pay taxes not on the basis of what he withdraws, but on the basis of what his share is, whether it is left in the business or taken out.

Mr. Campbell: I object to a speech.

The Court: Objection overruled. Answer the question.

Mr. Avakian: May I assign as misconduct the remark of counsel I was making a speech? I have a right to state the grounds of my objection.

The Court: You may. Objection overruled and the witness may answer the question.

(Question read.)

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(Testimony of William E. Kyne.)

A. No, sir.

Q. Will you state, Mr. Kyne, whether or not, as of [926] December 31, 1946, there had been returned to Mr. Remmer, as called for in this agreement, the sum of 175 thousand dollars?

A. I wouldn't know.

Q. Do you know whether or not, as of December 31, 1946, your 15 per cent interest in the business had come into being?

A. Will you repeat that, please?

(Question read.)

A. I wouldn't know that.

Q. Now, Mr. Kyne, do you know whether or not a bank account was maintained for the Menlo Club?

A. I believe there was; yes, sir.

Q. And in what name was it maintained?

A. I think there was one bank account in my name and one in Harold Maundrell's.

Q. In your personal names, as you recall?

A. Yes, sir.

Q. And where was the bank account which was in your name?

A. It was the Day and Night branch of the Bank of America, No. 1 Powell Street.

Q. Was there more than one authorized signator on that account? A. That I don't remember.

Q. Do you know where the bank account in the name of Harold Maundrell was maintained?

A. I believe it was at the Crocker Bank.

Q. Were you the authorized signature on that account? [927] A. I do not remember.

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(Testimony of William E. Kyne.)

Q. Were you familiar with the business prior to your return from the army? A. No, sir.

Q. Now after you returned from the army, did you take any active part in the operation of that business? A. Yes, sir.

Q. What was the nature of your activity?

A. For a while I kept the monies and the records pertaining to the Menlo Club.

Q. By records do you refer to books of account?

A. No, just the money and the sheets.

Q. By sheets to what do you refer?

A. Daily record.

Q. What was the business of the Menlo Club?

A. Social club, card room.

Q. You say social club, card room; were there licenses in connection with that business?

A. I believe they had some kind of a permit.

Q. Do you know whose name that was in?

A. No, I don't.

Q. I will ask to have these three sets of sheets headed "Poker" marked Exhibits for Identification 114, 114A and 114B, respectively. What were the business hours of the Menlo Club?

A. Open twenty-four hours a day. [928]

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

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December 17, 1951—1:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Kyne, prior to the recess you had been testifying concerning the Menlo Club and you referred to sheets which were delivered to you. I am going to show you government's Exhibits 114, 114A and 114B for identification and ask you first if you recognize this type of record? A. Yes, sir.

Q. And I will ask you if those were the type of sheets which you referred to as having been delivered to you daily from the Menlo Club?

A. Yes, sir.

Q. What is the nature of those sheets?

A. Well, I am not too well acquainted with them, Mr. Campbell. There are markers and also record of the employees here.

Q. Now when such sheets were delivered to you, what did you do with them?

A. Bundled them up and put them in a box.

Q. Did you make entries into any other records from them? [929] A. No, sir.

Q. Do you know whether or not the figures set forth on those sheets, or any of the figures, were entered into any books? A. No, sir.

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(Testimony of William E. Kyne.)

Q. You do recognize these as sheets from the Menlo Club? A. Yes, sir.

Mr. Campbell: They will be offered in evidence under the numbers heretofore given, 114, 114A and 114B, respectively.

Mr. Gillen: Just a moment. I would like to examine the witness on voir dire before they are admitted in evidence, your Honor.

The Court: You may do so.

Q. (By Mr. Gillen): Mr. Kyne, will you look at those sheets and tell us whether or not you actually recognize them as sheets from the Menlo Club or types used?

A. There are names on there of employees—Joe Atkinson—that I recognize they work at the Menlo Club.

Q. Can you say from your own knowledge whether those are sheets from the Menlo Club?

A. Well, it is the type sheet that was used over there, and I know most of these names.

Q. Do you know whether, from looking at this, those are some of the sheets that you turned over to the Internal Revenue agents that they promised to return to you?

A. I wouldn't know that. [930]

Q. You wouldn't know that?

A. I am just recognizing the employees' names here.

Q. Was it your testimony, Mr. Kyne, that because the type of sheets look the same and because you recognized some of the names on the sheets,

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(Testimony of William E. Kyne.)

you concluded from that that they must have come from the Menlo Club? A. Yes.

Mr. Gillen: I think, your Honor, they are not properly identified.

Mr. Campbell: I renew my offer.

The Court: Objection overruled. Admitted, 114, 114A, 114B.

Mr. Golden: May it be understood, your Honor, that we have the same standing objection to those records on the ground that they were illegally obtained and promised to return them?

The Court: If you want that objection in this record, too, you may have it.

Q. (By Mr. Campbell): Mr. Kyne, I call your attention to government's Exhibit 114, which consists of two sheets, both dated January 1, 1946, and in the upper left-hand portion of this sheet appears the heading, "Mine Alone," under which appears certain figures, against which there is a column headed "Name" and certain names bearing "Return," with certain amounts set forth, "ours" and "ours." Do you know to what that refers?

A. No, I do not. [931]

Q. Do you recognize any of the names appearing herein—one of Miller; do you recognize the name Miller?

A. I recognize Olson, Fricker; not Miller.

Q. Referring to this portion, the upper left-hand portion, first page?

A. Fricker worked for the Menlo Club; and I also recognize Oscar Nelson.

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(Testimony of William E. Kyne.)

Q. Did he also work for the Menlo Club?

A. He was the manager.

Q. Do you recognize any of the other names in that column, upper left-hand column?

Mr. Gillen: Is that the same exhibit?

Mr. Campbell: Yes, the same exhibit.

A. No, sir; those are all the names that I recognize.

Q. Do you know what is meant by "Mine alone," set forth against your name?

A. No, I do not.

Mr. Gillen: Objected to as asked and answered.

The Court: He has already answered the question; he didn't know.

Q. Do you know what is meant by these amounts set forth under the heading "Return"?

Mr. Gillen: Objected to on the same ground, already asked and answered.

The Court: Objection overruled. [932]

A. I believe it refers to the time, but I am not sure.

Mr. Gillen: I move it be stricken if he isn't sure.

The Court: It may go out.

Q. Now calling your attention to the figures at the bottom of the left-hand column, "Sheet Win $75.50," do you know what that refers to?

A. No, I wouldn't know.

Q. You don't know? A. No, sir.

Q. I call your attention to the initials BR $10,000; do you know what that refers to?

A. No, I wouldn't know.

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(Testimony of William E. Kyne.)

Q. I call your attention to the language, "New top"; do you know to what that refers, $10,075?

A. No, I wouldn't know.

Q. I call your attention to the names appearing under the heading "Incidentals," number of names with certain amounts, ranging from $6 to $20, appearing opposite the name, and ask you if you recognize any of those names?

A. I recognize about three names on here.

Q. Which names do you recognize?

A. Fricker, Nelson and Atkinson. He is not here on this sheet. Those are names I recognize as employees.

Q. Was Atkinson also an employee?

A. Yes, sir. [933]

Q. I call your attention to the second page dated January 1, 1946, to the language appearing, "Sheet Win $265.50"; do you know what that means?

A. No, I don't.

Q. The "Old top," $10,075? A. No, sir.

Q. And the figure, "Cash $10,341"; do you know what that means? A. No, sir.

Q. Were you present at any time during the making of records, either this or similar records?

A. No, sir. They were made three times a day.

Q. Will you explain that; how did that come about?

A. Three eight-hour shifts, and whoever came on to work in the cage made out his own sheets.

Q. So that, for example, calling your attention to plaintiff's Exhibit 114A, which consists of three

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(Testimony of William E. Kyne.)

sheets, all dated December 31, 1946, will you examine those and state whether or not they represent the three shifts for that date?

Mr. Gillen: I imagine, your Honor, the shifts are around the clock; the third shift would be in the morning of January 1, 1947. It wouldn't be all three shifts under one date; if there were three 8-hour shifts, one would be after midnight.

The Court: It might start at 12:01?

Mr. Gillen: That is right; there would be two different dates at least. [934]

Mr. Campbell: Not necessarily.

The Court: Well, you may proceed.

A. That looks like a complete set for 24 hours.

Q. Could you state, from your knowledge of the operation of the club, what 24 hours would be covered by a set of three shifts bearing the same date?

A. Wherever you start her off at, from 12 to 12.

Q. That is my inquiry; when did you start her off? A. That I don't know.

Q. After you returned from the service, Mr. Kyne, what portion of your time was spent at the Menlo Club?

A. About five minutes each day.

Q. And what duties did you perform there in that five minutes?

A. I received whatever money was left in the safe.

Q. And what did you do with it?

A. Put it in my box.

Q. And which box? A. 48.

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(Testimony of William E. Kyne.)

Q. That is the box of the Day and Night branch of the Bank of America? A. Yes, sir.

Q. I believe you testified that you and Mr. Remmer had access to that box? A. Yes, sir.

Q. Can you state whether or not that money was subsequently all [935] transferred to the bank account?

A. I think in October we opened up a bank account.

Q. After the bank account was opened were the entire daily receipts placed in the bank account?

A. I don't remember.

Q. Let me ask you this—when you stopped by there daily to pick up the money, did you place in the safety deposit box all of the money that you picked up? A. Not always; no, sir.

Q. What would you do with money which you did not place in the safety deposit box?

A. If I needed it in some other spot I used it.

Q. When you say when you needed it in some other spot, was that for your personal use?

A. No, sir.

Q. What was the use of that?

A. Went to 110 Eddy Club or the 186 Club, or Day-Night Cigar Store.

Q. Did you retain any of that money for your personal use? A. No, sir.

Q. Will you *state or* not more was placed in the bank than was required to pay current accruing bills? A. Most of it went to the bank.

Q. At the time you picked up the money at the

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(Testimony of William E. Kyne.)

Menlo Club, did you check it against the daily [936] sheets? A. No, sir.

Q. From whom would you receive the money when you picked it up?

A. It was put in the safe.

Q. By whom?

A. By anyone who was in charge on the last shift.

Q. Will you name those individuals during that period of time when you came back from the service and up until the end of 1946?

A. Joseph Silva and Oscar Nelson.

Q. You referred to Oscar Nelson as a manager. Did he have any particular period of time in which he served in that capacity?

A. Usually night time.

Q. And what period during the period of day did Silva serve? A. Night also.

Q. Who, if anyone, served in the day time?

A. Fricker is the only one I can think of right now.

Q. In what manner would money be left in the safe for you? A. Usually in an envelope.

Q. Will you state whether or not there was any accounting slip of any kind in that connection?

A. A total written on the envelope.

Q. You say after the bank account was opened that you were the authorized signator on one of the two accounts? A. Yes, sir.

Mr. Campbell: May I have check dated November 7th marked [937] 115 for identification.

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(Testimony of William E. Kyne.)

Q. I show you this exhibit, Mr. Kyne, 115 for identification, and ask you if you recognize that?

A. Yes, sir.

Q. Is that your signature appearing as drawer of the check? A. Yes, sir.

Q. And is that also your signature appearing as endorser of the check? A. Yes, sir.

Q. And on what account was this check drawn?

A. Menlo Club.

Q. What, if anything, did you do with the proceeds of the check?

A. Gave it to Mr. Remmer.

Mr. Campbell: I will ask that this be received in evidence as government's Exhibit 115.

Mr. Golden: Same objection, your Honor, on the grounds it is illegally acquired and retained.

The Court: Objection overruled and exhibit is admitted in evidence.

Q. Now, Mr. Kyne, I call your attention to the fact that this is check dated November 7, 1946, payable to W. E. Kyne in amount of 65 thousand dollars, signed Menlo Club, Wm. E. Kyne, and in typing on the side, "Apply to Elmer Remmer." Did you type up this check?

A. Yes, sir. [938]

Q. At whose request? A. Mr. Remmer.

Q. I notice it bears your endorsement on the back. Did you cash this check? A. Yes, sir.

Q. And did you receive cash for it from the bank? A. Yes, sir.

Q. And I believe you stated you turned the cash over to Mr. Remmer? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. And on what date?

A. Same day it was issued.

Q. Where did you cash it? I notice the bank perforation is November 8, 1945.

A. It was Day and Night branch; they probably carried it over through the morning hours.

Q. Do you know what was done with this money? A. No, I don't.

Q. Do you recall the form in which you received 65 thousand dollars?

A. I think it was in thousand dollar bills; I am not sure.

Q. What is your best recollection?

A. Large bills.

Q. And where did you deliver that to Mr. Remmer? A. 50 Mason Street. [939]

Q. Now for the moment I wish to refer back, Mr. Kyne, to the B & R Smoke Shoppe.

Mr. Avakian: May I inquire of counsel whether he has concluded questioning the witness regarding that particular check?

Mr. Campbell: Not necessarily.

Mr. Avakian: When it was concluded, we assumed it would be connected. If he is not through, I will reserve my motion.

The Court: Proceed.

Q. Incidentally, Mr. Kyne, what do the initials B. R. of B & R Smoke Shoppe stand for?

A. Bank roll.

Q. Who, incidentally, decided on that name?

Mr. Gillen: What difference would it make? In-

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(Testimony of William E. Kyne.)

competent, irrelevant and immaterial. It is something started back in 1942.

The Court: I think so. I agree with counsel. Objection sustained.

Mr. Campbell: Very well.

Q. Coming back for a moment to the lay-off bets, that is, lay-off bets you made and lay-off bets received by you from others. How often were settlements had as between yourself and other bookmakers?

A. It varied from one day to a month. [940]

Q. And what form did those settlements take, Mr. Kyne?

A. I usually paid off with a cashier's check.

Q. You say usually—was there any other method of paying off?

A. If a party was in town and wanted cash, I usually give it to him.

Q. In what manner were you paid off on what was coming in?

A. Cash or cashier's check.

Q. The same manner? A. Yes, sir.

Q. Now so far as arrangements for lay-off, or accepting lay-off bets from others, who made those arrangements?

A. Either the party producing new players or——

Q. So far as other bookmakers were concerned?

A. Will you repeat that question?

A. Through people I knew or Mr. Remmer or Mr. Lando.

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(Testimony of William E. Kyne.)

Q. Now so far as your payments were concerned, where were the cashier's checks purchased?

A. Most of them at the Day and Night Branch, Bank of America.

Q. I wish to have these checks marked government's next exhibit for identification in order.

Clerk: 116.

Mr. Avakian: Your Honor, counsel handed us additional sheets, one packet relating entirely to 1942 and another packet entirely to the year 1943. May we inquire whether counsel intended to go ahead with those two years also? [941]

Mr. Campbell: Yes.

Q. I am going to hand you these sheets, Mr. Kyne, and ask you if you recognize them?

A. Yes, sir.

Q. What do they purport to represent, without stating the items?

A. Payments to bookmakers.

Q. Will you state whether or not that is by way of cashier's checks which were purchased?

A. Yes, sir; that is a record of the bank.

Mr. Campbell: I am going to ask that these be received in evidence, with the exception—I am going to withdraw this last page upon which the clerk has placed his stamp, and as to the last page which now remains, only the items running to December, 1946. The balance we will arrange to black off in some way.

Mr. Gillen: I would like to examine this witness on voir dire in regard to these accounts, may it

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(Testimony of William E. Kyne.)

please the Court, before they are admitted in evidence.

The Court: You may do so.

Q. (By Mr. Gillen): Mr. Kyne, will you look at those sheets and tell us whether or not you personally prepared those sheets?

A. No, sir. I imagine the Bank of America prepared them.

Q. You imagine the Bank of America [942] prepared them? A. Yes, sir.

Q. You don't know of your own knowledge who prepared them? A. No, I do not.

Q. Had you seen those before coming to court?

A. I believe I did see this one here.

Q. When, where, and under what circumstances?

A. Each year I used to pay the clerks at the Bank of America so much to go through their files to give me a complete record what checks were purchased, and that is one of the records.

Q. I think you recognized the year 1943 for checks purchased in 1942? A. Yes, sir.

Q. Do you recognize any other?

A. No, these other two I do not.

Q. So it is your belief that these sheets which Mr. Campbell handed you are probably sheets that were prepared for you by somebody in the Bank of America as a special courtesy, at your request?

A. Yes, sir; a record.

Q. To give you a record of cashier checks purchased? A. All checks going out.

Q. Now you are not in position to say whether

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(Testimony of William E. Kyne.)

or not this truly reflects all the cashier's checks that you purchased? A. No, I am not.

Mr. Gillen: I will offer the objection, may it please [943] the Court, that these records which are offered are records which were not either prepared or kept by Mr. Kyne in the ordinary course of his business, or that it was his business to keep those records; that he believes they comprise records that he had prepared as a special courtesy to him, in order to enable him to try to keep track of his affairs; that they were prepared by some other persons; that he does not know the accuracy or correctness of those records, and I do not think under those circumstances they could be identified as evidence of what they are claimed to portray and, of course, as your Honor readily recognizes, under those circumstances we are left bereft of any opportunity to cross-examine whoever prepared them from whatever records and therefore deprived of that cross-examination, so I do not think Mr. Kyne is the witness who can properly establish the foundation, or would he establish the foundation, for admission of such documents in evidence. Your Honor will recall that we had a man here from the Bank of America who produced a goodly number of records here and identified them, had familiarity with them, and that is one of the few witnesses who had complete familiarity with what he brought into court.

Mr. Campbell: I object to the last statement. I think that is uncalled for.

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(Testimony of William E. Kyne.)

The Court: I think that ought to be stricken. It will be stricken from the record, that last [944] statement.

Mr. Gillen: I mention that because your Honor recognized it and became irritated with the lack of knowledge——

The Court: Objection will be overruled.

Mr. Campbell: I would like to ask further questions of the witness.

The Court: You may do so.

Q. (By Mr. Campbell): Mr. Kyne, will you examine these sheets, which consist of a large number of items, and will you state whether or not the items set forth here of cashier's checks purchased in the amounts stated and upon the dates stated to the best of your recollection?

A. I believe that is a record of cashier's checks——

The Court: Wait a minute—do you want to make an objection?

Mr. Gillen: Your Honor, that still does not cure the lack of foundation. Some of those names might be names he recognizes as people he sent cashier's checks to, but in toto the last question propounded by Mr. Campbell would not cure the lack of foundation and would not enable us to cross-examine the proper person.

The Court: Objection overruled. Let us have the question read.

A. I believe this is a record of cashier's checks I purchased at the Bank of America.

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(Testimony of William E. Kyne.)

Mr. Campbell: I renew my offer.

Mr. Golden: May I inquire further on voir dire?

The Court: Yes. [945]

Q. (By Mr. Golden): Mr. Kyne, do you know that this is record of cashier's checks that you purchased from the Bank of America during the years that are set forth on these sheets?

A. I couldn't swear to it, but those are the names of people I did business with.

Q. Do you know whether it comprises a complete list?

A. I paid for a complete list from the bank.

Q. My question is, do you know whether it comprises a complete list, of your own knowledge?

A. I do not know. I paid for a complete list.

Q. I understand you asked the man to give you a complete list and paid him for it? A. Yes.

Q. But you did not look at the bank records yourself? A. No.

Q. You relied on him to supply it?

A. Yes.

Q. You don't know how many errors, how many wrong amounts may be represented, how many names left out or how many other names picked up that didn't belong there? A. No, sir.

Mr. Golden: I submit, your Honor, we are in a position where we are not able to cross-examine, if this exhibit is allowed to go into the record, the person who prepared it. Mr. Kyne cannot say this is an accurate list. He paid [946] someone especially to do that work, but he did not go over the

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(Testimony of William E. Kyne.)

records and cannot say whether he got a correct list or not.

The Court: Objection is overruled. The exhibit will be admitted.

Mr. Gillen: May I have another objection to admission of the exhibit upon the same grounds urged so frequently, the illegality of obtaining and retaining of the documents by the Internal Revenue Department?

The Court: Yes, that objection will be considered as made. Objection overruled. Exhibit admitted in evidence.

Q. (By Mr. Campbell): Mr. Kyne, did you maintain any record of the cashier's checks received by you in connection with the B & R Smoke Shoppe? A. No, sir.

Q. You understand I refer to payments made by others to the B & R Smoke Shoppe; is that correct?

A. Yes, sir.

Q. Now when you received cashier checks——

Mr. Gillen: May I interrupt a minute, may it please the Court. I think for the record I should add to my objection, although your Honor has already ruled, if you will permit me to do so.

The Court: You may do so.

Mr. Gillen: I should add that this exhibit is entirely [947] hearsay. In other words, it is not the best evidence. The best evidence would be the bank records of the bank, of which we had many produced of the identical exact cashier's checks produced by this witness over the period of time, and

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(Testimony of William E. Kyne.)

also urge again to your Honor that we are absolutely powerless to cross-examine on accuracy, and also they were produced not by the witness on the witness stand as records, but they were produced by Mr. Campbell, the prosecutor. Of course, your Honor can see that Mr. Kyne could have made his own record every time he purchased a cashier's check, then we would be in position to cross-examine him, but he called on somebody else to make a record for him, and there we are.

The Court: The objection is overruled and the ruling admitting the exhibit in evidence will stand.

Mr. Gillen: Is that all one exhibit?

Mr. Campbell: That is one exhibit, with the exception of those items appearing after date of December 31, 1946, which I will arrange to black out.

Mr. Gillen: I wonder if we might find out how many sheets there are in that exhibit?

Mr. Campbell: 27 sheets.

Mr. Gillen: I think also, your Honor, that we should specifically object——

The Court: I am not going to entertain any further objections. [948]

Mr. Gillen: This is a new objection just called to my attention.

The Court: No, I think objection should be made when the exhibit is offered. I do not want to hear any more.

Mr. Gillen: There are two earlier years in there, your Honor.

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(Testimony of William E. Kyne.)

The Court: I do not want to hear any other objections.

Mr. Gillen: Well, I move to strike that portion of the exhibit that refers to the years 1942 and 1943, as being beyond the scope of the time bracket fixed in the indictment, which we will recall was 1944 to 1946, inclusive.

The Court: The motion is denied.

Q. Mr. Kyne, did you have anything to do with the preparation of Mr. Remmer's personal income tax returns? A. No, sir.

Q. I am going to show you defendant's Exhibit H, a letter dated March 7, 1947, which purports to be a carbon copy of letter dated March 7th under the signature of Pat Mooney, and ask you if you received the original of that letter?

A. I do not remember.

Q. Do you remember ever having seen the original of that letter? A. I do not remember.

Q. Mr. Kyne, are you familiar with the operations known as the 186 Club and the Day-Night Cigar Store? [949] A. Yes, sir.

Q. Do you recall when they were acquired?

A. Either '42 or '43.

Q. Do you recall from whom they were acquired?

A. Max Silverman.

Q. I am going to call your attention to government's Exhibit 20, document dated February 4, 1943, and bearing the typed signature of Max Silverman and Willie Kyne, and ask you if you recall that document?

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(Testimony of William E. Kyne.)

A. I don't remember that paper, but that was the price for the back room.

Q. The amount set forth here of 16 thousand dollars? A. Yes, sir.

Q. You say that was the back room?

A. Yes, sir.

Q. Does the date February 4, 1943, which is set forth on this document, refresh your recollection as to the date that that business was acquired?

A. About that time; yes, sir.

Q. That will be your best recollection?

A. Yes, sir.

Q. Now you refer to the back room; was there also a front room; also a business in the front room, was there not?

A. Yes, sir; Day-Night Cigar Store.

Q. And the room in back was known as the 186 Club? [950] A. Yes, sir.

Q. Now you have stated the price for the back room was 16 thousand dollars. Do you recall who put up the money?

A. Carl Nealis and Jess Kopstick.

Q. Did you handle the money yourself?

A. Either gave the money to Elmer Remmer or myself.

Q. Did you transmit the money to Mr. Silverman?

A. Yes, sir; in the form of cashier's check.

Q. Did you purchase the cashier's check?

A. I believe so.

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(Testimony of William E. Kyne.)

Q. Do you recall in what form Mr. Kopstick and Mr. Nealis put up the 16 thousand dollars?

A. Probably cash.

Q. Do you recall where you purchased the cashier's check?

A. I think it was the Bank of America.

Q. Now at the time that was acquired, that is the back room, 186 Club, in approximately February, 1943, who was interested in that club?

A. There were seven people in all.

Q. Who were those seven people?

A. Jess Kopstick, Carl Nealis, Attilio Casselini, Bert Bustrano, Elmer Remmer, Willie Kyne, and Sylvan Lando.

Q. What interest did each of them have in that operation? A. One-sixth.

Q. You have seven people and you say it was divided into [951] sixths; will you explain that?

A. Carl Nealis and Jess Kopstick had one share, one-sixth.

Q. In the acquisition of that for 16 thousand dollars, you say that money was entirely put up by them? A. Yes, sir.

Q. Did anybody else put up any money in connection with the acquisition of the back room?

A. None for the back room; no, sir.

Q. And for that 16 thousand dollars together they received one-sixth interest? A. Yes, sir.

Q. And the other five people you named each had one-sixth? A. Yes, sir.

Q. Did you put up any money?

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(Testimony of William E. Kyne.)

A. No, sir.

Q. How long did Carl Nealis and Jess Kopstick remain interested in that business?

A. I believe they filed for one year.

Q. Was that the year 1943, the first year?

A. Yes, sir.

Q. After that what occurred, so far as their interest was concerned?

A. I think they drew their money out. I believe they drew that money out.

Q. At any rate, were they repaid their [952] money? A. Yes, sir.

Q. And after the first year——

Mr. Gillen: Just a minute. I wonder if we can get these things settled from the witness, may it please the court, without a suggestion. Mr. Kyne said he believed they drew their money out; counsel suggested they were paid that money back. I think if counsel will ask the witness, the witness will testify what he knows, and if he doesn't know he can say so.

The Court: Try to avoid leading questions, Mr. Campbell.

Mr. Campbell: I will to the best of my ability.

Q. Were you present at the time that Kopstick and Nealis withdrew from the partnership?

A. I don't remember.

Q. Do you recall in what manner or method they obtained their money?

A. I believe I paid them back.

Q. And what was the source of the money which

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(Testimony of William E. Kyne.)

you paid them back? A. The club, 186 Club.

Q. Was there a bank account maintained for the 186 Club? A. No, sir.

Q. In what form did you pay them the money?

A. Cash.

Q. And you say the source of the cash was the 186 Club? A. Yes, sir. [953]

Q. Where was the cash belonging to the 186 Club kept? A. Box 48.

Q. That is in the Day and Night Branch of the Bank of America? A. Yes, sir.

Q. And will you state whether or not you were acting on any one's instructions when you paid them back? A. No, sir.

Q. Will you relate the circumstances under which you paid them back?

A. They wanted their money back so I gave it to them as promptly as it came in.

Q. And how much did you pay them?

A. Sixteen thousand.

Q. After they left or withdrew from the partnership, what were the interests in the 186 Club?

A. It was equal share.

Q. Well, that left five of you, is that correct?

A. Yes, sir.

Q. Well, prior to the end of 1946 did any of the others withdraw? A. Yes, sir.

Q. Who?

A. I may be mistaken there, Mr. Campbell. I think that Lando and Casselini withdrew, but I am not sure as to the exact year.

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(Testimony of William E. Kyne.)

Q. At the time they withdrew, were they paid any money? [954] A. Not to my knowledge.

Q. Did you pay them any money?

A. No, sir.

Q. Now so far as your interest in the 186 Club was concerned, was any written agreement entered into?

A. I believe we had—I think we had papers concerning a partnership the first year until they changed into a corporation, but I am not sure.

Q. Now will you describe the nature of the operations of the 186 Club?

A. It was a card room, open 24 hours a day.

Q. Was that operation similar to that of the Menlo Club? A. Same type, yes, sir.

Q. Who were the managers there?

A. Bert Bustrano was manager.

Q. What hours, if any, did he serve as manager? A. Mostly at night time.

Q. Who served in the day hours?

A. Oh, different floor forces, I don't remember the names,

Q. I am going to show you government's Exhibits 110 to 110F for identification, sheets headed "Poker," and ask you first if you are familiar with such sheets? A. Yes, sir.

Mr. Avakian: Your Honor, may we raise objection to that question and be permitted—— [955]

The Court: No, it is too late. You want it on the regular ground?

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(Testimony of William E. Kyne.)

Mr. Avakian: No, as to the form of the question.

The Court: No, it is too late. The question has been answered.

Mr. Avakian: May we move to strike?

The Court: Motion denied because there was no objection made before the answer.

Mr. Avakian: He answered before we could speak, your Honor.

The Court: The ruling will stand.

Mr. Gillen: Will your Honor instruct the witness not to answer quite so fast?

The Court: Yes, do not answer immediately the question is propounded. Give counsel an opportunity to object.

Q. Do you recognize those particular sheets?

A. Yes, sir.

Q. Do you recognize the handwriting thereon?

A. No, sir.

Q. Now in the course of your connection with the 186 Club, were sheets similar to these delivered to you? A. Yes, sir.

Q. And by whom?

A. They were left in the cage and I used to pick them up every [956] morning.

Q. Now how much of your time was spent on the premises of the 186 Club?

A. About five minutes.

Q. A day? A. Daily.

Q. What did you do there other than pick up these sheets?

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(Testimony of William E. Kyne.)

A. Pick up what money there was.

Q. And that was money, you say, that was kept in Box 48? A. Yes, sir.

Q. Where was the money kept on the premises?

A. In the cage.

Q. Cashier's cage? A. Yes.

Q. In connection with your services, did you draw any salary from the 186 Club?

A. At the time I was in the army my wife drew ten dollars a day. That was from the Day-Night, nothing from the 186.

Q. Did you at any time draw a salary?

A. No, sir.

Q. Did you at any time receive any profits from the 186 Club? A. No, sir.

Q. Did you at any time make any investment in the 186 Club? A. No, sir.

Q. So far as the other people whom you say were participating [957] there were concerned, do you know whether or not Mr. Busterno drew a salary?

A. I believe he drew twenty or twenty-five dollars a day, I am not sure.

Q. Do you know whether or not Mr. Lando drew any salary? A. No, he did not.

Q. Do you know whether or not Attillio Cassenili drew any salary? A. No, sir.

Q. Incidentally, Mr. Cassenili is usually known by some other name? A. Dutch White.

Q. Do you know whether or not he drew any salary? A. No, sir.

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(Testimony of William E. Kyne.)

Q. Do you know whether or not any of those individuals drew any profits from the 186 Club?

A. No, I don't.

(Jury and alternate jurors admonished and recess taken at 2:50 for 15 minutes.)

3:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now after you picked up the sheets from the 186 Club, Mr. [958] Kyne, what did you do with them? A. Put them in a box.

Q. On what premises? A. 50 Mason.

Q. That is where you maintained your office?

A. Yes, sir.

Q. And was that also Mr. Remmer's office?

A. Yes, sir.

Q. I believe you stated that you recognized these sheets? A. Yes, sir.

Q. I notice, Mr. Kyne, there are several sheets in each group. I will hand you the top group, appears to be that of December 30, 1944, which is

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(Testimony of William E. Kyne.)

marked 110A for identification. Can you explain why there are several sheets as to that day?

A. There would be three shifts.

Q. There are some five sheets there. Occasionally were there more than one sheet used on a shift?

A. Between the markers and employees there might be more than one sheet, yes.

Mr. Campbell: I am going to offer these sheets in evidence as government's Exhibits 110A to F inclusive.

Mr. Gillen: May it please the Court, if I recollect Mr. Kyne's testimony correctly, he couldn't recognize the handwriting on those sheets. I might be in error, but I would like to examine him on voir dire. [959]

Mr. Campbell: I believe that is a correct statement.

Mr. Gillen: If that is correct, he can not identify the sheets. Of course, those sheets were produced by the prosecution and not by the witness. He says he does not recognize the handwriting and at one point in his testimony, if I recall, he stated they appeared similar to sheets used at the 186 Club. That is as near as he comes. We are entitled, of course to the person who made the sheets and who is familiar with them. Mr. Kyne's only connection with the sheets seems to be that he picked them up at one place and deposited them in another place, without any checking or anything of the sort. So I submit, first of all, no proper foundation has been laid from this witness to entitle those sheets

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(Testimony of William E. Kyne.)

to be entered into evidence. Of course, in addition, to that, I think at this time I should make the original objection that is made to all of these documents, the grounds of which have been fully stated and restated.

Mr. Campbell: I might say also there was a partial identification by Mr. Lando of these sheets.

Mr. Gillen: Mr. Lando didn't recognize them at all, as I recall.

Mr. Campbell: You may be correct. I don't have the transcript of his testimony.

Mr. Gillen: I think the reason why they did not go into evidence is because Mr. Lando did not recognize them. [960]

Mr. Campbell: May I be permitted to ask a few more questions of this witness before renewing the offer?

The Court: Yes.

Q. Using plaintiff's Exihibt 110A for identification as an example, and particularly referring to the names appearing in the left-hand column, do you recognize those names, Mr. Kyne?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, may it please the Court, whether he recognizes names or not, that still would not lay the foundation as to the accuracy of the contents of the sheets and still would not furnish us with an opportunity to cross-examine the person familiar with them.

The Court: That may be just one question in an attempt to lay a foundation. Objection overruled.

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(Testimony of William E. Kyne.)

Mr. Campbell: Yes, your Honor.

Q. You may answer this yes or no, Mr. Kyne.

A. Will you repeat the question?

(Question read.)

A. Yes.

Q. And will you state at this time whether or not you recognize names appearing there of those who were connected with the business, either as partners or as employees?

A. I recognize four names here.

Q. And what was the nature of the connection of those individuals with the business? [961]

A. So much credit on the house.

Q. Will you state whether or not any of those were employees or partners?

A. Three of them partners, one was an employee.

Q. Mr. Kyne, will you state whether or not it was a regular part of the operation of the 186 Club to make up sheets during the course of each day of operation of the type which you hold in your hand?

A. Yes, sir.

Mr. Gillen: May it be considered my objection goes to all these questions as incompetent, irrelevant and immaterial, and still not laying the proper foundation?

The Court: Your objection to this question will be overruled.

Q. Calling your attention to the other exhibits in the group, that is 110 for identification and 110B

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(Testimony of William E. Kyne.)

to F for identification, I will ask you whether or not these are sheets of a similar nature to that which I showed you which was 110A?

A. Yes, sir.

Q. And do you also recognize the names of partners and employees thereon? A. Yes, sir.

Q. Now after you received such sheets, Mr. Kyne, did you examine them?

A. No, sir. [962]

Q. Do you know if any one examined them?

A. No, sir.

Q. Were any entries made in any books of such sheets? A. No, sir.

Mr. Avakian: Was the question if he knew or if any were made?

(Question read.)

Mr. Avakian: May we ask the answer be stricken? There is no foundation as to his knowledge as to whether he knew.

The Court: The answer will stand.

Q. Mr. Kyne, did you at any time see any books or records purporting to be books and records of the 186 Club? A. No, sir.

Q. Now calling your attention again to these sheets, Mr. Kyne, was it a part of your duties to pick up such sheets from the 186 Club and deliver them to the office at 50 Mason Street?

Mr. Gillen: Objected to as asked and answered, leading and suggestive and also incompetent, irrele-

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(Testimony of William E. Kyne.)

vant and immaterial because it lays no foundation for the admission of these sheets in evidence.

The Court: Objection overruled. You may answer the question.

A. Yes, sir.

Q. Now did you subsequently, Mr. Kyne, deliver to the agents of the Bureau of Internal Revenue the books containing the [963] Poker sheets?

A. Yes, sir.

Q. And did they contain all of such Poker sheets as were in your possession at that time?

A. Yes, sir.

Q. Do you recall the date of that?

A. No, I do not.

Mr. Campbell: I am going to renew the offer at this time, if the Court please, of Exhibits 110 to 110F, inclusive, in evidence.

Mr. Gillen: May it please the Court, he has done absolutely nothing to lay the foundation in the first place.

Mr. Campbell: I ask counsel state his objection rather than making a statement of that kind.

Mr. Gillen: I am stating my objection and I am not making a speech.

The Court: What is your objection?

Mr. Gillen: My objection is, may it please the Court, counsel has gotten no farther in the matter of laying foundation than initially when he made his offer. Now if I may point out to your Honor, the asking of the question by Mr. Campbell if Mr. Kyne recognized a name, that does not establish the

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(Testimony of William E. Kyne.)

truth or authenticity or accuracy of anything about the exhibit, because I may write your Honor a letter and mention another man's name and if your Honor was asked if you recognize [964] the name I mentioned, you might say yes, but that still wouldn't place your Honor in the position of establishing the authenticity of anything written in that letter or anything about it and I think there are other means counsel has of getting those records in. Apparently the agents picked those up from Mr. Kyne. They wouldn't know whether they are the same records picked up by Mr. Kyne, there is a question then whether or not they were authentic records of this particular enterprise. It has been indicated here that their enterprises had the same sheets and whether or not one sheet from one place or another belonged to either place, has not been established by this witness' testimony. He is not in position to recognize the handwriting or whether he actually picked up those records from that particular enterprise. He never checked, simply picked up at one place, delivered to another place, without looking at them or using or in any wise utilizing them in connection with his duties and I submit, your Honor, of course whatever is in the records Mr. Kyne is not in position to answer so any cross-examination wouldn't be evidence on them.

The Court: I think we may sum up the situation this way. It has been shown that records similar to these exhibits were kept in the regular course of business, but so far it can not be said that these rec-

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(Testimony of William E. Kyne.)

ords were kept in the regular course of business of this institution. We have gone so far and no farther to [965] show that records similar to this exhibit were kept in the course of business. I will sustain the objection.

Mr. Gillen: May I respectfully call your Honor's attention to Exhibit 114 in evidence, and 114A and 114B. Those exhibits are in the identical position as the exhibits offered here and may I respectfully ask your Honor to reconsider the ruling. Those were admitted with no greater foundation than in this instance. I think, your Honor, if you refer to the record you will see that Mr. Kyne was unable to lay a foundation for the authenticity of those records as he was in this case.

Mr. Campbell: It occurs to me that the objection was entered at great length at the time and passed upon by the Court.

The Court: If you point out to me at any time that a ruling made here was erroneous, I am perfectly willing to vacate that ruling.

Mr. Gillen: Whatever your Honor suggests. I think the record will reflect the positions are identical.

The Court: I think it can be said of these records, 110 to 110F, it has been shown records similar to those were kept in the regular course of business but it has not been shown that these particular records were kept in the regular course of business. If [966] that is the same situation as to 114, 114A and 114B, I will vacate the ruling.

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(Testimony of William E. Kyne.)

Mr. Gillen: I think your Honor will find it is identical. If your Honor would rather wait until the transcript is written up tomorrow, we will call it to your Honor's attention at that time.

The Court: Very well.

Q. Referring, Mr. Kyne, to Exhibit 110 for identification, which consists of some nine sheets, I refer first to the first sheet and ask you if you recognize any of the handwriting on that page?

Mr. Gillen: Objected to first of all, already asked and answered; secondly, that it is referring to an exhibit that has already been excluded from evidence by your Honor. The foundation will have to be laid before counsel can use that.

The Court: Objection overruled.

Q. I wish you would go through this exhibit page by page and state whether or not you recognize any of the various handwritings which appear?

A. I wouldn't recognize any handwriting.

Q. Now I call your attention on the first page to the name Kyne and amount set forth opposite. Does that in any way refresh your recollection?

A. Yes, sir.

Mr. Gillen: Just a moment. I don't think counsel should [967] refer to any contents of a document that has been excluded by your Honor. If he can do it with one or two items, he can read the whole matter in and it has been excluded.

The Court: Of course, I wouldn't want to see the contents of the document brought out unless it

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(Testimony of William E. Kyne.)

is admitted in evidence, but I think this question is all right. Objection overruled.

Q. Does that refresh your recollection as to whether or not that was a record of the 186 Club?

A. Yes, sir.

Q. And what is your recollection?

A. Regarding this amount?

Q. As to whether or not that is a record of the 186 Club? A. That was my daily record.

Q. And is that true—examine each of these and state whether having examined that item, if that is true of each of the sheets?

A. I believe that is the record.

Mr. Campbell: I will renew the offer.

Mr. Gillen: Now I ask permission to examine this witness on his voir dire in connection therewith.

The Court: Yes.

Q. (By Mr. Gillen): Mr. Kyne, counsel showed you Exhibit 110 for identification and he asked you to look at page 1 of the sheet of pages in that exhibit, and asked you to look particularly at the name Kyne and asked you if that refreshed your [968] recollection as to whether or not that was the record of the 186 Club. Let me ask you now, Mr. Kyne, does the fact that your name appears on one sheet refresh your recollection that was an original accurate and authentic record of the 186 Club?

A. The amount refreshes my memory.

Q. The amount refreshes your memory that everything else in that record was a record of the club? A. That I wouldn't know.

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(Testimony of William E. Kyne.)

Q. The name Kyne and the amount refreshes your recollection as to some transaction with the 186 Club, is that correct? A. Yes.

Q. Can you tell us whether you are refreshed mentally as to the other pages as to all the other various names, as to the authenticity and original records of the 186 Club?

A. That I wouldn't know.

Mr. Campbell: That is not proper voir dire. It might be proper cross-examination.

The Court: He may answer the question.

(Question read.)

A. That I wouldn't know about. They are the parties mentioned on the sheet.

Mr. Gillen: I might advise your Honor, if your Honor cares to look at them, there are numerous names on these various sheets and Mr. Kyne look at 110 and tell us whether there is anything else on any of those sheets that you know anything [969] about or recall anything about? A. No, sir.

Q. Other than the item referring to you. Now, Mr. Kyne, I am going to hand you the balance of these exhibits and ask you if you will run through the balance of the exhibits and tell us if that is your position and condition of mind as to all the other exhibits there, A to F?

A. The only account I can swear to would be my own account.

Q. In other words, is it true that on each of those exhibits the name of Kyne appears with something

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(Testimony of William E. Kyne.)

that refreshes your recollection as to a personal transaction of yours? A. Yes, sir.

Q. And you know nothing about anything else on those sheets? A. No, sir.

Mr. Gillen: May it please the Court, the foundation has not been laid.

Mr. Campbell: May I ask the witness a further question?

The Court: You may do so.

Q. (By Mr. Campbell): When you say that is the only thing you can swear to on there, are you referring to the accuracy of the information or not?

A. The only amount I can swear to is the amount made to me.

Q. You did not make the entries yourself, is that correct? A. No, sir.

Q. The question I asked you, after having seen that information, [970] if you can state that these were records made in the conduct of the 186 business?

Mr. Gillen: Just a moment, may it please the Court. He has already answered a number of times they were similar to records kept.

The Court: No, he answered just before the voir dire that those were the records.

(Record read.)

The Court: Objection overruled. Admitted in evidence.

Mr. Gillen: May I respectfully state, as the record stands, he has answered both ways. He says he

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(Testimony of William E. Kyne.)

knows nothing other than the matter of his own transactions.

The Court: Objection overruled. There are other matters the Court takes into consideration in addition to that answer.

Mr. Gillen: May I ask a question on voir dire?

The Court: I will withdraw the ruling. You may do so.

Q. (By Mr. Gillen): I hand you, Mr. Kyne, prosecution's exhibits 110 to 110F inclusive, and I will ask you to look at those and tell us whether or not you know, of your own knowledge, if those are actually the records of the 186 Club, if those are the records at the time turned over to the Internal Revenue agent, or who kept them or whether they are accurate or not or whether you know anything about them other than appears under an item referring to you? [971]

Mr. Campbell: Objected to on the ground it is a compound question, contains five or six elements.

The Court: Objection sustained.

Mr. Gillen: I can break it down. I was trying to save a little time.

Q. Do you know of your own knowledge that those were the actual records, the exhibits which you hold on your knee now, prosecution's exhibits 110 to 110F, inclusive?

Mr. Campbell: Objected to as having been asked and answered.

The Court: You may answer the question.

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(Testimony of William E. Kyne.)

A. I can only swear to the one amount that is owed to me.

Q. My question is, do you know whether or not those documents which you hold on your knee are the actual authentic, original records kept by the 186 Club?

Mr. Campbell: I object to the question in that form because it includes descriptive matter as to authentic. They were actual records, but of course he did not make the entries and can't say.

The Court: Do you recognize those as the documents which you picked up from the cage?

A. No, I don't, aside from the one amount owed to me.

Q. In other words, your testimony is that there is one item reflected on those exhibits that you are familiar with, had something to do with? [972]

A. That is correct.

Q. You don't recognize the handwriting?

A. No.

Q. You don't know whether you ever picked up those actual documents which you have there on your knee from the 186 Club and dropped them at 50 Mason Street? A. No, sir.

Q. And you don't know whether those are part of the documents you turned over to the Internal Revenue Department? A. No, sir.

Mr. Gillen: We stipulate, your Honor, the foundation has not been laid.

The Court: The exhibit will not be admitted in evidence. Objection sustained.

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(Testimony of William E. Kyne.)

Q. (By Mr. Campbell): Now you stated, Mr. Kyne, that as you were examining this particular document, you saw there an item relating to you?

A. Yes, sir.

Q. And you stated, I believe, that that was an accurate item? A. Yes, sir.

Q. Now what was the nature of the business which you had with the 186 Club which gave rise to that item? A. I had a credit there——

Mr. Gillen: Pardon me—objected to as incompetent, irrelevant and immaterial. [973]

The Court: I assume counsel is trying to lay the foundation.

Mr. Gillen: I will withdraw the objection.

A. I had a credit with the 186 Club of fifteen thousand dollars.

Q. And that is the item that you refer to on the sheets which were shown to you? A. Yes, sir.

Q. And for the purpose of refreshing your recollection, I call your attention to Exhibit 110B for identification, is that the amount which is owed for which you have a credit on December 31, 1944?

A. I don't remember the dates.

Q. Does examination of 110B for identification refresh your recollection in that regard?

A. That is noted there.

Mr. Avakian: That may be answered yes or no, your Honor.

The Court: Answer yes or no.

A. Yes.

Q. What is your present recollection as to the

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(Testimony of William E. Kyne.)

amount of credit that the 186 Club owed you as of December 31, 1944?

Mr. Avakian: Objected to on the ground counsel is not laying the foundation but is trying to get into evidence contents of a document which has been excluded from evidence.

Mr. Campbell: I am asking for his own personal recollection. [974]

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial as to this case, which involves income tax of Elmer Remmer.

Mr. Campbell: This is a preliminary question.

The Court: You may answer the question.

A. I had that much credit in 1944.

Q. I will ask you, Mr. Kyne, if that credit to you at the end of 1944 was a personal credit?

A. No, sir.

Q. Will you state whether or not that was a credit belonging to some one else?

A. It was money belonging to the partners in the the 186 Club.

Q. And by partners you are referring to the various people whose names you gave as being interested in the partnership as of that date?

A. Yes, sir.

Q. Will you state whether or not the credit being in your name was as a representative of all the partners? A. Yes, sir.

Q. Now will you state the manner in which that credit in your name arose, so far as the conduct of the business was concerned?

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(Testimony of William E. Kyne.)

A. It was a fill-in for markers.

Q. Will you state whether or not that 16 thousand dollars represented monies withdrawn by the partners?

Mr. Gillen: Objected to as leading and suggestive. I [975] think counsel can ask him what he means.

The Court: Objection sustained.

Q. Very well. What do you mean by fill-in for markers?

A. You are supposed to have some cash in a place to operate and if it is all markers, someone has to go and get a new bank roll until the markers are paid.

Q. Yes; and what did the 15 thousand dollars credit represent? Did that repay the money?

A. That represented the partner's money, yes.

Q. And that 15 thousand dollars that was credited to you, was that in regard to cash deposit there? A. Yes, sir.

Q. And who, if anyone, supplied you with the 15 thousand dollars cash to fill in for the markers?

A. It was money I had collected from the Club.

Q. Previous to the time that you put it up?

A. Yes, sir.

Q. And where had you kept that 15 thousand dollars previous to the time that you put it up with the club as a fill-in for the markers?

A. The sheets will show. I paid it in a little at a time.

Q. And whose markers were involved?

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(Testimony of William E. Kyne.)

A. There are about 20 names on this sheet here.

Q. Well, do you recognize those names?

A. No, sir. [976]

Q. With regard to the markers they were fill-in for and you put up this money, where were those markers held? A. The cage, 186 Club.

Q. Did you, yourself, at any time examine those markers? A. No, sir.

Q. Now taking the year 1944, will you state, if you know, whose duty it was to make up the daily Poker sheets?

Mr. Gillen: Objected to as asked and answered. He said it was made up by each shift of cashiers.

Mr. Campbell: I am trying to ascertain who they were.

The Court: You may answer the question.

A. I don't remember their names.

Q. Do you remember the names of any single one of them?

A. No, I don't. There were quite a few of them.

Q. Mr. Kyne, do you know whether or not any pay roll record was kept of the employees of the 186 Club?

A. Yes, sir. The social security will show that.

Q. Who maintained that record?

A. I believe Mr. Slater kept that record.

Q. Can you state under whose supervision the daily Poker sheets were made up?

A. Bert Busterno was the manager of the club.

Q. Incidentally, what were Mr. Cassilini's duties there?

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(Testimony of William E. Kyne.)

A. Attilio Cassilini had quite a following among the sporting people and he used to play cards there at night time and bring [977] his friends there.

Q. Those were the duties he had?

A. Yes, sir, and cashing checks and OKing.

Q. And I believe you said Billy Silva was the day manager? A. I did not.

Q. Who was day manager?

A. I was talking about Joe Silva at the Menlo Club.

Q. Who was on days at the 186 Club?

A. There wasn't much play in the day time. Any one might be in charge there, any one of these sheets.

Q. Do you have any recollection in that regard?

A. Joe Chilli was or any one of these employees could be on the floor.

Q. Any one of these employees, to what are you referring? A. This sheet here.

Q. Referring to plaintiff's Exhibit 110 for identification.

A. Young fellow Gene was, or any one on the sheet.

Q. You refer to the second page, government's 110 for identification, to the column at the upper left-hand corner, is that correct? A. Yes, sir.

Q. State whether or not you recognize the list of names there, or any of them, as being employees of the 186 Club?

Mr. Gillen: Objected to as asked and answered several times. [978]

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(Testimony of William E. Kyne.)

The Court: You many answer the question.

A. Well, these are just first names—Abe, Roy, Eddie, Murphy, Louie, Joe, Pete, Al, Phillips, Gene.

Q. Do you recognize those as employees?

A. I recognize Gene and Eddie.

Q. Now you stated, I believe, that there was in the front of the 186 Club a business known as the Day-Night Cigar Store, is that correct?

A. Yes, sir.

Q. Now will you state whether or not you had an interest in that operation as a partner or otherwise? A. Yes, sir, I had one-third.

Q. And when did you acquire that?

A. The day we opened up.

Q. Now did you invest any money for that one-third interest? A. No, sir.

Q. From whom did you receive the one-third interest?

A. Remmer put up about six thousand dollars, I believe, for it.

Q. From whom was that business purchased?

A. Max Silverman.

Q. And what was the nature of that business?

A. Cigars, magazines, liquor.

Q. Will you state whether or not there were any other sources of income to that business?

A. Pin ball machine, two of them. [979]

Q. And will you state whether or not any dice games were operated in connection with that business? A. No, sir.

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(Testimony of William E. Kyne.)

Q. Such as 26? A. No, sir.

Q. Did you at any time receive a salary from that business? A. Yes, sir.

Q. Over what period and in what amounts?

A. My wife received ten dollars a day out of the business when I was in the service and when I came out I received $12.50 a day out of the business.

Q. Did you perform any services in connection with that business?

A. No, sir. Slater had charge of the books.

Q. Did you perform any other services?

A. I hired the clerks.

Q. Aside from hiring the clerks, did you perform any services? A. No, sir.

Q. And aside from ten dollars a day, which was paid to your wife while you were in the service, and $12.50 a day that you received after you returned, did you receive any other amounts from the Day-Night Cigar Store by way of profits or distribution of capital?

Mr. Avakian: Objected to as incompetent, irrelevant and [980] immaterial. The same question counsel keeps repeating. The profits of the partner are immaterial.

The Court: We have heard that before two or three times.

Mr. Avakian: It is a perfectly good objection. I would like to have the Court consider it.

The Court: The Court will overrule the objection.

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(Testimony of William E. Kyne.)

(Question read.)

A. No, sir.

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.) [981]

Tuesday—December 18, 1951

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

The Court: Yesterday, just near the end of the session, there was some discussion about the foundation, concerning 110 series and 114 series, of exhibits. At that time I vacated the order admitting 114A, etc., for the reason that it appeared from the discussion here that the same situation existed as to 114 as was found to exist as to 110, but I think the matter should remain as it was before that discussion until we have an opportunity to examine the record in regard to the 114 series, and the order vacating and setting aside the admission of that series 114 is vacated and they are restored as exhibits, with the right, if counsel desires, to move for a reconsideration or to hear argument on the

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(Testimony of William E. Kyne.)

question of foundation later. For the present that order will stand and they will stand as they were before they were stricken from the record.

Mr. Gillen: Let me understand your Honor. Yesterday we were concerned with 110 to 110F and as I recall the record, [982] your Honor did not admit those in evidence.

The Court: No, without any prejudice to showing additional matters of foundation.

Mr. Gillen: Now then we called your Honor's attention to a similar situation as existed as to 114, 114A and 114B.

The Court: And on that suggestion, I vacated the order which had been made earlier, admitting those exhibits.

Mr. Gillen: I didn't understand your Honor had admitted them.

Mr. Campbell: I think the matter was held in abeyance until we saw the record.

Mr. Gillen: I have that here if your Honor would care to see it.

The Court: For the time being the matter will stand as it is.

Mr. Gillen: As I understand, nothing more will be done with those exhibits until your Honor has an opportunity to look at the record.

The Court: Yes. Of course, any time counsel wishes to present argument on the matter, I will be glad to hear it, but the way the record is, 114 series remains in the record as exhibits admitted in evidence.

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(Testimony of William E. Kyne.)

Mr. Gillen: But as I understand, they can not be referred to until your Honor has passed on that further. [983]

The Court: No, just leave them the way they are.

Mr. Gillen: Of course, you see what would happen. Counsel could go to work and get what they wanted out of them and our argument at a later time would be futile. We have the record, it is very short, at page 921 to 929.

Mr. Campbell: We would want to be heard on that matter as well.

The Court: We will let the matter stand the way it is at present.

Q. Mr. Kyne, referring back to plaintiff's Exhibit 115, check dated November 7, 1946, in amount of 65 thousand dollars, signed by you and which you testified you cashed and turned the proceeds over to Mr. Remmer, do you recall that?

A. Yes, sir.

Q. Showing you the exhibit. Now will you state whether or not, if you know, that 65 thousand dollars was returned to Mr. Remmer prior to the end of 1946?

A. No, it wasn't. Returned to the Menlo.

Q. Yes, and your answer is no, it wasn't?

A. No, sir.

Q. Now at the conclusion of court yesterday we were going into the matter of the Day-Night Cigar Store. Now will you state again what your interest was in that operation, Mr. Kyne?

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(Testimony of William E. Kyne.)

A. One-third.

Q. And the owners of the other [984] two-thirds? A. Remmer and Lando.

Q. And I believe you stated that you had invested no money, is that correct?

A. That is correct.

Q. What was the purchase price for above portion of the business?

A. $5500 or six thousand.

Q. And will you state what, if anything, was received in return for that $5000 or six thousand dollars.

A. There was a liquor license and inventory.

Q. Do you recall the amount of the inventory?

A. No, I don't.

Q. Now were books and records set up, so far as the Day-Night Cigar Store was concerned?

A. Yes, sir.

Mr. Campbell: If the Court will indulge me, I desire to withdraw some of the records here.

The Court: You may.

Mr. Golden: To save time, your Honor, while Mr. Weaver is going through the records, may we object to the use or offer of the contents on the same grounds?

The Court: The record may show that objection and the same ruling of the court. Objection is overruled.

Mr. Golden: That objection includes a motion to suppress on the same grounds.

The Court: It may be so understood. [985]

BLEED THROUGH– POOR COPY

(Testimony of William E. Kyne.)

Q. Mr. Kyne, who put up the money for the acquisition of the inventory and the license?

A. Mr. Remmer.

Mr. Campbell: May this be marked for identification 117 for identification. I ask to have this volume marked 117A for identification, cash receipts and disbursements, and as Exhibit 117B for identification, volume headed "Cafe and Restaurant Business and Tax Record." These are all Day-Night Cigar Store. Containing pay roll, income and expenses.

Q. Now, Mr. Kyne, I show you plaintiff's Exhibit 117 for identification, a bound accounting volume with the words "Day-Night Cigar Store" appearing on the front, and ask you if you recognize that volume? A. No, I don't.

Q. Do you recognize the handwriting in the volume? A. It looks like Slater's writing.

Q. Who was Mr. Slater?

A. He was the bookkeeper.

Q. I show you plaintiff's Exhibit 117A for identification. On its first page appears notation "Day-Night Cigar Store, W. E. Kyne, Commencing March 1, 1943," and ask you if you recognize that volume?

A. These books were kept up in his office. I do not recognize the volume. It looks like his handwriting.

Q. Is your testimony the same as to government's Exhibit 117? [986] A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. I show you government's Exhibit 117B and ask you if you recognize it?

A. This looks like a book that Maundrell kept, 50 Mason.

Q. And are all of these books, if you know, with relation to the Day-Night Cigar Store?

Mr. Gillen: Objected as calling for conclusion. He says he doesn't recognize them.

The Court: I will sustain the objection.

Mr. Campbell: If the Court please, I am going to offer these in evidence, they having been produced pursuant to subpoena to produce books and records of the Day-Night Cigar Store, as enumerated therein.

Mr. Gillen: May it please the Court, we object to the offer of the 117 series in evidence. Mr. Campbell's statement is not correct. They were not produced in response to a subpoena, as your Honor is well aware, and your Honor is also familiar with our objection along those lines. We have the same objection as yesterday to the 110 series, no foundation laid, no opportunity to cross-examine the person who prepared the books to determine the accuracy of the contents of the books, and Mr. Kyne says that the books look familiar but he does not recognize them and he does not know them to be the books of the establishment in question.

Mr. Campbell: These are a portion of the records called [987] for in the subpoena issued by the government.

Mr. Golden: That does not authenticate them.

BLEED THROUGH– POOR COPY

(Testimony of William E. Kyne.)

The Court: Well——

Mr. Campbell: Which have been produced here by the defense.

The Court: We have your statement for that and disputed by counsel. We have no evidence in the record to that effect.

Mr. Campbell: The subpoena is in the record, if the Court please. The subpoena was read in the record and the Court subsequently made its order with respect——

The Court: Does the record show that these were books produced pursuant to that subpoena?

Mr. Campbell: These books were produced here in the courtroom as books that had been placed in the possession of the clerk, if the Court please. I extracted them at this time from the records in the clerk's possession.

Mr. Golden: We renew our offer to take evidence on these books and your Honor will recall the question the other day and I won't go into it at length until permitted to, but we offered to produce evidence showing the conditions surrounding the circumstances of these books and records. Now as your Honor well says, there is no evidence at this time.

The Court: If the books and these other records, 110, were brought into court here pursuant to the order [988] the Court made sometime ago, then they will be admitted in evidence.

Mr. Golden: That doesn't authenticate them. They still have no foundation.

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(Testimony of William E. Kyne.)

The Court: The only question I have in regard to them is whether or not the foundation was laid sufficiently in accordance with the terms of Section 1732. (Reads section.) If that is a record that was kept——

Mr. Golden: There is no showing as to how these were made, as the section says, "in the regular course of the business at the time of transactions or within a reasonable time thereafter." There is no foundation.

The Court: The point which was bothering me yesterday, was whether or not the record was one which was kept by the particular establishment——

Mr. Golden: I think if your Honor will have read the answers of the witness since Mr. Campbell offered these books, you will find nothing to indicate, outside of Mr. Campbell's statement, that these are books——

The Court: Are these among the records which were brought into court pursuant to the Court's order?

Mr. Golden: Yes.

The Court: Required the defendant to produce?

Mr. Golden: That's right.

The Court: Then that, it would seem to me, would meet [989] the situation. They will be admitted in evidence, 117, 117A, and 117B. Now does the same situation apply to 114?

Mr. Campbell: No, your Honor, those are in a different category. The 110 and 114 series are in a different category.

BLEED THROUGH– POOR COPY

(Testimony of William E. Kyne.)

The Court: Very well. 117 is admitted.

Mr. Golden: But your Honor says that the holding is that anything the government calls for is ipso facto authentic?

The Court: No, I don't go that far. I take the fact that they were produced by the defendant, pursuant to order, taking that with the testimony I heard from the witness.

Mr. Golden: Suppose, your Honor——

The Court (Interceding): They are going to stand admitted 117, 117A and 117B.

Mr. Campbell: I will ask to have marked for identification as government's Exhibit 118, a folder containing various documents, the folder bearing the writing, "Inventories."

Mr. Golden: Your Honor, may I suggest, to avoid the necessity of interruptions, that the basic objection and motion to suppress——

The Court: It might be well if you just say the same objection.

Mr. Golden: Yes, I am willing to do that, provided the record will be clear in what is meant.

The Court: Well, you can make it clear as we go along. [990]

Mr. Golden: I hope so.

Mr. Campbell: I think it will be agreed that this folder document was withdrawn from those deposited with the clerk by counsel, is that correct?

Mr. Golden: We will if you say so.

Mr. Gillen: We won't go that far.

Mr. Campbell: May this be marked 112A for

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(Testimony of William E. Kyne.)

identification. 112 is in evidence, consists of ledgers of 110 Eddy Street. It is book headed "Cafe and Restaurant Business Tax Record 110 Eddy Street." Now will it be agreed 118 for identification is a portion of the documents delivered to the clerk pursuant to the Court's order?

Mr. Golden: Your Honor, I feel we can not agree to that, for this reason—your Honor is apparently——

The Court (Interceding): If you just don't agree, that is all that is necessary.

Mr. Campbell: Well, I am placed in this position, if the Court please. We took these out of the box this morning and I——

The Court (Interceding): There is nothing the Court can do about it counsel won't agree.

Mr. Golden: If your Honor will hear me, I would be very glad to be heard on it.

The Court: All right.

Mr. Campbell: That will be outside the presence of the jury. [991]

The Court: Very well, we will have to excuse the jury.

(Jury and alternate jurors admonished and excused at 10:30.)

(Argument in the absence of the jury. N.B. 325, p. 49 to p. 56.)

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10:45 A.M.

(Defendant present in court.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Campbell: At this time I wish to renew my offer in evidence of the 117 series.

The Court: Exhibits 117, 117A and 117B are admitted in evidence.

Mr. Campbell: Now in regard to 118 for identification, would it be agreed that this folder of papers was withdrawn from those delivered to the clerk?

Mr. Golden: We will agree, your Honor, that Mr. Campbell got it out of the box that was deposited with the clerk, but we can not agree as to what this is, because we do not know what evidence it is.

The Court: It was deposited with the clerk by whom?

Mr. Golden: By us.

The Court: Pursuant to that order?

Mr. Golden: Which we consider to be an illegal and [992] unconstitutional order.

The Court: Very well. It is admitted in evidence.

Mr. Golden: He hasn't even attempted to lay a foundation what it is.

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(Testimony of William E. Kyne.)

The Court: I will withdraw that.

Mr. Campbell: It has been stated, however, that this has been withdrawn from the records deposited with the clerk.

The Court: I understand.

Q. Mr. Kyne, I am going to show you government's Exhibit 118 for identification, which purports to contain various documents, is headed "Inventory" and names of various enterprises, and ask you to examine this. Do you know what record is? A. Yes, sir.

Q. Will you state whether or not, Mr. Kyne, based upon your participation and activity in various businesses which you have described, if it was customary and part of the business to take inventories? A. Yes, sir.

Mr. Gillen: Just a moment——

Mr. Campbell: Just a moment, I am asking him if it was the custom, and may I finish my question.

The Court: The question goes out.

(Question read.)

Q. (Continuing): ——from time to time of the merchandise on hand?

Mr. Gillen: Objected to as incompetent, irrelevant and [993] immaterial, whether it was customary to do anything. That does not establish whether this exhibit counsel holds in his hand, plaintiff's 118 for identification—or actually what might have been the custom in the various businesses can not in any way lay the foundation.

BLEED THROUGH– POOR COPY

(Testimony of William E. Kyne.)

The Court: Objection is overruled. Answer the question.

A. It was customary to take inventory for sales tax reports, floor tax.

Q. And when you refer to floor tax, to what particular type of merchandise do you refer?

A. Whiskey.

Q. That is alcoholic beverages?

A. Yes, sir.

Q. And did you, yourself, participate in taking inventories? A. No, sir.

Q. Who did take the inventories?

A. The bookkeeper.

Q. Now during the year 1944 who took the inventories of the Day-Night Cigar Store?

A. Slater.

Q. Of the 110 Eddy? A. Slater.

Q. Of the 186 Club?

A. That was a card room.

Q. Was any inventory taken there? [994]

A. No, sir.

Q. During 1945 who took the inventories of those establishments? A. That I don't know.

Q. During 1946 who took the inventories?

A. That I don't know.

Q. Now calling your attention again to plaintiff's Exhibit 118 for identification, do you recognize any of the various handwritings which appear therein? A. Most of this is printed.

Q. Do you recognize the printing?

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(Testimony of William E. Kyne.)

A. No, I don't.

Q. Do you recognize the handwriting of that which is handwriting? A. No, I don't.

Q. Mr. Kyne, I am going to show you government's Exhibit 80, being partnership return of income for the year 1943 for the 110 Eddy Street, and ask you if that is your signature thereon?

A. Yes, sir.

Q. I call your attention to the face of that document and the figure given "Inventory at the end of year $22,510," do you observe that?

A. Yes, sir.

Q. Who, if any one, supplied you with that figure? A. Bob Slater. [995]

Q. I call your attention to government's exhibit——

Mr. Gillen: I move the answer be stricken so I may offer an objection that that would be hearsay.

The Court: I will consider the objection has been made and overruled.

Q. I call your attention to plaintiff's Exhibit 81, partnership return of income, 110 Eddy Street, for the year 1944, and ask you if that is your signature thereon? A. Yes, sir.

Q. I call your attention to the figure on the face of the return of "Inventory at end of year $28,131.45," and ask you who, if any one, provided you with that figure? A. Slater.

Mr. Gillen: Same objection, may it please the Court.

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(Testimony of William E. Kyne.)

The Court: It may be understood that you made the same objection and same ruling.

Q. I call your attention to plaintiff's Exhibit 84, partnership return of income of 1944 of the Day-Night Cigar Store, and ask you if that is your signature thereon? A. Yes, sir.

Q. I call your attention to the figure on the face of the return, "Inventory at end of year $24,747.27," and ask you who, if any one, provided you with that figure? A. Slater.

Mr. Gillen: Same objection. [996]

The Court: Same ruling. You may answer the question.

A. I answered the question. Slater.

The Court: Pause a moment before you answer so counsel may have an opportunity to make an objection.

Q. I show you government's Exhibit 86, partnership return of income Day-Night Cigar Store for the year 1946, and ask you if that is your signature?

A. Yes, sir.

Q. I call your attention to the figure appearing on the face of the return, "Inventory at end of year, $22,466.44," and ask you who, if any one, provided you with that figure?

A. I don't know who took the inventory that year.

Q. Do you recall the capacity of the person taking the inventory?

Mr. Gillen: Objected to as calling for opinion

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(Testimony of William E. Kyne.)

and conclusion and hearsay and speculation on his part. He said he didn't know.

The Court: Objection sustained. Can you reframe that question?

Q. Was that figure of $22,466.44 given to you by some one? A. Yes, sir.

Q. And do you at this time recall who gave it to you? A. No, I don't.

Q. I believe you stated you did not personally take the inventory? [997] A. Yes, sir

Q. Now with regard to these returns which you signed and which I have shown you, do you have any reason to doubt the accuracy of the inventory taken and provided to you in those returns?

Mr. Gillen: Well, that is objected to——

The Court: Objection sustained.

Mr. Campbell: At this time I will offer in evidence plaintiff's Exhibit 118 for identification.

Mr. Gillen: To which we offer the objection, may it please the court, no foundation has been laid.

The Court: Objection sustained.

Mr. Campbell: May I be heard later on that?

The Court: Yes, without prejudice to allow any further attempt to lay a foundation, if you desire to make it.

Q. Now, Mr. Kyne, as I recall your testimony yesterday, you stated that, with reference to the Day-Night Cigar Store, a daily amount was paid to your wife from that business while you were in the service? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. From February, 1945, until approximately June of 1946, is that correct? A. Yes, sir.

Q. And that after you returned from the service you received a daily amount, I believe of $12.50 per day? [998] A. Yes.

Q. Now I believe also you stated that aside from those sums, you never received any monies from the Day-Night Cigar Store? A. Yes, sir.

Q. Now will you state, Mr. Kyne, whether or not, for the year 1943, you returned all of the profit of the Day-Night Cigar Store as your individual profit in your income tax return?

A. I do not remember.

Mr. Campbell: I will ask to have marked for identification what purports to be a 1943 individual return of Wm. E. Kyne and 1943 amended return of Wm. E. Kyne, as one number.

The Clerk: 119.

(Jury and alternate jurors admonished and short recess taken at 11:05.)

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11:15 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now I will ask you, Mr. Kyne, if for the calendar year 1943 you have reported operation known as the Day-Night Cigar Store as your individual business, and you stated that you did not recall.

Mr. Gillen: I am going to offer the objection, may it please the Court, that Mr. Kyne's individual tax return for the [999] year 1943 is incompetent, irrelevant and immaterial. This is a year prior to the starting point named in the indictment, to wit, 1944. We are concerned in this indictment with the individual tax of the defendant Remmer for 1944, 1945 and 1946. Mr. Kyne's return for the year 1943 would not be binding upon us, would be entirely incompetent, irrelevant and immaterial as to the issues of this case.

The Court: Objection overruled. Answer the question.

Mr. Campbell: I had not quite finished my question, if the Court please.

Q. At this time I show you government's Exhi-

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(Testimony of William E. Kyne.)

bit 119 for identification and ask you if that refreshes your recollection?

Mr. Gillen: We offer the objection it is an attempt to impeach his own witness.

The Court: Objection overruled.

A. That is my signature.

Q. Is the document which I have shown you the return which you filed, Mr. Kyne?

A. Yes, sir.

Q. Now does that refresh your recollection that you did report the operation of the Day-Night Cigar Store for the calendar year 1943 as your individual operation?

Mr. Gillen: Objected to as impeaching his own witness. The witness has previously testified and exhibits were produced here to show that the Day-Night Cigar Store was a partnership. [1000]

The Court: Objection overruled. You may answer the question.

A. That may have been filed for this amount, but I don't remember if that is the amount of the whole operation.

Mr. Campbell: I am going to offer this in evidence as government's Exhibit 119.

Mr. Gillen: To which we offer an objection, may it please the Court, as incompetent, irrelevant and immaterial. It is impeaching other exhibits that have been offered by the government heretofore, and third, it is an attempt to impeach his own witness. Your Honor will recall that the government offered exhibits to show that this Day-Night Cigar Store

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(Testimony of William E. Kyne.)

was a partnership and introduced the testimony of other witnesses to that effect. Now they can't blow hot and blow cold. They are bound by the evidence which they introduced themselves.

Mr. Campbell: Yes, your Honor, but we are now showing how it was reported to the government.

The Court: Objection overruled. The exhibit may be admitted, No. 119.

Mr. Campbell: I will read from this document, Exhibit 119. (Reads.) After deduction of expenses which are enumerated, including wages and depreciation and other expenses, a net profit of $8505.80.

Q. Now, Mr. Kyne, I believe you testified, have you not, that during the year 1943 the Day-Night Cigar Store was in fact [1001] a partnership, is that correct?

Mr. Gillen: Objected to as repetition and asked and answered. Counsel repeatedly asked the same question. I have a score here of one instance five times. We will be here until the rest of next year if counsel——

The Court: I will sustain the objection.

Q. Did you at that time, or any time, receive any of the profit shown on that statement?

A. No.

Mr. Gillen: Objected to as asked and answered three times and outside of ten dollars given to his wife while he was in the army and $12.50 given to him when he returned, he received nothing from the Day-Night Cigar Store.

Mr. Campbell: I will withdraw the question.

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(Testimony of William E. Kyne.)

Mr. Gillen: When I said "nothing," I should have said nothing by way of cash. It will be shown there was an equity in the business being built up.

Mr. Campbell: I didn't get that last statement.

The Court: It is not necessary. Proceed.

Q. Now, Mr. Kyne, with relation to the purchase of the 186 Club and the Day-Night Cigar Store, what, if anything, was received by way of physical assets for the 16 thousand dollars paid for the back room which you have described?

A. Thirteen card tables and chairs.

Q. Was anything else obtained? [1002]

A. Nothing.

Q. By way of equipment?

A. Some decks of cards and things like that.

Q. Chips, I presume? A. Chips.

Q. Do you at this time recall the value which was placed, or any separate value placed, upon that merchandise or equipment?

Mr. Gillen: Objected to as calling for opinion and conclusion. Your Honor will recall that Mr. Silverman testified, said he placed some valuation and couldn't break it down how he placed the valuation on the property he sold.

Mr. Campbell: I am asking if the purchaser can place any value on it.

The Court: You may answer the question.

(Question read.)

A. I don't know.

Q. Now, Mr. Kyne, were you familiar with an

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(Testimony of William E. Kyne.)

operation known as the Transit Smoke Shop?

A. Yes, sir.

Q. And did you have any interest in that enterprise? A. One-fourth.

Q. And do you recall when that was acquired?

A. I believe November '46.

Q. In that connection, did you handle the negotiations? A. No, sir. [1003]

Q. Who did handle the negotiations?

A. Gordon Partee.

Q. Prior to the operation of the Transit Smoke Shop had Gordon Partee been associated with you in any enterprise? A. No, sir.

Q. I am going to show you plaintiff's Exhibit 98, purporting to be agreement between Gordon Partee as party of the first part, and Elmer F. Remmer and William E. Kyne as parties of the second part, and ask you if you are familiar with that agreement? A. Yes, sir.

Q. Is that your signature thereon?

A. Yes, sir.

Q. Do you recognize the signature of Elmer Remmer? A. Yes, sir.

Q. And is that the signature of Elmer Remmer?

A. Yes, sir.

Q. Now I call your attention, Mr. Kyne, to the fact that this agreement recites that the parties of the second part have contributed the sum of $32,011.01. Did you, yourself, contribute any of that money? A. No, sir.

Q. Who did supply the 32 thousand dollars?

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(Testimony of William E. Kyne.)

A. Mr. Remmer.

Q. Did you, yourself, handle the paying out of that money? [1004] A. Yes, sir.

Q. And to whom did you pay it?

A. Gordon Partee.

Q. Was that full amount paid to him?

A. Yes, sir.

Q. And were any additional amounts paid to him at that time, or to any one?

A. No, sir, 32 thousand was the whole.

Q. $32,011.01? A. Yes, sir.

Q. State whether or not Mr. Remmer handed you the money to pay him?

Mr. Gillen: Objected to as leading and suggestive, may it please the Court.

Mr. Campbell: Very well, I will withdraw it.

Q. Where did you get the money, $32,000?

A. I believe I got it out of Box 48.

Q. At the Bank of America, Day and Night Branch? A. Yes, sir.

Q. And in what form was the money?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: I don't see the materiality. Objection will be sustained.

Mr. Campbell: I am going to have a check on the Bank of [1005] America Day and Night office marked as Exhibit 120 for identification.

Q. Mr. Kyne, I am going to show you government's Exhibit 120 for identification and ask you if that is your signature? A. Yes, sir.

BLURRED COPY

(Testimony of William E. Kyne.)

Q. And will you state upon what bank account that check was drawn? A. Bank of America.

Q. And what particular account there?

A. The Menlo Club.

Q. That is the same bank account which you described in your testimony yesterday?

A. Yes, sir.

Q. And I call your attention to the reverse side and ask you if that is your signature as endorser?

A. Yes, sir.

Q. I call your attention to the words appearing on the front of the check, "Loan for Transit," is that in your handwriting? A. Yes, sir.

Q. Mr. Kyne, was this check used in connection with the purchase of the Transit Smoke Shop?

A. Yes, sir. Paid back to Remmer.

Q. After you drew this check, did you cash it?

A. Yes, sir.

Q. And obtained the cash thereon?

A. Yes, sir. [1006]

Q. And what did you do with the cash?

A. I used——

Mr. Gillen: This is only a document marked for identification. We believe he should not go into the contents. We do not care in this particular instance —we have no objection to its going into evidence.

The Court: The exhibit will be admitted in evidence.

Q. What did you do with the cash obtained?

A. I used it in any activity that came up; for instance, the pool for the B & R Smoke Shoppe.

BLEED THROUGH– POOR COPY

(Testimony of William E Kyne.)

Q. Did you use any of this money for your personal benefit?

Mr. Gillen: Objected to as calling for opinion and conclusion, whether he used it for his personal benefit. Calls for self-serving statement.

The Court: Objection overruled.

Mr. Gillen: My thought was he could say what he used it for and it would be up to the jury to determine whose benefit it was used for.

The Court: Answer the question.

A. Will you repeat the question?

(Question read.)

A. No, sir.

Q. Now, Mr. Kyne, after the Transit Smoke Shop was acquired in November, 1946, was it in operation until the end of the year? [1007]

A. Yes, sir.

Q. Did you take any part in the management of the Transit Smoke Shop? A. No, sir.

Q. Or did you take any part in the conduct of the business? A. No, sir.

Q. Now as a result of the operations during 1946, was any money paid to you by way of profit?

A. I believe a thousand dollars, I am not sure.

Q. And what, if anything, did you do with the money that was paid to you?

A. Put it in box 48.

Q. That is box 48 of the Bank of America?

A. Yes, sir.

Q. Did you personally use for yourself the

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(Testimony of William E. Kyne.)

money paid to you as profit of the Transit Smoke Shop for the year 1946?

Mr. Gillen: Objected to as leading and suggestive, calling for opinion and conclusion and calling for self-serving statement.

The Court: Objection overruled.

Mr. Gillen: It is incompetent, irrelevant and immaterial whether he personally used any profit that he got.

The Court: Objection overruled. You may answer the question.

A. No, sir. [1008]

Q. Was that money used for any purpose?

A. It could have been used in the pool room.

Q. If you know?

A. I say it could have been used in the pool room.

Q. What is your best recollection?

A. I don't remember.

Q. Now will you describe the nature of the operation at the Transit Smoke Shop?

A. It is cigar store and liquor store.

Q. Were any games operated there?

A. Dice games.

Q. And what type of dice games?

A. A game called 26.

Q. Will you state the nature of that game?

A. I believe it is played with five dice.

Q. And will you state in that operation whether that game was played for money or for merchandise? A. Money.

BLEED THROUGH– POOR COPY

(Testimony of William E. Kyne.)

Q. I call your attention to plaintiff's Exhibit 92, the partnership return of income of the Transit Smoke Shop, bearing signature of Gordon A. Partee, and ask you if you have seen that return before? A. No, I have not.

Q. Do you have a recollection, Mr. Kyne, of the amount of profit arising during the operation in November and December of [1009] 1946 from dice games?

Mr. Gillen: Objected, assuming something not in evidence. Assuming there was a profit.

Q. ——profit, if any? A. No, I don't.

Q. I call your attention to the fact that on plaintiff's Exhibit 92, the return of the Transit Smoke Shop for the period November 1, 1946, to December 31, 1946, there appears under "Other Income," pins, etc., $1248.51; games, $5843.43, and I will ask you if that refreshes your recollection as to the amount of profit that came from that source?

Mr. Gillen: Objected to as having been asked and answered. He said he didn't know.

Mr. Campbell: And I asked if that refreshed his recollection.

Mr. Gillen: He said he hadn't seen this return before.

The Court: You may answer the question yes or no.

A. No, sir.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

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Afternoon Session—December 18, 1951

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on further [1010]

Direct Examination

By Mr. Campbell:

Q. Mr. Kyne, with reference to the Day-Night Cigar Store, I direct your attention to plaintiff's Exhibit 117, book of accounts, under the heading "Capital" account, headed "William E. Kyne, Investment Account," are you familiar with that account? A. No, sir.

Q. Have you ever seen that before?

A. No, sir.

Q. It would appear from this account that a contribution was made in the name of William E. Kyne for equipment, $10,400, inventory $5600, or a total of 16 thousand dollars investment. Did you ever make any such investment? A. No, sir.

Q. State whether or not that is the money which you referred to as having been paid by Mr. Remmer? A. That I can't say.

Q. That is the same amount?

A. That room cost 16 thousand dollars, the B & R Smoke Shoppe, I think we put in about six thousand.

Mr. Gillen: Is that the B & R or the Day and Night?

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(Testimony of William E. Kyne.)

A. 186 and Day-Night.

Mr. Gillen: I thought Mr. Kyne said B & R.

Q. You mean to refer to the Day-Night Cigar Store? A. Yes, sir. [1011]

Q. Now, Mr. Kyne, immediately adjoining the B & R Smoke Shoppe and your offices at 50 Mason Street, will you state whether or not, in connection with the operations of the various enterprises there was rented a storeroom or warehouse?

A. Yes, sir.

Q. And what was the location of that storehouse? A. 52 Mason.

Q. First let me ask you, what was the type of building which was rented there?

A. Probably an empty store. We used it as a warehouse for whiskey.

Q. And over what period of time, Mr. Kyne?

A. Until we gave up the place at 50 Mason.

Q. When was that? A. I don't remember.

Q. Was that after 1946? A. Yes.

Q. And when did you first acquire that location?

Mr. Gillen: After 1946?

Mr. Campbell: He said yes.

Mr. Gillen: When was that acquired, after 1946?

Mr. Campbell: No, he said he gave it up after 1946.

(Record read.)

Q. Were those premises known as 52 Mason Street? A. Yes, sir. [1012]

Q. When did you acquire the occupancy of those premises?

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(Testimony of William E. Kyne.)

A. I don't remember. It was after we were at 50 Mason. I don't remember the exact date.

Q. Can you state whether or not it was acquired prior to the year 1944? A. I wouldn't know.

Q. Can you state whether it was acquired prior to the time that you went into the army?

A. Before, yes.

Q. Now you say you used that for storing what?

A. Whiskey.

Q. And to what enterprise or enterprises did that whiskey belong?

A. I believe it was 110 Eddy and 186 Club, or rather Day-Night Cigar Store.

Q. And was any other whiskey stored there?

A. I don't remember.

Q. Now during the time that you were associated with Mr. Remmer, and prior to the end of 1946, did you participate in the handling of any deals for the purchase of whiskey? A. Yes.

Mr. Gillen: Just a moment——

The Court: The answer may be stricken.

Mr. Gillen: That has been asked and answered very early in this witness' testimony. He said the only participation [1013] he had was that he obtained a cashier's check in payment of some whiskey.

The Court: He may answer the question. The answer may stand. He answered it yes.

Q. And in that connection did you have anything to do with the purchase of some whiskey through the Sierra Wine & Liquor Company?

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(Testimony of William E. Kyne.)

A. No, sir.

Q. Did you, yourself, participate by way of investment or otherwise in any such purchase?

A. No, sir.

Q. In that connection I am going to show you plaintiff's exhibit 65, a check from the Sierra Wine & Liquor Company, payable to cash, $17,739.50, and the endorsement on the rear thereof, William Kyne, and ask you if that is your endorsement?

A. Yes, sir.

Mr. Gillen: Just a moment——

The Court: The answer may go out.

Mr. Gillen: I renew my objection, may it please the Court, this question has been asked and answered. It is an attempt to impeach his own witness. I call your Honor's attention to the fact that the record shows at the outset of this man's testimony he was asked if he had anything to do with the 21 Club, the San Diego Social Club or Cal-Neva and he said no. He was asked if he had anything to do with the purchase of any [1014] liquor and his testimony was that he purchased a cashier's check for payment of some whiskey.

The Court: Objection will be overruled. The witness has answered the question. Read the question.

(Question read.)

A. Yes, it is.

Q. I call your attention also to some figures appearing in green ink on the reverse of this check and ask you if those are your figures?

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(Testimony of William E. Kyne.)

A. Yes, sir.

Q. Do you recall when this came into your possession?

A. I believe originally was 34 thousand dollars payable to cash; in fact, I note on it reference to Haas Bros.

Q. I am referring now to this particular check. Do you recall when the particular check of the Sierra Wine & Liquor Company came into your possession?

A. It was after the check was issued for 34 thousand dollars.

Q. I call your attention to the fact that this is dated November 14, 1943, and is perforated paid 11-15-43.

Mr. Avakian: Pardon me, I believe counsel misread the perforation. I think it was 12.

Mr. Campbell: It couldn't be 12—it is dated 11——

Mr. Avakian: It was cashed in December.

Mr. Campbell: I see, yes, 12—what do you make out the balance—12-3-43 it appears. [1015]

Mr. Avakian: That is right, counsel, I believe.

Q. What, if anything, did you do with the cash which you secured from this check?

A. Put it in my Box 48.

Q. What, if you know, was subsequently done with that cash?

A. To be used as we needed it, whether the pool room, 186 Club or any other enterprise.

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(Testimony of William E. Kyne.)

Q. Was any of the money used for your personal benefit? A. No, sir.

Mr. Gillen: I move the answer be stricken.

The Court: The answer may go out.

Mr. Gillen: I am going to object to that as calling for opinion and conclusion and self-serving statement. If he was a partner and it was used in the partnership enterprise, at least indirectly it would be used for his benefit.

The Court: Objection overruled and the answer may stand.

Q. Now you stated, Mr. Kyne, that the check which I have shown you was given to you subsequent to a check received from Haas Bros. Will you state whether or not some transaction was had with Haas Bros., relating to the purchase of whiskey? Answer that yes or no.

A. Will you repeat that, please?

(Question read.)

A. Yes, sir.

Q. Do you recall when that transaction was had? [1016] A. No, I don't.

Mr. Campbell: I will ask to have this marked for identification, containing photostatic copy of two documents.

The Clerk: One hundred and twenty-one.

Mr. Campbell: I ask also to have marked as part of 121 for identification a second series of photostats, all to be part of 121 for identification, 121-A.

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(Testimony of William E. Kyne.)

Q. Now in connection with the transactions had with Haas Bros., do you recall whether or not a cashier's check was purchased?

A. I am quite sure it was.

Q. And by whom was it purchased?

A. Myself.

Q. Do you recall the amount of that cashier's check? A. Around 34 thousand.

Q. And will you state whether or not any of the funds used to purchase that cashier's check were your personal funds? A. No, sir.

Q. Who, if anyone, supplied you with the funds to purchase that check? A. Mr. Remmer.

Q. And in what form was it supplied to you?

A. In cash.

Q. Do you at this time recollect when that cashier's check was purchased?

A. No, I don't. [1017]

Q. I am going to show you Plaintiff's Exhibit 121 for identification and ask you if that refreshes your recollection as to the date upon which the cashier's check was purchased?

A. I purchased the check. I don't remember the date.

Q. I call your attention to the photostatic copy of the application for the check and ask you if that is your signature that appears thereon?

A. Yes, sir.

Q. I call your attention to the date of the application, September 8, 1943.

Mr. Gillen: Just a moment—may it please the

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(Testimony of William E. Kyne.)

Court, it is not in evidence, it should not be read from.

The Court: I think so.

Mr. Campbell: Very well. Do those photostats relate to the transaction which you have described?

A. Yes, sir.

Mr. Campbell: I am going to offer this in evidence, without, however, the top portion pencilled notes, which I will remove from the exhibit.

Mr. Gillen: We have no objection to its going in evidence. My objection previously was it was only offered for identification and the contents should not be read.

The Court: Yes. That is Exhibit 121 that is now being offered?

Mr. Campbell: Yes. [1018]

The Court: It will be admitted in evidence, 121.

Q. Showing you Government's Exhibit 121, you have identified your signature on the application?

A. Yes.

Q. And I will ask you whether or not, Mr. Kyne, the money paid to Haas Bros. was subsequently refunded by them?

A. Half of it was refunded to me.

Q. Mr. Kyne, I am going to show you Plaintiff's Exhibit 121-A for identification, photostatic copy of a check, and call your attention to the endorsement, "William Kyne," and ask you if that is your signature? A. No, sir.

Q. Do you recognize the handwriting of the signature "William Kyne"?

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(Testimony of William E. Kyne.)

A. No, sir; I can't say I do.

Q. Did you at any time authorize anyone to place your signature on the document which you hold in your hand?

A. Mr. Remmer has my power of attorney.

Q. Referring to this specific document, did you at any time authorize anyone specifically with respect to this document?

Mr. Gillen: Objected to as having been asked and answered. He said he authorized nobody to use his signature except Mr. Remmer, who had his power of attorney.

The Court: Objection overruled. Answer this question.

Q. Do you want the question read? [1019]

A. Yes, sir.

(Question read.)

A. No, sir.

Q. Let me ask you this, Mr. Kyne, did you ever see this document before? A. No, sir.

The Court: I would like to have that cleared. Do you mean this document or the original of it?

Mr. Campbell: I shall reframe my question.

Q. Mr. Kyne, did you ever see the original document of which this is a photostat?

A. Yes, sir.

Q. When did you see it?

A. I believe in your office.

Q. The original document? A. Yes, sir.

Q. And was that the first time that you ever saw it? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Do you recall the date, Mr. Kyne?

A. No, I don't.

Q. Was that on or about May 3, 1950?

A. 1950?

Q. Yes. A. No, sir.

Q. What is your best recollection? [1020]

A. Period from '43 to '45.

Q. That you saw it in my office?

A. Oh, in your office—excuse me, I misunderstood your question.

Q. When was it that you first saw the original of the document, of which this is a photostatic copy? A. May, 1950.

Q. Prior to that time had you known any such document was in existence?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled. You may answer the question.

A. It had to be in existence for me to get the half back.

Mr. Campbell: I don't think that is responsive.

The Court: The answer may be stricken.

(Question read.)

The Court: Answer that yes or no.

A. Yes.

Q. And from whom had you learned that such a document was in existence?

A. I received the check for 17 thousand dollars

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(Testimony of William E. Kyne.)

for half of the carload of whiskey, received that back.

Q. And from whom did you receive a check for 17 thousand dollars? [1021]

A. From Mr. Remmer.

Q. Do you recall upon what account that check was drawn? A. I believe from a Reno bank.

Q. Which bank?

A. I believe from a Reno bank.

Q. Do you recall what Reno bank?

A. No, I don't.

Q. And do you recall when it was that you received that amount? A. I don't remember.

Q. As I understand your testimony, was it at that time that you learned of the existence of the original document, of which 121-A is a photostatic copy, is that right?

Mr. Gillen: Objected to as asked and answered.

The Court: I think that has already been answered.

Q. During the years 1944 to 1946, other than the two boxes which you have testified about, to which Mr. Remmer had access, that is to say, Box 48 in the Day and Night Branch of the Bank of America, and the box under the name of Henry Clay in the Crocker First National Bank, do you know of other safety deposit boxes which Mr. Remmer maintained?

Mr. Gillen: Objected to—that was asked and answered yesterday.

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(Testimony of William E. Kyne.)

The Court: Objection overruled. Answer the question.

A. Concerning Remmer's personal box?

Q. Yes, other boxes to which he may have had access. Do you [1022] have any knowledge of that?

A. No, sir.

Q. Now other than the bank accounts to which you have testified, that is bank accounts upon which you were signator, of various enterprises, do you know of any bank accounts which Mr. Remmer maintained during the years 1944 to 1946, inclusive?

A. I believe he had a personal account in a bank in Tracy, California.

Q. Is that the Bank of America, do you know?

A. I believe it is.

Q. Where is Tracy, California, with relation to San Francisco?

A. It is right outside of Stockton, southeast.

Q. Approximately how many miles from San Francisco? A. About 90 miles.

Q. And what other bank accounts did you know of at that time? A. That is the only one.

Q. Now you have referred to a check given to you by Mr. Remmer on a Reno bank. Do you recall the signature on that check?

A. I believe it is Pete Barengo.

Q. Is the check that you are referring to that Mr. Remmer gave you Plaintiff's Exhibit 65?

A. Yes, sir.

Q. And this is the check by which you say you received back half of the 34 thousand dollars, is that correct? [1023] A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Do you know whether or not Mr. Remmer had an account in the Reno bank?

A. No, I don't.

Q. Mr. Kyne, were you acquainted with a man by the name of Badovinatz? A. Yes, sir.

Q. What was his first name?

A. He was known as Curley, that is his nickname.

Q. Where did he reside?

A. I believe he lived most of the time in Stockton, Stockton or Fresno.

Q. Do you know whether or not, during the years 1944 to 1946, he borrowed money from Mr. Remmer? A. I do not know.

Q. You have no knowledge of that subject?

A. No, sir.

Q. Do you know whether or not during that period of time he was a patron of any of the businesses with which you were connected?

A. He played at the 186 Club.

Q. But you have no knowledge of any loans made to him? A. No, sir.

Q. Did you ever discuss with Mr. Remmer the matter of a loan to Mr. Badovinatz? [1024]

Mr. Gillen: May it please the Court, this is four times that this witness has been asked about any knowledge of this loan. He said no, he had no knowledge in each instance, and now he is asking for a discussion. If those questions are asked repeatedly, we are going to prolong this trial indefinitely.

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(Testimony of William E. Kyne.)

The Court: My understanding is in response to questions he stated he did not know if this individual borrowed money from Mr. Remmer.

Mr. Campbell: That is correct. I am asking if he had a conversation.

The Court: Objection overruled.

A. No, sir.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Kyne, going back to your testimony, which began on December 14th, I understood you said that although you have known Mr. Remmer for some twenty years, that you had first engaged in business enterprises with him in the year 1941, is that correct? A. Correct.

Q. And you enumerated six different enterprises in which you were interested with Mr. Remmer, do you recall that? A. Yes. [1025]

Q. And those enterprises, as I recall, and the order in which they came into being, were first of all the B & R Smoke Shoppe, which came into being in 1941, if I recall, and after that the 110 Eddy Club, then the 186 Club and in conjunction with the 186 Club a separate enterprise known as the Day-Night Smoke Shop, and the Menlo Club, and finally the Transit Smoke Shop, is that correct, those were the six enterprises? A. Yes.

Q. I understood you to testify also that you never had anything to do in the way of any part-

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(Testimony of William E. Kyne.)

nership interest or business interest in Cal-Neva Lodge at Lake Tahoe? A. That is correct.

Q. Nor did you have any interest with Mr. Remmer, or anybody else, in the 21 Club or the San Diego Social Club in El Cerrito, California?

A. Right.

Q. Now in the various enterprises that you have testified you had an interest in, the six I mentioned a moment ago, let me ask you whether or not, throughout the time that you were associated with Mr. Remmer, when those particular enterprises were operating, did Mr. Remmer spend any amount of time in and about any of those businesses, either managing or operating or overseeing or supervising? A. No, sir.

Mr. Campbell: May the answer be stricken and the question [1026] read?

The Court: Yes.

(Question read.)

The Court: The answer may stand.

Q. It is true, is it not, Mr. Kyne, that you were really the overseeing partner or the general manager of those various places? A. Yes, sir.

Q. And it is true Mr. Remmer left his interests and the welfare of his interests to you and to the various people who were employed under you, either as manager, bookkeepers or auditors or whoever they might have been? A. Yes, sir.

Q. Now did Mr. Remmer, to your knowledge, ever participate in keeping books on any of those

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(Testimony of William E. Kyne.)

establishments or preparing books on any of those establishments? A. No, sir.

Q. Now you stated in your direct examination that of the six enterprises in which you were interested with Mr. Remmer, with regard to the first five of them, namely, the B & R, 110 Eddy, 186 Club, Day-Night Club and the Menlo Club, you never actually invested any money out of your own pocket, is that correct? A. Correct.

Q. That you received your partnership share, or your interest as a member of the corporation, as in the case of the 186 Club, [1027] without actually having taken any money out of your pocket and putting it in, is that true? A. That's right.

Q. Now also you were asked whether or not you had actually taken any money out of any of those organizations by way of profit and put that into your pocket, that is, other than the salaries or allowances or drawing accounts that you have mentioned, do you recall that? A. Yes.

Q. And you stated that you had not?

A. That's right.

Q. Now with relation to the Transit Smoke Shop, you did, did you not, make an investment in the Transit Smoke Shop? A. Yes, sir.

Q. In other words, there was 32 thousand odd dollars paid for the Transit Smoke Shop and you at a subsequent time borrowed some money from the Menlo Club and charged it against your account, isn't that correct?

A. Sixteen thousand; yes, sir.

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(Testimony of William E. Kyne.)

Q. $16,005 and I believe 50 cents, is that correct? A. That is right.

Q. And then you stated that that 16 thousand was placed by you in the general fund in Box 48 at the Day and Night Branch of the Bank of America? A. Yes, sir. [1028]

Q. And that money was then used for various partnerships wherever and whenever any part of it was needed, is that correct? A. Correct.

Q. And, of course, you were a member of all those partnerships, isn't that true?

A. Correct.

Q. Now the Menlo Club was purchased during the year 1945, while you were still in the United States Army, is that correct? A. Yes, sir.

Q. And away, of course, from San Francisco and you were informed that you had an interest in the Menlo Club, isn't that true? A. Yes, sir.

Q. And the amount of that interest was what, Mr. Kyne? A. I believe it was 15 per cent.

Q. Now it is true, is it not, Mr. Kyne, that from the very inception of your associations with Mr. Remmer, it was agreed between you and Mr. Remmer that you would have an interest with him in any San Francisco enterprise that he undertook, is that correct? A. That is correct.

Q. And you did during the period of time that you were together, between 1941, when the B & R Smoke Shoppe came into being, until the month of February of 1949, when you and Mr. [1029] Remmer no longer had enterprises together, with the

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(Testimony of William E. Kyne.)

exception that you still remain on two of the licenses, you did have an interest in every enterprise that Mr. Remmer was interested in, is that true?

A. Yes, sir.

Q. And when I say every enterprise, I mean every enterprise in San Francisco.

A. Yes, sir.

Q. Now you recall, do you not, Mr. Kyne, being shown an agreement that was prepared with regard to the purchase of the Menlo Club and with regard to there having been given to you a 15 per cent interest in the Menlo Club?

Mr. Campbell: I object to the characterization of the document. The document speaks for itself and it doesn't so provide.

Mr. Gillen: What is wrong with it?

The Court: Let us have the question.

(Question read.)

Mr. Campbell: The document, if the Court please, provides he is to have a 15 per cent interest in and when certain sums are received back by Mr. Remmer out of the business, and I submit that is the provision of the document. It does not provide for an immediate 15 per cent interest.

Mr. Gillen: I will accept the difference.

Mr. Campbell: I object to the [1030] characterization.

The Court: Let us have the question.

Mr. Gillen: I will change my mind—I will not accept it. The agreement says he does have an immediate 15 per cent interest.

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(Testimony of William E. Kyne.)

Mr. Campbell: I submit the document to the Court and the document must be read by its four corners.

Mr. Gillen: We will read the document.

Q. With the Court's permission, I will show you the original prosecution's Exhibit 113 in evidence, and a copy which is a little easier to read than the photostat. Mr. Kyne, will you look at Exhibit 113 and the typewritten two pages that are copies of 113 and tell us if you are familiar with that document as the agreement wherein you derived a 15 per cent interest in the Menlo Club?

Mr. Campbell: Objected to as assuming a fact not in evidence. The document speaks for itself, if the Court please, and does not provide for the characterization as stated by counsel.

Mr. Gillen: May I ask through the Court wherein he believes I mischaracterize this, because I would like to read him a paragraph here. You read Paragraph 8 on Page 1.

Mr. Campbell: First, if I may, I will read Paragraph 6. (Reads.)

Mr. Gillen: Now will you read Paragraph 8?

Mr. Campbell: (Reads Paragraph 8 and [1031] 9.)

The Court: Objection will be sustained.

Mr. Gillen: Now let me get this straight, so I won't be accused by counsel of mischaracterization again. Will it be stipulated by counsel that this agreement conveys to Mr. Kyne immediately a 15

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(Testimony of William E. Kyne.)

per cent interest in the profits of this enterprise in Paragraph 8?

Mr. Campbell: I suggest the document speaks for itself.

The Court: He evidently will not accept the stipulation.

Mr. Gillen: Well, then, it is going to take about three-quarters of an hour to make this clear.

Q. Now, Mr. Kyne, you recall this agreement, do you? A. Yes.

Q. And you recall by the terms of that agreement that you were to receive, as indicated in Paragraph 8 of the agreement—and if you wish to look at it while I am interrogating you on it I will give you the original document—Paragraph 8 on the first page, you will find the paragraph which states that effective as of May 1, 1945, that you are given an immediate 15 per cent working interest in and to the profits derived from the operation of the aforesaid social room, restaurant businesses and so on, situated as aforesaid.

Mr. Campbell: Objected to on the grounds that the document speaks for itself.

The Court: May I see the document a [1032] moment?

Mr. Gillen: Paragraph 8 on page 1.

Mr. Campbell: I think the entire document should be examined.

The Court: The objection is sustained.

Mr. Gillen: Sustained what, so I may be guided?

The Court: I have Paragraph 6 in mind, Para-

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(Testimony of William E. Kyne.)

graph 6 after the word "Witnesseth." Now keep that in mind.

Mr. Gillen: Paragraph 6 says——

The Court: Objection sustained.

Mr. Gillen: Will your Honor look at Paragraph 8?

The Court: No, I am through. The objection is sustained.

Mr. Gillen: Your Honor won't look at the rest of the document?

The Court: I have looked at it and studied it and heard it read and that is my view. Objection sustained.

Mr. Gillen: Is it your Honor's view that this man did not get any immediate interest——

The Court: My ruling explains my view.

Mr. Gillen: No, it does not to me, your Honor, I do not understand.

The Court: There will be no further explanation.

Mr. Gillen: I don't think there was any question pending for your Honor to sustain before it. I think counsel wanted you to look at the document.

Mr. Campbell: I refer to the question. [1033]

(Last question read.)

The Court: We had in mind the similar question, in substance would be the objection that the question assumes matters not in evidence. Now I am sustaining the objection to that question on that ground.

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(Testimony of William E. Kyne.)

Mr. Gillen: What portion isn't in evidence? I want to be guided so I will not get in trouble with the Court and counsel. I want to conduct my examination with the least amount of trouble.

The Court: Just proceed.

Q. Did you read Paragraph 8 of the agreement, Mr. Kyne? A. Yes, sir.

Q. And did you observe in Paragraph 8 of the agreement that you were to immediately have an interest of 15 per cent of all profits derived?

Mr. Campbell: Objected to on the grounds the document speaks for itself.

The Court: Sustained.

Mr. Gillen: I wanted to ask him if he read it and understood what he was getting.

The Court: Objection sustained.

Mr. Gillen: Are you going to keep the jury in the dark about what this agreement is?

The Court: Mr. Gillen, that implies the Court is trying to keep the jury in the dark about some evidence. [1034]

Mr. Gillen: I am not implying the Court is trying to keep the jury in the dark.

The Court: There is nothing before the Court. Let us proceed. Objection sustained.

Mr. Gillen: I am trying to cross-examine this man on a document shown to him and introduced during direct examination.

The Court: I sustained the objection. There is nothing before the Court now.

Q. What did you receive by way of interest in

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(Testimony of William E. Kyne.)

the Menlo Club under this agreement, Mr. Kyne?

Mr. Campbell: Objected to on the ground the agreement speaks for itself.

The Court: Sustained.

Q. Do you know what you received?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Mr. Gillen: Certainly he is entitled to state if he knows what interest he had.

The Court: The Court has ruled.

Q. Did you have an interest in the Menlo Club?

Mr. Campbell: Same objection. The document conveys whatever interest there was and speaks for itself.

The Court: That objection is overruled. Answer the question.

Q. Did you have an interest in the Menlo [1035] Club? A. Yes, sir.

Q. What interest did you have in the Menlo Club in 1945?

Mr. Campbell: Same objection.

The Court: Objection overruled.

Mr. Campbell: It is an attempt to vary the terms of the document.

The Court: Objection overruled.

A. 15 per cent.

Q. What did you have 15 per cent in, the profits or in the actual tables or chairs?

Mr. Campbell: May I ask a question on voir dire?

The Court: Yes, you may.

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(Testimony of William E. Kyne.)

Mr. Gillen: Just a minute——

The Court: I gave him permission.

Mr. Gillen: I know your Honor has given him permission, but I do not see any reason at this point why my cross-examination should——

The Court: I have given him permission to ask questions on voir dire.

Q. (By Mr. Campbell): Mr. Kyne, referring to the written contract, did that set forth the entire terms of your agreement with Mr. Remmer relative to the Menlo Club?

Mr. Gillen: Objected to—the document speaks for itself.

A. I have 15 per cent working interest in the Menlo Club.

Mr. Gillen: I ask that the question be read and the [1036] answer be stricken.

The Court: Read the question.

(Question read.)

Mr. Campbell: That may be answered yes or no.

Mr. Gillen: Just a minute—this is his witness.

The Court: There is nothing before the Court. He may answer yes or no.

Mr. Gillen: Objected to; he is cross-examining his own witness.

The Court: Objection is overruled. Read the question once more, please.

(Question read.)

The Court: Answer it yes or no.

A. Can I read the document again?

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(Testimony of William E. Kyne.)

The Court: Yes, you may, and the objection is overruled, and I wish counsel would make a practice, when they object to a question to state all their grounds in one objection, so we don't have constant rulings on all the grounds known to Mr. Wigmore for making objections.

Mr. Gillen: There is nothing wrong to stating our grounds.

The Court: The Court has made a request and we desire to have that done.

Mr. Gillen: I object on the ground Mr. Campbell is making [1037] speeches.

The Court: Mr. Gillen, let's get along now. Now we will have the question read to the witness.

(Question read.)

A. Yes, sir.

Mr. Campbell: That is the only question I have.

The Court: Now you may proceed, Mr. Gillen.

Mr. Gillen: May I have the answer of this witness prior to the interruption on voir dire?

(Question read.)

Mr. Campbell: I now object to that question on the grounds the document speaks for itself.

The Court: Objection sustained. The answer may go out.

Q. You stated in answer to question by counsel that you had 15 per cent working interest in the profits; is that a fact?

Mr. Campbell: Objected to as assuming a fact not in evidence.

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(Testimony of William E. Kyne.)

The Court: Objection sustained.

Q. What did you state to counsel was your interest?

Mr. Campbell: The record is the best evidence.

The Court: Objection sustained.

Mr. Gillen: I will have the record read, his whole testimony regarding the Menlo Club.

The Court: We won't stop to do that now.

Mr. Gillen: Then I will have to stop my [1038] examination. If he says the record is the best evidence, I can't go on until we get that point cleared up.

The Court: What point do you want cleared up?

Mr. Gillen: I want what interest Mr. Kyne had in the Menlo Club.

The Court: I am not going to have the whole record read.

Mr. Gillen: I could clear it up in a couple of questions. Counsel said the record was the best evidence.

The Court: We will excuse the jury and comply with your request. You want the record read, do you?

Mr. Gillen: I don't; counsel wants the record read.

Mr. Campbell: No, I do not.

Mr. Gillen: He says the record is the best evidence.

The Court: So you don't want the record read now? If you do, we will send the jury out.

Mr. Gillen: No, I can get at it in another way.

Q. Mr. Kyne, did you state to counsel you had

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(Testimony of William E. Kyne.)

15 per cent working interest in the Menlo Club?

Mr. Campbell: Objected to; the record is the best evidence.

Mr. Gillen: I will withdraw the question.

Q. Did you have 15 per cent working interest in the Menlo Club in 1945?

Mr. Campbell: Objected to; the contract speaks for itself.

Mr. Gillen: This is cross-examination. [1039]

The Court: Objection sustained.

Mr. Gillen: In cross-examination I can ask him the same question twice.

The Court: I sustained the objection.

Q. Do you know what your interest was in the Menlo Club?

Mr. Campbell: Objected to on the same ground.

The Court: Sustained.

Q. Did you have any interest in the Menlo Club?

Mr. Campbell: Same objection.

The Court: Sustained.

Q. Look at this agreement and tell me what was meant by working interest in the amount of 15 per cent?

Mr. Campbell: Same objection, may it please the Court.

The Court: Objection sustained. Now I am going to respectfully suggest that you do not pursue this line any further.

Mr. Gillen: This line of what?

The Court: Pursuing this same subject that has been covered by my rulings, sustaining objections

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(Testimony of William E. Kyne.)

to your questions. I think when the Court has ruled on a subject, then it is no longer proper to persist with questions along the same line.

Mr. Gillen: May it please the Court, this man was examined specifically——

The Court: I just made a suggestion. [1040]

Mr. Gillen: I respectfully suggest I have a right to pursue——

The Court: You may proceed.

Mr. Gillen: Could we be heard on this matter in the absence of the jury?

The Court: No, there is nothing before the Court.

Mr. Gillen: Your Honor, it is cross-examination of the witness on matters gone into on direct.

The Court: I have sustained the objection, and if you *do like* the rulings, you can take it on appeal. That is my ruling.

Mr. Gillen: I take exception to your Honor's remarks, that there would be a necessity for appeal in this case.

The Court: Very well. Go ahead.

Mr. Gillen: I demand at this time, for the record, that we be permitted, out of the presence of the jury, to be heard on our right to cross-examine Mr. Kyne with regard to his interests, both in the Menlo Club and any other enterprise in which he was interested with the defendant Remmer.

The Court: The request will be denied.

Q. Mr. Kyne, what happened to your 15 per cent

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(Testimony of William E. Kyne.)

share of any profits of the Menlo Club during the years 1944 to 1946, inclusive?

Mr. Campbell: Objected to as assuming a fact not in evidence. [1041]

The Court: Objection sustained. Now I am going to send the jury out.

(Jury and alternate jurors admonished and excused at 2:15 p.m.)

(Argument in the absence of the jury. N.B. 325, pp. 89-100; N.B. 326, pp. 1-3.)

2:50 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Mr. Gillen: It is my understanding that we are permitted to question Mr. Kyne concerning his agreement with the Menlo Club.

The Court: Yes, particularly in regard to that paragraph 8.

Mr. Gillen: Yes, your Honor.

Q. Now, Mr. Kyne, with the Court's permission, I will hand you the prosecution's Exhibit 113, which is the agreement in which is provided that you are

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(Testimony of William E. Kyne.)

given a 15 per cent working interest in the profits of the Menlo Club, and when the full purchase price of the Menlo Club, to wit, $175,000, has been recovered out of the profits and returned to the initial investor, [1042] Mr. Remmer, that you are to receive then a 15 per cent interest in the physical assets of the Menlo Club. Do you have that paragraph in mind? A. Yes, sir.

Q. Now, Mr. Kyne, did you participate in 15 per cent of the profits of the Menlo Club, commencing as of May 1, 1945, the date the Menlo Club was purchased, throughout the period of time that you were associated with the Menlo Club?

A. Yes, sir.

Q. And you stated that you did not draw any of the profits that were credited to you; is that correct? A. Yes, sir.

Q. What happened to those profits that were credited to you; where did they go?

A. Credited to my account on the books of the Menlo Club.

Q. And that was credited to your account toward building up your equity in the physical assets of the Menlo Club; is that correct? A. Yes.

Mr. Campbell: We object to the last question and move the answer be stricken.

The Court: It may go out.

Mr. Campbell: On the ground that would vary the terms of the agreement.

The Court: Let me have the question. [1043]

(Question read.)

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(Testimony of William E. Kyne.)

The Court: The answer may stand.

Q. Now, Mr. Kyne, you were questioned by Mr. Campbell regarding the purchase price of the Menlo Club as it is set forth in this agreement. Do you recall that you were questioned on the agreement, the purchase price? A. Yes, sir.

Q. And do you recall that the agreement, which is in your hands there, set forth that the purchase price of the businesses referred to as the Menlo Club at 30-32 Turk Street and 24 Turk Street, 18 Turk Street, were purchased for a total of 175 thousand dollars? Do you recall that?

A. Yes, sir.

Q. And you were asked by Mr. Campbell if that 175 thousand dollars had been paid by anyone and you said it had been paid by Mr. Remmer.

Mr. Campbell: Objected to as stating a fact not in the record. Mr. Kyne testified he was in the army when that thing was purchased and I think counsel——

Mr. Gillen: We will show it to you in the record.

Mr. Campbell: Yes, I would like to see it.

The Court: I have a note here—I don't know whether it would be any use—just before that Exhibit 113 was offered, the Menlo Club acquired in '45 while he was away; Mr. Remmer told him he had an interest after [1044] his return. There was a written agreement.

Mr. Gillen: That is correct, your Honor, and there is some other testimony regarding the amount of money paid.

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(Testimony of William E. Kyne.)

Mr. Campbell: There is this testimony beginning at the top of page 926 as follows: (Reads).

Mr. Gillen: Of course, that was for 15 per cent interest in the physical assets of the property, not as to profits.

Mr. Campbell: I object to that.

The Court: Let us have the question.

(Question read.)

Mr. Campbell: I know of no such testimony in the record.

Mr. Gillen: I may be wrong.

The Court: I do not recollect that myself.

Mr. Gillen: I can reframe my question, in the interest of time.

Q. Mr. Kyne, you understood, did you not, that retroactive as of May 1, 1945, you were participating in a 15 per cent interest in the profits that came out of the Menlo Club?

Mr. Campbell: I object to the question in that form.

The Court: Objection overruled. Answer the question.

A. Yes, sir.

Q. And you understood, did you not, that you were to leave your 15 per cent interest in the profits toward building up on the books your equity toward the ultimate equivalent of 15 per cent of the physical assets of all the businesses comprising the Menlo Club? [1045]

Mr. Campbell: Objected, the document speaks

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(Testimony of William E. Kyne.)

for itself. Further, I suggest that the form of the question is improper, in that the witness should be permitted to state his understanding rather than counsel stating the understanding to him, and in that regard it is not within the scope of direct examination.

Mr. Gillen: This is cross-examination, your Honor.

The Court: Objection overruled. Answer the question.

Q. Do you have the question in mind?

A. Yes, sir.

Q. Did you learn, from your own knowledge, how or in what manner the Menlo Club was purchased; that is, was it all paid for at once, or notes given, or how the purchase was made?

Mr. Campbell: Objected to as calling for hearsay, the witness having testified he was in the service.

The Court: He can state whether or not he knows. He can answer that yes or no.

A. No, I don't know.

Q. Do you know anything about any notes that were given for the Menlo Club? A. No, sir.

Q. Do you know, of your own knowledge, whether or not the 175 thousand dollars that was the purchase price for the Menlo Club had ever been fully paid? A. No, sir.

Q. Do you know of your own knowledge whether or not the Menlo [1046] Club had, by way of profits, returned to Mr. Remmer the amount of his investment? A. No, sir.

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(Testimony of William E. Kyne.)

Q. Do you know, when the Menlo Club closed, what the books reflected as to the interest that you had acquired by way of participating to the extent of 15 per cent in the profits of the Menlo Club?

Mr. Campbell: Objected to on the grounds the books are the best evidence.

The Court: That objection may be good.

Mr. Gillen: I think that objection is good.

Q. Let me ask, eliminating the books, do you know, of your own knowledge, what equity you had acquired in the Menlo Club from profits by way of participating to the extent of 15 per cent?

Mr. Campbell: As of what date?

Mr. Gillen: As of the date the Menlo Club closed.

Mr. Campbell: Objected to as a period beyond December 31, 1946.

The Court: Objection overruled. Answer the question.

A. I don't know.

Q. Do you have any idea at all?

A. No, sir.

Q. Now let me ask you, Mr. Kyne, with regard to the B & R Smoke Shoppe, the first enterprise that you and Mr. Remmer entered into together. Did you have a working interest similar to [1047] the working interest that you had in the Menlo Club in that organization?

Mr. Campbell: If he is referring to a similar document to the written document, I submit the written document is the best evidence.

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(Testimony of William E. Kyne.)

The Court: I will sustain the objection.

Q. Let me ask you this, Mr. Kyne——

The Court: The reason is, I do not think we should bring that out by comparison.

Mr. Gillen: Very well, I think we can reach it another way.

Q. Mr. Kyne, you testified that in 1941, without making an actual cash investment, that you acquired a 25 per cent partnership interest in the B & R Smoke Shoppe; is that correct?

A. That is correct.

Q. Was the agreement regarding your 25 per cent interest with your partners reduced to writing, or was it an oral agreement? A. Oral.

Q. What was the nature of that agreement? Was it a working interest that would ultimately enable you to acquire 25 per cent in physical assets, or was it another kind of agreement?

Mr. Campbell: I am going to object to the question in that form, as calling for the witness' characterization of the agreement.

(Question read.) [1048]

The Court: It is a leading question, but I understand leading questions are proper on cross-examination.

Mr. Campbell: My objection is not that it is leading; it is calling for characterization of agreement, the agreement not being before the Court.

The Court: You may answer the question.

A. It was a working agreement.

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(Testimony of William E. Kyne.)

Q. Will you just state what the agreement was?

A. I received 25 per cent of the profits and ten dollars a day.

Q. Were you to withdraw those profits, 25 per cent of the profits, or were you to leave them in the business for any period of time, or for any reason?

A. I believe we gave Mr. Remmer back his bank roll.

Q. In other words, you were to leave your profits in the business until Mr. Remmer had recovered his initial investment; is that correct?

A. I think that is it.

Q. Now in regard to the second enterprise that you went into with Mr. Remmer and one other person, as I recall, 110 Eddy Street tavern, what was your interest in that?

A. That was a working interest.

Q. I mean what percentage?

A. I wound up with 25 per cent.

Q. Was the agreement with regard to your partnership in the 110 Eddy Street reduced to writing or was it an oral agreement? [1049] A. Oral.

Q. Now I understood your testimony to be that with regard to that 25 per cent you had actually put in no investment? A. That's correct.

Q. You received 25 per cent under a working agreement; is that correct? A. Yes, sir.

Q. And were you to withdraw 25 per cent of the profits or were you to leave it in the business for any reason? A. Building up the inventory.

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(Testimony of William E. Kyne.)

Q. You were to leave it in the business to build up the inventory? A. Yes, sir.

Q. Is that what happened? A. Yes, sir.

Q. Now with regard to the B & R Smoke Shoppe and with regard to the 110 Eddy Street tavern business, you were chargeable on the books of those businesses with the profits, a share of the profits to which you were entitled?

Mr. Campbell: Objected to—the books are the best evidence.

The Court: Objection sustained.

Mr. Gillen: I think those are in evidence.

Mr. Campbell: I still say they are the best evidence of their contents. [1050]

Q. You paid income taxes, did you not, on your share of profits that were credited to you; isn't that so? A. Yes, sir.

Q. Where did you get the money to pay income tax on the share of profits credited to you in those two businesses, namely, the B & R and 110 Eddy?

A. I had money for the B & R Smoke Shoppe myself and got 110 money from Bob Slater, the bookeeper.

Q. Now with regard to the 186 Club, what was your interest in that Club? A. One-sixth.

Q. And if I remember correctly, that is the enterprise that was originally started as a partnership with seven persons, each owning one-sixth interest and two of the persons owning one-sixth between them; is that correct? A. Yes.

Q. And then after eight months or a year, at

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(Testimony of William E. Kyne.)

the direction of the man from the Internal Revenue Department, you were required to change that from a partnership to a corporation?

A. That is right.

Q. Now as I recall your testimony, you testified that you did not actually put any money in for that one-sixth interest in the 186 Club; is that correct?

A. Yes.

Q. What was the nature of your interest [1051] in that? A. Working interest.

Q. Was that working interest arising out of agreement that was reduced to writing, or was that an oral agreement; I mean initially?

A. It was oral.

Q. Subsequently, when it was set up as a corporation, there were some corporate papers kept on it, some minutes, references; is that correct?

A. That is correct.

Q. Now with regard to the 186 Club, I believe that was the enterprise that made no money; is that correct? A. That is correct.

Q. That is the enterprise that was filled with markers rather than cash?

A. That is correct.

Q. What was the arrangement, however, with regard to when you would acquire any interest in the physical assets in the event there were profits? In other words, were you to take out the profits or were you to leave them in the business for any reason? A. Take them out.

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(Testimony of William E. Kyne.)

Q. You were to take out the profits in the 186 Club? A. Yes, sir.

Q. Now in the 186 Club, you paid some income tax on that, did you not? A. Yes, sir. [1052]

Q. Now let me go back for a moment to the inception of the 186 Club. Isn't it a fact that the agreement was that Mr. Kopstick and Mr. Nealis, who between them had put up some 16 thousand dollars for a one-sixth interest in the enterprise, between them were to receive their money back first? A. That is correct.

Q. And their money was given back to them out of the profits, isn't that correct? A. Yes.

Q. And as I understood your testimony yesterday, you gave it to them when, as, and if you were able to give it to them, in installments?

A. That is correct.

Q. Now you were, and the other persons interested with you were, nevertheless credited with certain profits out of that, were you not?

A. That's right.

Q. Do you recall, Mr. Kyne, the first year of the operation of the 186 Club when it was operated as a partnership, the profits were approximately 12 thousand dollars, as I recall?

A. I do not remember.

Q. Well, do you recall that two thousand dollars of the profits was credited on account of Mr. Remmer, do you recall that?

A. I don't remember.

Q. Do you recall that nobody drew down any

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(Testimony of William E. Kyne.)

of the twelve thousand [1053] dollar profit in that first year because it was all turned over to Kopstick and Nealis to give them their money back and buy up their interest? A. I don't remember.

Q. I would like you to look at defendant's Exhibit "P." With the permission of the Court I will show you defendant's Exhibit "P" in evidence, and on the reverse side you will note the partnership interest, that is, what was credited to each person, and I will ask you if that refreshes your recollection the first year, while it was still operating as a partnership, the profit was 12 thousand dollars, each partner was given credit for a share of that, but that actually the whole 12 thousand dollars was turned over to Kopstick and Nealis to pay back their interest? A. That's correct.

Q. And then in addition to that 12 thousand dollars, there was four thousand dollars more to take Kopstick and Nealis out of that business?

A. There was no money given to the partners.

Q. There was no money given to the partners even though the partnership return for that year showed credit to the account of Busterna, two thousand, Casselini, two thousand, Kyne, two thousand and five cents, Lando, two thousand, Jess Kopstick, one thousand and Carl Nealis, one thousand, total of twelve thousand five cents; even though each partner was credited with having received [1054] that much profit, none of the partners took any money out except Kopstick and Nealis, who were given the money to buy out their one-sixth interest, is that correct? A. Yes.

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(Testimony of William E. Kyne.)

Q. And the reason, I presume, Kopstick and Nealis were each shown to have credit of one thousand dollars instead of two thousand against every other partner was because they owned one-sixth between them, is that correct? A. Correct.

Q. And they were splitting between them the profit on the one-sixth interest? A. Yes, sir.

Q. Now, Mr. Kyne, after approximately a year, or the following year then, due to the direction of a man from the Internal Revenue Department, the 186 Club was thereafter set up as a corporation?

A. Yes, sir.

Q. And that is when it began to get markers instead of money and made no money, showed no profits, is that correct? A. That is correct.

Q. Now, Mr. Kyne, let me invite your attention now to the Day-Night Smoke Shoppe, which you recall was the store in front of the 186 Club, being the social club in back and the Day-Night Cigar Store in front, is that correct?

A. That is right. [1055]

Q. That was a different enterprise altogether?

A. Yes, it was.

Q. That was retail liquor, cigars, magazines, periodicals, pin ball machines, is that true?

A. Right.

Q. In that organization or enterprise you had what, one-third interest? A. One-third.

Q. And your two partners, together with Mr. Remmer and Mr. Lando? A. Lando.

Q. Let me ask you whether or not the agreement

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(Testimony of William E. Kyne.)

that gave you a one-third interest in the Day-Night Cigar Store was a written or oral agreement?

A. Oral.

Q. And what was the nature of your interest in that Day-Night? Was it a partnership or working agreement? A. Working.

Q. And as I understood your testimony on direct examination you had not actually put up any money for that one-third interest? A. That's right.

Q. And what was the agreement with regard to what should have been done, outside of drawing or salary or commissions, with the one-third profit? Was it to be drawn down by you or put [1056] back in the business?

A. We put it back into inventory.

Q. So that the business that orginally showed one year inventory, the first year some 11 thousand dollars merchandise, is that correct?

A. I don't remember.

Q. Do you recall that that was the enterprise that doubled its inventory the following year?

Mr. Campbell: Objected to, the books and records of the business are the best evidence.

The Court: Objection sustained.

Q. Mr. Kyne, with the Court's permission, I will show you prosecution's Exhibits 84 and 86, and I will identify those for you as partnership income tax returns for the Day-Night Cigar Stand for the year 1944, being Exhibit 84, and the return for the same organization for the year 1946, being Exhibit 86. Will you look at the first page, where it states

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(Testimony of William E. Kyne.)

what is the inventory in 1944 return and you will note there it shows inventory of 11 thousand dollars. A. $11,889.

Mr. Campbell: As of what year?

Mr. Gillen: Beginning of year 1944, is that correct?

A. Yes.

Q. Now will you look at Exhibit 86 and will you tell us what it shows there for the inventory as of the year 1946 rather [1057] the end of the year 1946?

A. End of the year shows $22,466.44 inventory.

Q. So you doubled your inventory. Now was there anything which was supposed to have been done in the way of returning initial investment to the initial investor out of the profits that were to be derived from the Day-Night Cigar Stand?

A. It all went back into inventory.

Q. Now let me ask you, the oral agreement, in which you and Mr. Remmer and Mr. Lando each held one-third interest in the Day-Night Cigar Store, did that oral agreement contemplate that Mr. Remmer was to receive his initial investment back out of the profits before the profits were to be drawn out by the partners? A. I think so.

Mr. Campbell: I ask that the answer be stricken as not responsive.

The Court: It may stand.

Q. Now, Mr. Kyne, the next enterprise then was the Menlo Club and as to that, we have already examined into that and found that that was the one

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(Testimony of William E. Kyne.)

agreement that was reduced to writing, is that correct? A. Yes, sir.

Q. And your percentage was different, it was a 15 per cent interest in the profits?

A. Yes. [1058]

Q. Now finally the sixth enterprise that you became interested in with Mr. Remmer was the Transit Smoke Shop?

A. That is right. That was in writing also, the agreeement.

Q. And in that instance you borrowed $16,005.50 from the Menlo account and put that in as your share of the investment? A. Yes, sir.

Q. In the Transit Smoke Shop, is that correct?

A. Yes, sir.

Q. Then as I recall your testimony you took that 16 thousand dollars and put it into the box 48 and it was used as it was needed in the various enterprises in which Mr. Remmer was interested and which you were interested in, is that correct?

A. That's right.

Q. Now Mr. Campbell examined you, Mr. Kyne, regarding the records that you kept of the B & R Smoke Shoppe. Do you recall your examination on that subject? A. Yes.

Q. And you were shown, as I recollect, diaries for certain years, in which you had noted on the particular date pages when the transactions occurred initially, whether the enterprise had made any money or had lost any money on that day, is that true? A. That's right.

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(Testimony of William E. Kyne.)

Q. And initially entries were very simply, simply showed lost so much money or won so much, as the case might be, is that correct? [1059]

A. That's right.

Q. And then you testified at some later time your mode of bookkeeping was changed to the extent of making more than one entry regarding losses or winnings, is that true? A. That's right.

Q. And you stated, in answer to a question by Mr. Campbell, that that was the way the government wanted you to do it, do you recall that answer? A. That is correct.

Q. Will you state what was meant by that answer and how that came about that was so?

A. Mr. Izraole suggested it.

Q. Who was Mr. Izraole?

A. Government agent.

Q. Of the Internal Revenue? A. Yes, sir.

Q. Had he checked over your accounts in his official capacity at one time or another?

A. He had all my accounts.

Q. What was the change that was suggested by Mr. Izraole?

A. That I enter the daily play, daily pay-out and daily take.

Q. In other words, when you say daily play, pay-out and take, Mr. Izraole wanted you to show how much money had passed through your hands in gross form and your disbursements and how much was retained by you, is that correct? [1060]

A. That is right.

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(Testimony of William E. Kyne.)

Q. Now the play was the amount of betting that passed through your hands, is that correct?

A. Yes, sir.

Q. And the take, I understand, was the winnings? A. That's right.

Q. And the pay-out meant the losses plus the expenses, is that correct? A. That's right.

Q. And, thereafter, following that suggestion by Mr. Izraole, you kept those records that way?

A. That is correct.

Q. Now you were also questioned by Mr. Campbell regarding the transactions that are known in racing parlance as layoffs. There is only one form really of layoff, is there not; that is where a man making a book feels he has too much money on a horse and he lays it off to somebody who is willing to take part of the bet or risk with him, is that correct? A. That is correct.

Q. Now the matter of accepting part of a risk is not a layoff, is it? That is making a bet, so far as you are concerned. Do I make myself clear?

A. No, you don't.

Q. If I were to call you, Mr. Kyne, and say to you, I have twenty thousand dollars bet on a horse, I don't want to keep [1061] all of that, would you like to take some part of the risk with me, or some part of the bet, whatever you took from me I would be laying off to you? A. Giving me a bet.

Q. I mean so far as I am concerned, I would be laying off to you? A. Yes.

Q. Whatever part of that risk you would be

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(Testimony of William E. Kyne.)

willing to take, you would be taking a bet, isn't that correct? A. Yes, sir.

Q. Now with regard to another situation that has been testified to here, I believe both by you and Mr. Lando, there is still another aspect of this laying off, which is where you do not care to take any money yourself, but you agree, as a matter of courtesy, to try to find someone who is willing to take some of the money, is that true? A. Yes.

Q. So if I had an opportunity to take 20 thousand dollars worth of bets on a horse and I thought I didn't want to take that entire risk and I called you up and asked you if you cared to take any and you didn't care to take it but you would agree to find somebody else who would take it, you would be merely doing me a courtesy, for which you earned no money, is that right? A. Yes, sir. [1062]

Q. Now, with regard to that courtesy business—let me put it this way so we can understand—it is a homely illustration that we may follow through—if I called you and say I have 20 thousand dollars on a horse and didn't want to carry all of it and you said you didn't care to take it on and I said, "Can you find somebody that might be willing to take some of it" and you found Mr. Avakian, for example, who was willing to take some of the risk, the money would pass through your hands, would it not? A. Yes, it would.

Q. Regardless of whether it was win or lose, it would pass through your hands, is that true?

A. That is right.

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(Testimony of William E. Kyne.)

Q. So depending upon what resulted, you would either be sending some money to me or sending some money to Mr. Avakian? A. Yes, sir.

Q. And those are the kind of transactions that you handle with cashier's checks, is that true?

A. Yes, sir.

Q. Now, on those transactions, where you did not take any of the laid-off money yourself, but you found somebody else as a matter of courtesy for me, did you receive any emolument, any percentage, commission, or anything for doing that?

A. Only in the one instance I brought out the other day of the California Jockey Club. [1063]

Q. And that was a situation that existed only for a short period of time? A. That is right.

Q. But for professional bookmakers you receive nothing, is that correct? A. Yes.

Q. As a matter of fact, in those instances you were actually out any telephone tolls that you incurred? A. That is correct.

Q. And you did that as a matter of courtesy for what reason?

A. We expected the same treatment with other people.

Q. You expected reciprocal courtesies from whoever you helped out in situations, is that correct?

A. That is right.

Q. Now, Mr. Kyne, when you were examined regarding your accounts for the B & R Smoke Shoppe by Mr. Campbell the other day, there was produced in evidence, as I recall, your books for

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(Testimony of William E. Kyne.)

the years, I think, 1943, 1945, and 1946, and no book for 1944. Do you recall that?

A. Yes, I do.

Q. As a matter of fact, I do not think books of 1945, because you were away in 1945.

Mr. Campbell: I think there is only one or two entries in the 1945 book.

Q. Let me ask you, Mr. Kyne, did you keep a set of records of [1064] the transactions of the B & R Smoke Shoppe for the year 1944?

A. Yes, sir.

Q. Did you keep them in the same manner, in the same kind of diary? A. Yes, sir.

Q. Did you turn over to the Internal Revenue agents your 1944 diary of the B & R Smoke Shoppe transactions, together with these other diaries that have been produced here? A. Yes, sir.

Q. When was that done by you?

A. I believe in '46.

Q. In 1946? A. I think so.

Q. May I have that diary? May I ask counsel, through the Court if I may have that 1944 diary?

Mr. Campbell: I will state that we have no such diary.

Q. Did you receive a receipt from the Internal Revenue agent? A. No, sir.

Q. Did you receive a receipt from the Internal Revenue man for any of the books that you turned over to him or any of the records?

A. I believe I have one receipt dealing with the 186 Club.

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(Testimony of William E. Kyne.)

Q. Do you know where that is?

A. I think Conrad Hubner has it, I am not sure.

Q. Conrad Hubner is the tax lawyer in San Francisco, is that [1065] correct? A. Yes.

Mr. Gillen: I wonder if I might ask counsel, through the court, if the prosecution will produce any copy of any receipt they gave Mr. Kyne for any records turned over by Mr. Kyne to the Internal Revenue agents?

Mr. Campbell: I do not have any receipts. I do not know whether any were given or not. I can explore the subject.

Mr. Gillen: I wonder if we might ask counsel, through the Court, if he will seek to find any receipt given Mr. Kyne and also have the agents seek to find the 1944 diary?

Mr. Campbell: I have stated we do not have in our possession the 1944 diary.

Mr. Gillen: I wonder if they have receipt that might show what became of it?

Mr. Campbell: I object to this method of procedure.

Mr. Gillen: There is nothing improper about asking.

The Court: I understand counsel has stated the government hasn't the 1944 diary.

Mr. Campbell: And I am not prepared to answer the question as to receipts because I don't know, but I will explore that subject and will advise counsel.

Mr. Gillen: If counsel finds the 1944 diary, may

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(Testimony of William E. Kyne.)

I ask through the Court that they produce it? I would like to examine it. [1066]

Mr. Campbell: I will be more than happy to.

Q. When you turned over the records of these various enterprises to the Internal Revenue man, you also turned over to them, did you not, your agreement on the Menlo Club?

A. I gave them a photostatic copy of it.

Q. With Mr. Remmer, about 15 per cent of the Menlo Club? A. Yes, sir.

Q. Now, by the way, who were the agents who took these records from you?

A. The first one was Izraole, then there was Weaver, Morgan, Marcus and some fellow back in the army, a captain.

Q. You don't recall his name?

A. Mr. Weaver will know.

Q. When you turned over these records to these agents, did any or all of them agree to return them to you?

A. They said I could have access to them.

Q. Now, Mr. Kyne, you were asked by Mr. Campbell yesterday, I believe it was, whether or not you personally had had anything to do with making out the individual income tax returns of the defendant, Elmer Remmer, during the years in question here, 1944, 1945, and 1946. Do you recall that question? A. I believe I do.

Q. And you answered that you had nothing to do with preparing the individual income tax returns of Mr. Remmer, is that right?

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(Testimony of William E. Kyne.)

A. Yes, sir. [1067]

Q. Now, did you have anything to do with providing the data to be put into the individual income tax returns of Mr. Remmer. A. Yes, sir.

Q. What did you have to do in that regard?

A. I gave the figures from each enterprise to Pat Mooney to make up the total.

Q. In other words, you gave the figures showing any profits or credits due Mr. Remmer from each enterprise, such as the B & R and 110 and 186 and Day-Night and so on, to Mr. Mooney?

A. That is correct.

Q. Now, of course I presume that the year that you were in the army—you left in the month of February of 1945 and didn't return, as I recall your testimony until June, 1946, from the service—I take it that year you were not here to provide those figures.

Mr. Campbell: I object to the question in that form, because the period related by counsel covers two filing dates.

The Court: Let me have the question.

(Question read.)

Mr. Gillen: I think, your Honor, there is in the record a showing here that Mr. Remmer's individual tax return was in that year extended and was not filed until after Mr. Kyne's return from the army.

The Court: He may answer the question.

A. I don't think I was here. [1068]

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(Testimony of William E. Kyne.)

Q. Do you recall that the 1946 return of Mr. Remmer was not filed by reason of extensions being granted to both Elmer Remmer and Helen Remmer, until following your return from the service in 1946?

Mr. Campbell: I submit that question is misleading. That return would not be filed until 1947. It must be filed by the 15th of March for the succeeding year.

Mr. Gillen: I am in error on that. I withdraw the question. I have in mind the 1945 returns.

Q. Mr. Kyne, do you have any recollection of the fact that the 1945 returns, individual income tax returns, of Helen Remmer and Elmer Remmer were not filed by reason of extensions granted by the government until June 14, 1946, some weeks following your return to work from the service?

A. I wouldn't remember that.

Q. Well, let me show you prosecution's Exhibit 3, which is the 1945 return of Elmer Remmer and prosecution's Exhibit 4, which is the return for the same year of Helen Remmer; first, I will ask you to look at the receiving stamps on those and see if they refresh your recollection. If they do, all right, if they don't, all right.

Mr. Campbell: Unless the witness is familiar with the document, I don't see how it could refresh his recollection. These documents were prepared by another individual.

The Court: We will see if it does. [1069]

A. I wouldn't remember these documents.

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(Testimony of William E. Kyne.)

Q. Let me ask you, Mr. Kyne, the data that you furnished regarding credits due Mr. Remmer out of the various enterprises, the date that you furnished Mr. Pat Mooney for the purpose of enabling him to make up individual tax returns of Elmer Remmer and Helen Remmer, was that data true and correct, to the best of your knowledge and ability to determine? A. Yes, sir.

Q. And did you give that data to Mr. Mooney, did he ask you for it or did you volunteer to give it to him, or how did it come about, if you recall?

Mr. Campbell: Objected to unless the use or years for which the data was given is developed.

Mr. Gillen: I will withdraw that.

Q. How many years did you furnish information to Mr. Mooney concerning individual income tax returns of Helen Remmer and Elmer Remmer?

A. About five or six years.

Q. How did he get the information from you?

Mr. Campbell: Objected to unless it be established for what years the data was furnished, so we can determine whether or not these questions are within the issues here.

Mr. Gillen: I am trying to save time.

Q. Can you tell us approximately within what year range you gave those? [1070]

A. From about 1942 on.

Q. From about 1942 on? A. Yes.

Q. For five or six years? A. Yes.

Q. Now, did you give him that data each year in those successive years, with the exception, of course, of the year that you were away in the service?

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(Testimony of William E. Kyne.)

A. Yes, sir.

Q. How did he get that data from you, by telephone, personal contact, letter, or what?

A. He usually came to San Francisco on a vacation and took care of it then. If he couldn't come to San Francisco, I called him in Reno.

Q. You were shown a letter by Mr. Campbell, which is defendant's Exhibit "H," purporting to be a letter to you from Mr. Pat Mooney on date of March 7, 1947, and you were asked whether or not you recollect receiving that letter. Do you remember the question? A. Yes.

Q. And as I recall your answer, you said you did not remember receiving that letter.

A. No, I do not.

Q. Do you recall whether or not you ever received a letter of inquiry from Mr. Mooney regarding data for Elmer Remmer's income [1071] tax return? A. I received two or three.

Q. But you don't recall, or do you recall now, what they were about or whether this was one of them?

A. Well, he wanted me to give him the figures directly because Mr. Remmer used to lose them.

Q. In other words, if you gave the figures to Mr. Remmer, he would lose them before they got to Pat Mooney? A. That is right.

Q. And Mr. Mooney asked you to give him the figures directly? A. That is right.

Q. So am I correct in asuming that you would

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(Testimony of William E. Kyne.)

not say that you did not receive that letter, you just don't recall?

Mr. Campbell: Objected to as argumentative.

The Court: Objection overruled. Answer the question.

A. I don't recall the exact letter.

(Jury and alternate jurors admonished and court recessed at 4:00 p.m.) [1072]

Wednesday, December 19, 1951, 10:00 A.M.

(Defendant present with counsel. Mr. Lohse absent.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumed the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Kyne, you have mentioned from time to time, through your direct examination and I believe your cross-examination also, that one safety deposit box that was maintained for taking care of case was Box 48 of the Day and Night Branch of the Bank of America, that is correct, is it? A. Yes, sir.

Q. I believe you also mentioned that there was a safe at 50 Mason Street, the main office to certain of the enterprises, is that true?

A. That is right.

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(Testimony of William E. Kyne.)

Q. Was money kept in that safe during the years in question? A. Yes, sir.

Q. And then you mentioned also the Crocker safety deposit box that you and Mr. Remmer had together. Was money kept in that safety deposit box? A. No, sir.

Q. And that was the box the name Henry Clay was attached to? A. Yes, sir.

Q. And no money was kept there? [1073]

A. No, sir.

Q. I understood your testimony to be that Mr. Remmer never went to either Box 48 in the Bank of America nor the Crocker Bank box, is that true? A. I don't believe he did.

Q. And I believe you mentioned also there was a safe at 110 Eddy? A. Yes, sir.

Q. Was there money kept in that safe?

A. Yes, sir.

Q. Then when the Menlo Social Club was acquired, I believe you stated there was a safe at the Menlo Social Club? A. There was.

Q. Was money kept in that safe?

A. Just over night.

Q. That was part of your duties, to go and pick up that money, is that correct? A. Yes, sir.

Q. And take it usually to 50 Mason Street or Box 48? A. That is correct.

Q. In Box 48 was there an appreciable amount of money through the years?

A. It varied every day.

Q. Sometimes would be considerable and sometimes less? A. Yes, sir. [1074]

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(Testimony of William E. Kyne.)

Q. Was that also the situation with regard to the safe at 50 Mason Street?

A. Well that the diary will show.

Q. And with regard to the safe at the Menlo Club, I think you said that was only left there over night? A. Over night.

Q. Now, in your direct testimony you were asked regarding a transaction wherein you obtained some money from Box 48 of the Day and Night Branch of the Bank of America, and with it purchased a check for 34 thousand some odd dollars, I think $34,608, cashier's check made payable to Haas Bros.? A. That is correct.

Q. And you did that at the instance and request of Mr. Remmer, is that correct? A. Yes, sir.

Q. Haas Bros. is probably the largest wholesale grocery in San Francisco for the Northern California, is that correct? A. That is right.

Q. In other words, they are wholesale grocers who also deal in liquor and all food commodities, groceries? A. Correct.

Q. And then I understood your testimony to be that at some subsequent time—this check was issued, I recall in September of 1943?

A. I don't remember the exact date. [1075]

Q. You were informed, were you not, at that time that this check to Haas Bros. in the sum of $34,608 was for the purchase of whiskey?

A. Carload of whiskey.

Q. Now, Mr. Kyne, prosecution's Exhibit 121 is exhibit which contains photostatic copies of an ap-

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(Testimony of William E. Kyne.)

plication of cashier's check plus the cashier's check itself, the application being your application to the Bank of America to issue cashier's check to Haas Bros., and the date of the check is September 7, 1943, does that refresh your recollection?

A. I don't remember the exact date. The check should speak for itself.

Q. Well, the date that shows on here, you would not dispute it? A. That is right.

Q. As I understood your testimony, at some later time that same year, I believe in November, a check was issued by Haas Bros. which was cashed by some one other than yourself?

A. Will you repeat that again?

Q. I believe your testimony was that at some later time, in November of 1943, a check was issued by Haas Bros. in the same amount, 34 thousand odd dollars, and that check was endorsed and cashed by somebody other than yourself?

A. That is right.

Q. And you stated, I believe, when shown the exhibit—I show you prosecution's Exhibit 121A, Mr. Kyne, you were shown prosecution's [1076] Exhibit 121A, if I may show this to the witness, and look on the reverse side of the photostat of that check, and tell us whether or not that is your signature? A. That is not my signature.

Q. You were asked, I believe, whether or not you were acquainted with the handwriting following that endorsement and you said you were not?

A. That is correct.

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(Testimony of William E. Kyne.)

Q. You did state, however, that Mr. Remmer had your power of attorney to sign your name, is that correct? A. Yes, sir.

Q. And you have Mr. Remmer's power of attorney, is that correct? A. Yes, sir.

Q. Now, at a subsequent time you did receive a check for $17,739 and some odd cents, I believe 50 cents, from Barengo or the Sierra Wine Company, did you not? A. That is correct.

Q. And it came to your attention and knowledge that that was a refund from the money that had been put up for the whiskey, is that true?

A. That is correct.

Q. And that money, I believe you stated, you put into Box 48 and commingled it with the other funds in Box 48? A. Yes, sir.

Q. Mr. Kyne, you were asked some questions by Mr. Campbell regarding [1077] your individual 1943 returns, income tax returns, do you recall the questions? A. Yes, sir.

Q. Do you recall being shown your individual income tax return for the year 1943, in which you were credited with the entire profit and paid an income tax on the entire profit for that year of the Day-Night Cigar Stand? A. Yes, sir.

Q. Now that Cigar Stand at that time was a partnership, was it not? A. Yes, sir.

Q. Did you prepare your own individual income tax return, or did somebody else prepare it for you?

A. Slater.

Q. Do you know why Mr. Slater charged the

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(Testimony of William E. Kyne.)

entire 1943 profits of the Day-Night Cigar Stand to you?

Mr. Campbell: Objected to as calling for his conclusion as to what Slater had in mind.

The Court: You may answer the question.

Q. I am asking you if you know why that was charged to you?

A. The liquor license was in my name.

Q. The liquor license of the Day-Night?

A. And I imagine he followed that out.

Mr. Campbell: I ask that go out.

The Court: It may go out. [1078]

Q. You can't imagine, Mr. Kyne. Do you know why Mr. Slater did that?

A. That would be the reason, he followed it out.

Q. At all events, Mr. Slater prepared it that way for you to sign, is that correct? A. Yes, sir.

Q. Of course you had informed Mr. Slater, and Mr. Slater having kept the books, knew that the Day-Night Cigar Stand was a partnership?

A. Yes, sir.

Q. He prepared the partnership returns, too, did he not, for the Day-Night Cigar Stand?

A. Yes, sir.

Q. Did the Internal Revenue Department ever come to you and say in effect, "The Day-Night Cigar Stand is a partnership; therefore all the partners should have paid tax on this income; therefore, you have overpaid, Mr. Kyne, and here is a refund"?

Mr. Campbell: I object to the question in that

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(Testimony of William E. Kyne.)

form. Obviously a department cannot come to an individual. I think we are entitled to more precise questions. The Department of Internal Revenue is an intangible thing in itself.

Mr. Gillen: I will reframe the question.

Q. Did anybody from the Internal Revenue ever come to you and say in effect, "Mr. Kyne, you overpaid your income tax return on the Day-Night Cigar Stand; you should have only paid your [1079] partnership interest instead of paying all the tax due from that partnership, therefore, you have a refund and here is a refund," did anything like that ever happen? A. No, sir.

Q. They kept the money that you paid?

A. Yes, sir.

Q. And you did pay on the entire profits shown for the Day-Night Cigar Stand? A. Yes, sir.

Q. And that question was never raised by the Internal Revenue Department, is that correct?

A. No, sir.

Q. Now, with regard to the 110 Eddy establishment, I believe you stated in your direct examination that there was a Clarence Bent who was a partner in that? A. Yes, sir.

Q. And I believe you were asked by Mr. Campbell and stated that you had been charged for and had paid for two-thirds of the profits that were made by the 110 establishment for the year 1943?

A. Yes, sir.

Q. Now, I believe you testified that Mr. Bent died? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Did Mr. Bent die during the year 1943?

A. I don't remember which year. I guess it was that year, '43 [1080] or '44.

Q. And who was it that prepared the partnership return for the 110 Eddy enterprise?

A. Slater.

Q. And who was it that prepared your individual partnership return for the year 1943, in which you were charged with and paid for two-thirds of the profit? A. Slater.

Q. Did anybody from the Internal Revenue Department ever come to you since that time and say, "Mr. Kyne, you overpaid with regard to the profits of the 110 Eddy establishment. As a partner you should not have paid two-thirds, and therefore here is a refund for your overpayment"?

A. No, sir.

Q. Now, Mr. Kyne, as I recall your testimony, at the time you went into the United States army—and it has been referred to that you were in the army and navy, it was the army?

A. I was also in the Air Corps.

Q. Was that separate from the army at that time? A. I was in the army.

Q. Now, you entered the service on February 14, 1945, is that correct?

A. Valentine's Day, yes, sir.

Q. And I believe you were transferred to Fayetteville, North Carolina? [1081]

A. North Carolina.

Q. At the time you went into service, the Menlo

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(Testimony of William E. Kyne.)

Club was not an enterprise in which you or Mr. Remmer were interested? A. No, sir.

Q. That was acquired whi you were away, is that correct? A. Yes, sir.

Q. If I remember correctly, the agreement will show that that was acquired on May 1, 1945?

A. I believe that's the month it was purchased.

Q. Because your agreement, which was written in November, was retroactive as of May 1, 1945?

A. Yes, sir.

Q. Now, at the time you left is it true that the only card room or social club in which you and Mr. Remmer were interested was the 186 Club?

A. That's correct.

Q. And at the time you left for the army, what did your records show with regard to credits in the form of markers, as they have been called here, but have been explained as IOUs from people owing to the 186 Club?

Mr. Campbell: Objected to as not the best evidence. The books themselves are the best evidence.

The Court: Objection sustained.

Q. Well, do you remember what was the condition of the 186 Club with regard to IOUs or markers? [1082]

Mr. Campbell: Same objection.

The Court: Same ruling.

Mr. Gillen: If I may be indulged a moment, I believe there is some testimony in regard to this in the direct examination.

Q. Mr. Kyne, do you have any independent

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(Testimony of William E. Kyne.)

recollection of what was owed to the 186 Club by way of markers or IOUs left by people at the time you went in the army?

Mr. Campbell: The books and records are the best evidence.

The Court: Objection sustained.

Mr. Gillen: May I respectfully suggest, your Honor, he can testify to any recollection he has. He is the man who was the chief custodian in charge of these things. I think if he has any independent recollection on it, he should be permitted to state.

The Court: Well, I think the books and records are the best evidence.

Q. Well, Mr. Kyne, after you returned from the army in June of 1946, do you have any independent recollection of whether or not the markers or IOUs owing to the 186 Club were increased or decreased?

Mr. Campbell: Same objection, the records are the best evidence.

The Court: Same ruling.

Q. Mr. Kyne, you testified that you tended to the money matters [1083] and records that were turned over to you, that you in turn turned over to the bookkeepers or auditors in all the places in which you and Mr. Remmer were interested, is that correct? A. Yes, sir.

Q. And among your duties you enumerated that you went every day and picked up lists, picked up money, put the money where it should be. You also stated if one enterprise needed money, that

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(Testimony of William E. Kyne.)

came out of a common fund from the enterprises to help the enterprise who needed it?

A. Yes, sir.

Q. Among your duties in connection with the various enterprises in which you and Mr. Remmer were interested, did you have anything to do with the good will and public relations of those enterprises towards customers? A. Yes, sir.

Q. Did you at Christmas time suggest what customers you thought should receive Christmas presents? A. Yes, sir.

Q. And do you know what was the usual Christmas present that was sent to customers by Mr. Remmer?

Mr. Campbell: Objected to as not within the scope of direct examination.

The Court: Objection will be sustained.

Mr. Gillen: May I respectfully say I think it is within the scope because counsel examined this witness as to his duties [1084] in direct examination and I think we encountered the same thing the other day with Mr. Lando and I think I am entitled to enlarge on cross-examination on those duties and find out if there were other duties to perform in addition to carrying money from one place to another or hiring bookkeepers. I asked him if he had anything to do with public relations and good will and he said yes. I think it would be perfectly proper to permit me to go into that.

The Court: The ruling will stand.

Mr. Gillen: May I respectfully offer to your

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(Testimony of William E. Kyne.)

Honor when our explanation was given during the cross-examination of Mr. Lando, you did permit me to examine Mr. Lando on his recommendations as to who was to receive Sulka ties.

The Court: The ruling will stand.

Mr. Gillen: It isn't so——

The Court: The ruling will stand.

Mr. Gillen: Of course the ruling will stand, but I will say too for the record, it is——

The Court: The ruling will stand.

Mr. Gillen: This is another question, your Honor, in my mind and not in derogation of your Honor's ruling.

Q. Did you ever receive any presents of Sulka ties from Mr. Remmer? A. Yes, sir.

Q. More than one? [1085] A. Yes, sir.

Mr. Gillen: Now, I am going to ask another question, your Honor, which I do not believe is in derogation of your Honor's order.

Q. In the course of your duties in and about the Menlo Club and other various enterprises, did you at Christmas time participate in wrapping of any neckties to be given as presents to customers of the various enterprises?

Mr. Campbell: Objected to as not within the scope of direct examination.

The Court: I think you waived that. You had no objection to that last question. He testified here in response to a question, "Did you receive any presents" and you made no objection.

Mr. Campbell: That is a different situation, if

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(Testimony of William E. Kyne.)

the Court please, than called for in this question presently propounded.

The Court: It seems to me it wasn't embraced within direct examination. I will overrule the objection.

Q. His Honor says you may answer the question. A. I did wrap ties at Christmas.

Q. Were they Sulka ties? A. Yes, sir.

Q. Mr. Kyne, you were asked with regard to bank accounts, or your knowledge of bank accounts, that Mr. Remmer had and you [1086] stated, I believe, that Mr. Remmer had a bank account, in which you had no interest, in Tracy, California?

A. That's correct.

Q. And that was approximately 90 miles from San Francisco? A. Yes, sir.

Q. And it is true, is it not, that Mr. Remmer at one time owned a restaurant and tavern business in Tracy, California, is that correct?

A. I believe it was a tavern.

Q. And it is within your knowledge, is it not, that that personal bank account at Tracy was in existence for many years? A. Yes, sir.

Q. Now, I may be in error about this, Mr. Kyne, but I believe when Mr. Campbell was examining you concerning the Haas Bros. check for $34,608, he asked you—I will withdraw that. I think what is correct is Mr. Campbell showed you the check of November, 1943, November 4th, I believe it is, 1943, the Haas Bros. check.

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(Testimony of William E. Kyne.)

The Court: Would you mind referring to the exhibit number if there is one?

Q. I am referring now to prosecution's Exhibit 121A for identification. I believe Mr. Campbell, when he showed you the Haas Bros. check, refunding $34,608, which you said was endorsed by some one other than yourself, asked you if you recalled seeing that check at his office in May of 1950. Do you remember [1087] that? A. Yes, sir.

Q. Now, you were interviewed by Mr. Campbell in May of 1950, were you? A. Yes, sir.

Q. And during the course of that interview with Mr. Campbell, did you explain to Mr. Campbell what was meant by the working agreements you had in the various enterprises with Mr. Remmer, including the 15 per cent working agreement that you had in the profits of the Menlo Club?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Gillen: Well, I would like to be heard on that, may it please the Court. I think it is a very vital part of the defense's case and I think the defense counsel should have an opportunity to present it to your Honor out of the presence of the jury.

The Court: We will excuse the jury.

(Jury admonished and excused at 10:30.)

(In the absence of the jury.)

(NB 326 pp. 35 to 52.)

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11:15 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on [1088]

Cross-Examination

By Mr. Gillen:

Mr. Gillen: Your Honor sustained the objection of counsel to the last question. I am going to ask some other questions touching the same subject matter. Those questions are not now in disobedience to your Honor's ruling, but will be questions I deem perfectly proper. If they are objected to, of course——

The Court: I would like to ask counsel a question. Isn't it a rule when an objection to a question is sustained, that the matter should not be pursued further?

Mr. Gillen: I do not think so, your Honor. I think the question should not be pursued further, of course.

The Court: Well, the same subject matter. I had in mind a situation where counsel might, in the face of an objection sustained, might change the appearance——

Mr. Gillen: I will be glad to tell your Honor what I intend to do. It is my understanding that in cross-examination the cross-examiner is entitled to ask the witness this question, by either side,

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(Testimony of William E. Kyne.)

whether or not he ever discussed his testimony with the prosecution, with the particular attorney who examines him, and questions pertaining to what was discussed. I think that is perfectly proper cross-examination.

Mr. Campbell: That is not our understanding, if the Court please. [1089]

The Court: Let us proceed. We will have the question read.

(Last question before jury was excused read.)

The Court: Objection was sustained to that.

Mr. Gillen: I am going to ask another question.

Mr. Pike: Your Honor, if I may comment, in view of counsel's statement. I will say this, that it is my understanding likewise that it is in order to ask a witness called by opposite parties who they have discussed their testimony with, but the record in this present instance shows that Mr. Kyne has discussed matters with Mr. Campbell and that matter has already been gone into and I respectfully suggest if there are other questions seeking to elaborate on that discussion, further discussion should take place in the absence of the jury.

Mr. Gillen: Counsel is saying now because——

The Court: Well, we will excuse the jury again until one o'clock this afternoon.

(Jury and alternate jurors admonished and excused at 11:20.)

(Argument in the absence of the jury.)

(NB 326 pp. 53-63.)

(Court recessed at 11:45 a.m.)

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December 19, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [1090]

MR. KYNE

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Kyne, you were interviewed by Mr. Campbell in May of 1950 concerning the matters pertaining to the income tax and the business affiliations with relation to Mr. Remmer?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: Objection sustained. This question has already been answered.

Mr. Gillen: I was not aware of that, your Honor. I will ask another question, contemplating it is already in the record and he so testified.

Q. Did your interview with Mr. Campbell consist of meeting one day or more than one day?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Who was present beside Mr. Campbell during the course of the interview?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Mr. Gillen: May I say respectfully, your Honor, I believe where there is evidence of a meeting or

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(Testimony of William E. Kyne.)

conversation between people that it is perfectly proper to ask who else was present at the meeting.

The Court: Due to the peculiar situation we have here, the ruling will stand. [1091]

Q. At the interview with Mr. Campbell in May, 1950, did you relate to Mr. Campbell approximately what you related on cross-examination here and nothing different than what you related under cross-examination here, with regard to Mr. Remmer's affairs, as you knew Mr. Remmer's affairs?

Mr. Campbell: Objected to as incompetent, calling for his conclusion and immaterial.

The Court: Objection sustained. I wish you would not pursue the subject any farther.

Mr. Gillen: May I make one observation to your Honor in connection with your Honor's ruling?

The Court: I would rather not.

Mr. Gillen: If your Honor tells me to desist, I will desist.

The Court: I would rather not.

Q. Now, Mr. Kyne, is it your testimony that in all of the six enterprises in which you were interested with Mr. Remmer, that you attended to the management of those enterprises, the handling of the money, the handling of the records, the engaging of the bookkeepers and auditors?

A. I handled the money and sheets and hired the bookkeepers except for Mr. Maundrell.

Q. Now, there was also for the Menlo Club a public accountant by the name of Ayton, was there not? A. That is correct. [1092]

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(Testimony of William E. Kyne.)

Q. And you did not engage Mr. Ayton, did you? A. No, sir.

Q. Mr. Ayton was a man who had for some ten years prior to Mr. Remmer's acquiring an interest in the Menlo Club, kept the books and records for the predecessors of Mr. Remmer, is that correct?

A. That is correct.

Q. And one more thing, Mr. Kyne—oh, and in regard to Mr. Ayton, he was just kept on because he was familiar with the books and records?

A. Yes, sir.

Q. One more thing, Mr. Kyne—you stated in your direct examination, and I believe you testified on cross, that in regard to the 186 Club, that an Internal Revenue agent directed that the 186 Club make a return as a corporation rather than as a partnership the first year it was in operation, is that correct?

A. We made a partnership return the first year.

Q. Now, that Revenue agent was a Mr. Mooser, was he not? A. Yes, sir.

Q. Let me ask you whether or not you recall that Mr. Mooser visited the 186 Club and remained there for some length of time making observations of the average business that was done?

A. He was there about a month.

Q. Did he prepare what he considered the average business of the club from his personal observations carried on there for a [1093] period of a month?

Mr. Campbell: Objected to as calling for this

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(Testimony of William E. Kyne.)

witness' conclusion as to Mr. Mooser's conclusion.

The Court: Objection sustained.

Q. I understand you to say that Mr. Mooser stayed at the club there for the period of a month?

A. About a month.

Q. Did he tell you what he was doing there?

A. He had our sheets and records, more or less wanted to verify them.

Q. Did he tell you how he was verifying them?

A. Yes, sir.

Q. What did he tell you in that regard?

A. By his own observation.

Q. That is, he was observing the amount of business done there? A. Yes, sir.

Q. And checking that against your records?

A. That's right.

Q. And did he present to you what he stated was his conclusion regarding the average business at the 186 Club over that period of time?

A. He presented that information to our attorney, John Taffe.

Q. And that is Mr. John Taffe, who is now deceased? A. Yes.

Q. Now, Mr. Kyne, I am going to show you defendant's Exhibit [1094] "Q" in evidence, which purports to be corporation interest profits tax return for the 186 Club for the fiscal period beginning July 1, 1942, and ending June 30, 1943, and I will ask you to look at the signature of the deputy collector at the bottom of that page and tell us if that is the same Mr. Mooser who spent a month at the

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(Testimony of William E. Kyne.)

186 Club getting an average of the business?

A. Yes, sir.

Q. And is that the fiscal year that Mr. Mooser had you change your returns from a partnership return to a corporation return?

A. That is correct.

Q. Now, as a matter of fact, Mr. Kyne, the 186 Club had already filed a full year's return, had it not, for the year 1943, as partnership, had it not?

A. That's correct.

Q. So that, as a matter of fact, the 186 Club at that time had paid an income tax as a partnership for the full year of 1943 and then when Mr. Mooser made the change, they paid double for part of the year 1943, is that true?

Mr. Campbell: Objected to as assuming a fact not in evidence; further, that a partnership, as such, does not pay an income tax.

The Court: I take that as a question. The witness may answer the question. [1095]

A. That is correct.

Q. In other words, the partners paid for the full year 1943 on a partnership basis?

A. As a partnership and a corporation.

Q. Partnership basis first, isn't that correct?

A. Yes.

Q. And then Mr. Mooser, after he had completed his survey and had a corporation return made, you paid for at least six months of the same year as a corporation, isn't that true? A. Yes.

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(Testimony of William E. Kyne.)

Q. Were the partners ever given any refund for the double payment? A. No, sir.

Q. Now, I am going to show you the prosecution's Exhibit 87A, which is the corporation return of the 186 Club for the fiscal year beginning July 1, 1943, and ending June 30, 1944, and ask you if you will notice that the deputy collector's name signed there is Louis Mooser. Is that the same Louis Mooser whom you have been referring to here as having made a survey? A. Yes, sir.

Q. Now, in this last exhibit that I showed you, prosecutor's Exhibit 87A, covering the period of fiscal year commencing July 1, 1943, and ending June 30, 1944, it is true, is it not, that the partners, having previously paid for the entire year of 1943 as a partnership, that on the next year's fiscal year's [1096] return of the corporation, there had been double payment of tax under this corporation return prepared by Mr. Mooser, isn't that true?

A. That's right.

Mr. Campbell: Objected to as unintelligible.

The Court: The answer may stand.

Q. Did you, or any of the partners, to your knowledge, get a refund from the Internal Revenue for the second half of the year that you paid taxes as partners and later on paid taxes for the same period as a corporation? A. No, sir.

Mr. Gillen: I think that is all.

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(Testimony of William E. Kyne.)

Redirect Examination

By Mr. Kyne:

Q. Mr. Kyne, in response to one of Mr. Gillen's questions, regarding the bank account at Tracy, you stated that Mr. Remmer owned a tavern at Tracy?

A. That is correct.

Q. What was the name of that tavern?

A. That I don't know.

Q. Over what period of time did he own it?

A. I don't know.

Q. Do you know whether or not he owned that tavern during any part of the years 1944 to 1946?

A. Not during those years. [1097]

Q. Do you know that definitely?

A. Well, I couldn't swear to it.

Q. Do you know where the tavern was located?

A. No, I do not.

Q. Have you ever been in the tavern?

A. No, sir.

Q. Can you state whether or not, to your knowledge, Mr. Remmer had any partners or associated in that tavern business in Tracy?

A. I know the gentleman that purchased it from him.

Q. What was his name?

A. Frank Cavani.

Q. I believe you testified, in response to Mr. Gillen's questions, that you were sort of a general manager of the six San Francisco enterprises?

A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. And that you handled the money and the sheets, is that correct? A. Yes, sir.

Q. Exactly to what do you refer when you state the sheets you handled?

A. Reports, card reports.

Q. Were those sheets similar to sheets shown to you as the Poker sheets of the Menlo and 186 Club?

A. Yes, sir.

Q. And you did handle those sheets how [1098] often?

A. Each day I would deliver them to 50 Mason Street.

Q. How did they come into your possession, Mr. Kyne?

Mr. Gillen: Objected to as already asked and answered quite fully on direct examination. He went each day and picked up at the two card rooms and placed them in a large box and delivered them to 50 Mason Street.

The Court: I think that is true. Objection sustained.

Q. Now, in response to question Mr. Gillen asked you whether or not any money was kept in the box at the Crocker Bank, safety deposit box, which was in the joint name of yourself and Mr. Remmer, under the name of Henry Clay, you answered that no money was kept there, was that correct?

A. I don't think so.

Q. What is your best recollection?

A. I mean in regard to the money being left there.

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(Testimony of William E. Kyne.)

Q. Was there any money left in that box?

A. No, I don't think so. The records will show. I just went in there a few days in the course of a few months.

Q. What was kept in there?

A. Oh, I think I had some records in there.

Q. Records of what?

A. Just papers accumulated.

Q. Did those refer to the six businesses as to which you have been interrogated?

A. No, it would have been my own sheets. [1099]

Q. Relating to personal business of your own?

A. Yes, sir.

Q. Do you recall whether or not there were kept in there any of the records pertaining to the six businesses? A. That I don't remember.

Q. You stated that money was kept in Box 48. Did you keep any record as to the source of the money which you placed in Box 48?

A. Yes, sir.

Q. And what was the nature of that record?

A. Just a daily record.

Q. Do you have that record now?

A. No, sir.

Q. Do you know where that record is?

A. Slater had it.

Q. Is that the last you saw of it?

A. Yes, sir.

Q. Slater is the gentleman who is now deceased, is that correct? A. Correct.

Q. Do you recall when Slater died?

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(Testimony of William E. Kyne.)

A. No, I don't.

Q. Was that a record which he kept or which you kept?

A. That I kept and turned over to him.

Q. How often did you turn it over to him? [1100]

A. Oh, maybe once a month.

Q. That was the information from which he kept a record?

A. So that he could file the taxes.

Q. Now, you testified, Mr. Kyne, in response to questions by Mr. Gillen, that each year you supplied Mr. Mooney with certain figures for use in preparing Mr. Remmer's individual income tax returns, is that correct? A. That is correct.

Q. Where did you obtain the figures which you supplied Mr. Mooney with?

A. I believe I supplied figures for the B & R Smoke Shoppe and Mr. Slater gave me the rest of the figures.

Q. Gave you the rest of the figures?

A. Yes.

Q. And you in turn turned them over to Mr. Mooney? A. Yes, sir.

Q. What records of the B & R Smoke Shoppe did you refer to for the purpose of determining Mr. Remmer's share of the income?

A. My own record.

Q. Was that a record other than the daily diaries which have been produced here? A. No, sir.

Q. Then did you refer to the daily diaries?

A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Let us take the first one, and I refer to the year 1945, [1101] government's Exhibit 111B, and will you state to what figure you referred in supplying the information to Mr. Mooney relative to Mr. Remmer's profit or loss from that enterprise for that year?

A. I wasn't here at that time.

Q. Did you supply any information to Mr. Mooney then in relation to Mr. Remmer's 1945 income tax?

Mr. Gillen: I think it is well established in direct examination and cross-examination—in fact, counsel reminded me yesterday when I looked at the 1945 record—there was only one record in 1945, and Mr. Kyne, you may recall, went in the army and was there for the balance of the year 1945.

Mr. Campbell: That is exactly what I am attempting to bring out, but the witness stated on cross-examination that he supplied information for each year.

Mr. Gillen: Your Honor will recall I eliminated in my cross the year 1945 when I asked the question concerning the supplying to Mr. Mooney, I said with the exception of 1945 and 1946 that you were away; so this would not be proper redirect examination.

(Question read.)

The Court: Answer the question.

A. I was away at that time.

Q. Would you answer the question yes or no?

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(Testimony of William E. Kyne.)

A. Slater would take care of it. [1102]

Q. That is not directly in response to my question, Mr. Kyne. I asked you if you supplied any information for 1945? A. The answer is no.

Q. Now, in relation to the year 1946—and I am referring to government's Exhibit 111C which you identified the other day—will you show me the source of the figure which you used in supplying information to Mr. Mooney?

A. I would have to have my income tax report in that connection.

Q. Mr. Kyne, was that supplied from that record which you hold in your hand? A. Yes, sir.

Q. Then can you point out to me the source of the information?

A. I still have to see the income tax return.

Q. Your personal income tax return?

A. For the B & R Smoke Shoppe.

Q. I will show you that if that will refresh your recollection. May we have plaintiff's Exhibit 79. I hand you plaintiff's Exhibit 79, 1946 partnership return of the B & R Smoke Shoppe, which you requested for the purpose of refreshing your recollection.

A. I believe that was a losing year.

Q. Does that refresh your recollection where in this record, 111C, you obtained the information?

A. No, it doesn't.

Q. It does not? [1103] A. It does not.

Q. Now, did you supply Mr. Mooney with any

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(Testimony of William E. Kyne.)

information relative to the 21 Club, the San Diego Social Club, or the 311 Club?

A. I may have through Mr. Simmons.

Q. What is your best recollection, Mr. Kyne?

A. I believe I did call on Mr. Simmons to find out figures for Mr. Mooney.

Q. Did you supply that information to Mr. Mooney? A. I think so, yes, sir.

Q. Will you state at this time for what calendar years did you supply figures to Mr. Mooney for preparation of Mr. Remmer's returns?

Mr. Gillen: Objected to as asked and answered. Already in the record he said he believed from 1942.

The Court: I believe that is correct, Mr. Campbell.

Mr. Campbell: Very well. May I have exhibits 1 to 10 inclusive?

Q. I am going to show you government's Exhibit 1, the individual return of Elmer Remmer for the year 1944, and ask you to examine it and state whether or not you supplied Mr. Mooney with any figures set forth thereon?

A. I believe I was away at that time, Mr. Campbell.

Q. What is your best recollection then as to whether or not you supplied Mr. Mooney with any figures relative to the preparation of the 1944 return? [1104]

A. Those figures were supplied by Slater.

Q. Did you furnish any? A. No, sir.

Q. I show you government's Exhibit 3, being the

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(Testimony of William E. Kyne.)

income tax return of Mr. Remmer for the calendar year 1945, and ask you if you supplied any of the figures set forth on that return to Mr. Mooney?

A. I believe I did.

Q. Will you state what figures you supplied? Will you identify the ones which you supplied?

A. This six thousand, I believe.

Mr. Campbell: The witness has indicated figures six thousand dollars which appear opposite line 7, "How much have you paid on your 1945 income tax by payments on 1945 declaration estimated tax, $6,000."

Q. Is that the figure to which you return?

A. Yes.

Q. Do you see any other figures which you supplied?

Mr. Gillen: I should offer the objection that this particular subject matter was introduced and established by the government in the testimony of Mr. Mooney, the government witness, with regard to this particular return. If your Honor will recall, Mr. Mooney testified that there was a return made on estimated figure and subsequently there was some correspondence passed between Mr. Mooney and persons from whom he was seeking [1105] additional information to make an amended return, and if your Honor will recall, there was also a letter written by Mr. Mooney to Mr. Remmer, an exhibit here, in which he said, "I will have to file return on the estimated figure and have to get the additional information to make an amended re-

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(Testimony of William E. Kyne.)

turn." I believe those are exhibits here and brought out by and introduced by the government on Mr. Mooney's testimony.

The Court: Objection overruled.

A. The figure I am referring to isn't even listed here under the income sheet.

Q. Do you recognize any figures on that return which you supplied to Mr. Mooney?

A. No, sir.

Q. I call your attention to government's Exhibit 5, being the individual income tax return of Elmer F. Remmer for the year 1946, calling your attention to not only the return itself, but to the attached schedule of income deductions, and ask if you recognize any of the figures thereon as having been supplied by you to Mr. Mooney?

A. B & R Smoke Shoppe, $1,300.

Q. Is that the only figure which you recognize?

A. The rest of the figures were given to me by the bookkeepers and then transferred to Mr. Mooney.

Q. Do you recognize the other figures as being figures which you transferred or transmitted to Mr. Mooney? [1106]

A. I think the books would show that.

Mr. Gillen: I offer the objection it is improper redirect examination and is cross-examining his own witness. He said he supplied figures personally from the B & R and the other figures he obtained from Mr. Slater, the bookkeeper, as to other items.

Mr. Campbell: The witness on cross-examination

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(Testimony of William E. Kyne.)

was asked the general question and answered he supplied information for all the years 1942 to 1946 and I am simply examining as to years.

Mr. Gillen: That isn't a correct statement. The year Mr. Kyne was away was eliminated of course—"with the exception of the time you were in the service."

The Court: Objection overruled.

(Question and answer read.)

The Court: The answer may stand.

Q. Now, in response to counsel's questions, you stated, Mr. Kyne, that you made investment in the Transit Smoke Shop of $16,005.50, do you recall that? A. Yes, sir.

Q. From what source was it that you obtained those funds? A. Menlo Club.

Q. Do you know whether or not that amount was charged against you on the books of the Menlo Club? A. I don't remember. [1107]

Q. In what manner did you receive the money from the Menlo Club, that is, as payment to you of what is due, in loan or in what manner?

A. It reads as a loan, the check.

Q. That is, the check which you identified when you were on the stand here as "Loan Transit Smoke Shop," is that correct? A. Yes, sir.

Q. Were you familiar with the entries which were made on the books in that regard?

A. No, I was not.

Q. And you say that 16 thousand dollars was

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(Testimony of William E. Kyne.)

subsequently used as however necessary, I believe in the conduct of the various businesses?

A. That is correct.

Q. Now, in response to counsel's questions regarding the B & R Smoke Shoppe, you stated that Mr. Remmer got his bank roll back. Do you recall that testimony? A. I believe that is correct.

Q. Do you know that to be the fact?

A. I don't remember.

Q. You don't know whether he did or not get it back? A. No, sir, it is too far back.

Q. Was any entry made of these records as a repayment to Mr. Remmer?

A. That I don't remember.

Q. Would an examination of these records refresh your recollection? [1108]

A. I don't believe so.

Q. Now, you stated at the suggestion of a Mr. Mooser, the 186 Club, which had been started as a partnership, became a corporation, is that correct?

A. Yes, sir.

Q. Do you recall at that time what, if anything, Mr. Mooser told you about the necessity for a charter for a social club?

A. The meetings took place between John Taffe, Bob Slater and Mooser in Mr. Taffe's office. They argued there for three months before Mr. Mooser won out and set up as a corporation.

Q. A corporation was organized?

A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. Who, incidentally, handled the legal aspects of setting up that corporation?

A. I believe Taffe handled it. I am not sure.

Q. Now, yesterday, I believe that you did not know whether or not records were kept, books and records, for the 186 Club?

A. What is that question again?

Q. You stated, I believe, that you did not recall whether or not books or records were kept on the 186 Club? A. We had the sheets.

Q. Did you have other books and records that you recall?

A. We had social security. I don't believe so.

Mr. Campbell: I am going to ask that this document be [1109] marked for identification.

The Clerk: 122.

Q. Mr. Kyne, I show you government's Exhibit 122 for identification and ask you if you recognize the signature on that exhibit? A. Yes, sir.

Q. You are familiar with that signature?

A. Yes, sir.

Q. Whose signature is that?

A. Harold Maundrell.

Q. Is that the same Maundrell as you have referred to as keeping books and records for the various enterprises? A. Yes, sir.

Q. Will you examine this——

Mr. Gillen: I think counsel made a mistake—books and records, I don't think that is a fact.

Mr. Campbell: That question may be stricken.

Q. Is that the same Mr. Maundrell that you have

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(Testimony of William E. Kyne.)

referred to in your testimony? A. Yes, sir.

Q. Will you examine that document and state whether or not that refreshes your recollection as to whether or not books and records were maintained for the 186 Club? A. Yes, sir.

Q. And what is your recollection as [1110] refreshed?

A. We have to keep some books.

Q. As to whether books and records were maintained for the 186 Club?

A. They were, but I didn't keep them.

Q. Do you know who did keep those records?

A. I believe Slater at first and then Maundrell.

Q. Now, in response to Mr. Gillen's questions, Mr. Kyne, you stated that Clarence Bent, who at one time was associated in the 110 Eddy Street bar, died in 1943 or 1944, do you recollect that testimony? A. Yes, sir.

Q. Now, do you know whether or not, at the time of his death, anything was paid out of 110 Eddy Street to his estate or to any one else regarding any share which he may have had in that business?

A. I believe John Taffe paid his sister $3,500.

Q. What is your best recollection?

A. I am pretty sure that was the amount.

Q. How was that paid, if you recall, by check or by cash?

A. I think it was a cashier's check; I am not sure.

Q. Who purchased it? A. I made it up.

Q. Where did you receive the money?

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(Testimony of William E. Kyne.)

A. Took it out of Box 48.

Q. Were you given instructions by any one to pay that money? [1111] A. John Taffe.

Q. Mr. Kyne, you stated on cross-examination that Mr. Remmer held your power of attorney?

A. Yes, sir.

Q. And when was it that you gave him your power of attorney? A. I don't remember.

Q. What is your best recollection?

A. I don't remember.

Q. Does he still have your power of attorney?

A. No, sir.

Q. When did you receive it back?

A. I forget exactly.

Q. What is your best recollection, Mr. Kyne?

A. I just don't remember.

Q. Can you state whether or not Mr. Remmer held your power of attorney during the years 1944 to 1946 inclusive? A. I don't remember.

Q. Do you recall whether or not Mr. Remmer held your power of attorney in the year 1943?

A. I don't remember.

Q. Was that a written power of attorney?

A. I forget.

Q. What is your best recollection?

A. I just don't remember.

Q. Now, you testified also, in response to Mr. Gillen's questions [1112] that you held power of attorney for Mr. Remmer, do you recall that testimony? A. Yes, sir.

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(Testimony of William E. Kyne.)

Q. And was that a written or oral power of attorney? A. That I don't remember.

Q. When did you receive that power of attorney? A. I don't remember.

Q. Do you still hold that power of attorney?

A. No, I don't believe so.

Q. When was the power of attorney cancelled?

A. I don't remember.

Mr. Gillen: Of course, that is assuming it was cancelled, may it please the Court. We move the answer be stricken for that reason. Also offer the objection this examination is not proper redirect examination but more in the nature of cross-examination of his own witness.

The Court: Objection overruled. Motion to strike is denied.

Q. Can you state whether or not you held Mr. Remmer's power of attorney during the years 1943 to 1946 inclusive?

Mr. Gillen: Objected to as already asked and answered. He says he doesn't recall.

The Court: Objection overruled.

A. I don't remember.

Q. Do you recall now that you were shown by counsel the check [1113] of Haas Brothers and attention was directed to testimony that that was not your signature endorsing that check, in 1943, and you stated that Mr. Remmer had your power of attorney at that time, does that refresh your recollection as to whether or not Mr. Remmer had your power of attorney in 1943?

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(Testimony of William E. Kyne.)

A. I believe that is right.

Q. That he did have your power of attorney in 1943?

A. I believe that is right. I don't exactly remember.

Mr. Gillen: I will state to your Honor, we have been looking for some powers of attorney and this might assist counsel in his redirect.

The Court: Show it to counsel.

Mr. Gillen: I believe there was special power of attorney given when Mr. Kyne went into the service. I believe there is an earlier one than that, which we may be able to find; that is, power of attorney from Mr. Remmer to Mr. Kyne.

Mr. Campbell: Counsel has produced and with his permission——

Mr. Gillen: We are happy to have you make any use of it you wish.

Q. I show you, Mr. Kyne, a document bearing date February 13, 1945, and ask you if you recognize the signatures thereon? A. Yes, sir.

Q. Is that your signature appearing on it?

A. Yes, sir. [1114]

Q. And is that the signature of Elmer Remmer?

A. Yes, sir.

Mr. Campbell: May this be marked in evidence as government's Exhibit 123.

The Court: Any objection to the admission of that document in evidence?

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(Testimony of William E. Kyne.)

Mr. Gillen: No, your Honor, we produced it for counsel to make whatever use he wanted to.

The Court: It may be admitted.

Mr. Campbell: Reading this document, with the Court's permission; dated San Francisco, California, February 13, 1945: (Reads Exhibit 123.)

Q. Now, is this the power of attorney which you referred to when you stated that Mr. Remmer had your power of attorney?

A. I believe that is it.

Q. Prior to that time had you executed any power of attorney for Mr. Remmer?

A. I do not remember.

Q. Now, simultaneously, or at or about the date of that document, had Mr. Remmer executed a power of attorney to you, if that refreshes your recollection?

A. I am pretty sure that was the power of attorney.

Q. Yes, but can you state, or can you fix in any way, or is there anything that refreshes your recollection, as to when you received that power of attorney, if it was in written form, and [1115] how long you had his power of attorney?

A. I think the Bank of America has a sheet similar to this one here pertaining to the fact that I had power of attorney, but I am not sure.

Q. Do you recall the wording of that power of attorney? A. No, I do not.

Mr. Gillen: Of course, the power of attorney would be the best evidence.

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(Testimony of William E. Kyne.)

The Court: He has answered the question, he doesn't know.

Q. After you returned from the service, Mr. Kyne, do you recall whether or not you executed another power of attorney to Mr. Remmer?

A. No, I don't.

Q. Now, Mr. Kyne, Mr. Gillen questioned you regarding operations of the B & R Smoke Shoppe and particularly as to the acceptance of lay-off bets, do you recall that? A. Yes, sir.

Q. I believe you were asked if all of the cashier's checks set forth in plaintiff's Exhibit 116, represented what were known as courtesy bets. Do you recall that?

Mr. Gillen: I do not believe I asked the question. I do not believe that question was asked.

Mr. Campbell: That is the note I have.

Mr. Gillen: I would refer to the record. I would [1116] challenge that.

The Court: May we have the question.

(Question read.)

The Court: Do you want to refer to the record?

Mr. Gillen: Yes, I would like to.

Mr. Campbell: I will reframe my question in a way I do not think will be objectionable.

The Court: The question is withdrawn.

Mr. Gillen: Very well.

Q. Mr. Kyne, referring to plaintiff's Exhibit 116, which you have previously identified as representing cashier's checks purchased from the Bank

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(Testimony of William E. Kyne.)

of America, do you recall that? A. Yes, sir.

Q. Were those purchased in connection with the B & R Smoke Shoppe operation? A. Yes, sir.

Q. Now, you were asked, I believe, by Mr. Gillen regarding what is known as courtesy bets, do you recall that? A. Yes, sir.

Q. And I believe you described a courtesy bet as one where another bookmaker would ask you if you could place money with other people, is that correct? A. That is correct.

Q. Now, do all of those cashier's checks set forth there represent what you term courtesy [1117] bets?

Mr. Gillen: I am going to offer the objection that this has been asked and answered in the record in both direct and cross-examination. I have a distinct recollection that Mr. Kyne was asked if lay-off business was done with cashier's checks and he said they usually paid with cashier's checks, with the exception on occasion somebody might come in and take cash. There was nothing said in either direct or cross-examination as to whether or not all of these checks represented courtesy lay-offs.

The Court: You may answer the question. Objection overruled.

Q. Do you have the question in mind, Mr. Kyne?

A. Yes, the cashier check to P. G. & E., Castro Floral Shop, and so on.

Q. Also cashier's checks, I believe, to the Collector of Internal Revenue? A. Yes, sir.

Q. Let us refer to some of these other checks.

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(Testimony of William E. Kyne.)

Taking the first page, which reads January, 1943——

Mr. Gillen: May I respectfully interrupt and say this is improper redirect examination. I did not go into details on cross-examination of what the checks represented. I simply asked for an over all description.

The Court: I can't very well rule until I hear the question. There has been no question propounded. [1118]

Mr. Campbell: I hadn't finished my question.

Mr. Gillen: I am sorry. I withdraw the objection.

Q. Taking the first page, which reads January, 1943, and the item on January 2, 1943, purchaser William E. Kyne, payee Gus Greenbaum, amount $2,180. Now, who is Gus Greenbaum?

Mr. Gillen: Just a moment. May it please the Court, I offer the objection, first of all that refers to a transaction in 1943, which is a year prior to the commencement of the time bracket of this indictment, which is from 1944 to 1946, inclusive. That is my first objection. My second objection is that I did not cross-examine Mr. Kyne regarding any 1943 checks, cashier checks, to whom they went or for what. My third objection is, may it please the court, that it is improper redirect examination, for the reason I did not cross-examine Mr. Kyne on who any check was made payable to, and if your Honor will recall, I base by objection on this, that my only reference to cashier's checks was that in these particular lay-off transactions Mr. Kyne tes-

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(Testimony of William E. Kyne.)

tified that they were usually handled by cashier's checks. I did not go into that at all and the record will bear me out, I am certain.

Mr. Campbell: Here is the record, your Honor, reading from page 1063 of the transcript: (Reads.) It is to that cross-examination to which I am directing questions.

Mr. Gillen: I submit, your Honor, there is no reference made to prosecution's Exhibit 116 or any reference made to any [1119] check in my cross-examination and this is improper redirect examination upon all the grounds I have stated, and it is incompetent, irrelevant and immaterial because it is a year prior to the commencement point of this indictment. I recall your Honor distinctly admonished the jury we are trying it for the years 1944, 1945, and 1946. We are not concerned with anything else.

The Court: The objection is overruled. He may answer the question.

(Question read.)

Mr. Gillen: We offer the objection it is incompetent, irrelevant and immaterial who Mr. Gus Greenbaum is.

The Court: Objection overruled. Answer the question.

Mr. Gillen: May I respectfully ask that your Honor hear me on that out of the presence of the jury?

The Court: Yes, very well.

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(Jury and alternate jurors admonished and excused and recess taken for 15 minutes, at 2:10 p.m.)

2:25 P.M.

(Defendant present with counsel.)

(Argument in absence of the jury.)

(NB 326 p. 84 to p. 98.)

3:07 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate juror stipulated.) [1120]

MR. KYNE

resumes the witness stand on further

Redirect Examination

By Mr. Campbell:

Q. Mr. Kyne, coming back to the matter of these courtesy bets, I believe you testified that in certain instances and from other bookmakers you received bets simply for the purpose of passing them on to other bookmakers, is that correct?

A. Yes, sir.

Q. Now, will you state whether or not under such circumstances you received a commission?

A. No, sir, aside from that one instance.

Q. Aside from the California Jockey?

A. Aside from the California Jockey.

Q. Now, as a part of your business there at the

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(Testimony of William E. Kyne.)

B & R Smoke Shoppe, will you state whether or not you also received from other bookmakers bets which you accepted for the B & R Smoke Shoppe?

A. Yes, sir.

Q. And in connection with that part of your business were such accepted from bookmakers operating at points outside of San Francisco?

A. Yes, sir.

Q. And from points throughout the United States? A. Yes, sir.

Q. And in making settlement with those out-of-town bookmakers, I believe you testified that you either used cashier's checks [1121] or cash, depending on whether any bookmaker or his representative happened to be passing through San Francisco, is that correct? A. That is correct.

Q. Now, in the event of those bets which you accepted for the B & R Smoke Shoppe from bookmakers outside of San Francisco and upon which you won, how would you receive your winnings?

A. Usually a cashier's check or own personal check.

Q. And in some cases would you receive some cash? A. Once in a while, yes, sir.

Q. Now, I am going to show you plaintiff's Exhibit 116, which you have previously identified as a list of cashier's checks which was drawn up for you by an employee of the Bank of America at your request, as cashier's checks purchased during the years 1943 to 1946, inclusive, and I will ask if you will indicate on this exhibit by a mark opposite

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(Testimony of William E. Kyne.)

the amount —I direct your attention to the fact that there are four columns on these pages headed, "Date," "Purchaser," "Payee," and "Amount." The date refers to date of the purchase of the check, does it not? A. Yes.

Q. And by purchaser there is set forth the name of the person who bought the check; is that correct?

A. Yes, sir.

Q. In most instances, I believe, yourself?

A. Yes, sir. [1122]

Q. Although in some instances by Mr. Pritchett, whom you have identified as an employee of B & R Smoke Shoppe? A. Yes, sir.

Q. There then follows the payee and underneath that is set forth a series of names and those, I presume, are the people in whose favor the particular check was drawn? A. Yes, sir.

Q. And under the heading "Amount," the amount of the cashier's check? A. Yes, sir.

Q. Now will you indicate by whatever mark you choose, an "X" mark, I presume, opposite the amount, any of these transactions which you can now recall represented a courtesy transaction, where you passed the bet on to someone else?

Mr. Gillen: May I make this suggestion, whatever transactions Mr. Kyne might recognize there, if it is a courtesy transaction he could mark with a "C"; any loss he could mark with an "L."

Mr. Campbell: I have no objection to his using "C" for courtesy transactions. At this time I ask he now mark those he now recalls as courtesy

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(Testimony of William E. Kyne.)

transactions, that is, transactions where he simply acted as transit agent for the money, placing the bet with someone else. Will you do so, Mr. Kyne?

A. The majority of these bets are lay-off bets. It would *be impossibility* to take out courtesy bets, the ones that went [1123] to the place.

Q. When you say lay-off bets, do you mean bets which you laid off or bets which were being laid off by individuals whose names are mentioned?

A. Bets I laid off for other bookmakers.

Q. And do you have any recollection as to any individual one of these transactions?

A. No, sir.

Q. Now isn't it a fact Mr. Kyne, or is it a fact that the individuals listed hereon, with the exception of a few items, such as in May of 1943, the St. Francis Hotel, Blackstone Hotel, Russell Waldon, assessor in San Francisco, together with certain checks, such as to the State Board of Equalization, Collector of Internal Revenue, Castro Flower Shop, Haas Bros., San Francisco Water Department, Golden State Company, Gerow-Filter Company, Lang Laundry Company, Arthur Pratt, South San Francisco Bank, Western Union Company, Daily Racing Form, that those listed thereon on Exhibit 116, are in the bookmaking business, or were at the time the various checks referred to were drawn?

A. Yes, sir.

Q. Are you able to state, and I will ask you whether or not, in instances of the various bookmakers or individuals engaged in bookmaking business, whose names appear hereon, if you were also

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(Testimony of William E. Kyne.)

receiving cashier's checks or personal checks from them? [1124] A. Yes, sir.

Mr. Gillen: May it please the Court, I respectfully request an opportunity to move to strike the question and answer previous to the last question and answer, on the ground that it is incompetent, irrelevant and immaterial whether the persons to whom the checks were made were in the bookmaking business. I respectfully submit the only materiality would be did those cashier's checks represent any profit or loss that would ultimately inure to Mr. Remmer, either as a profit or loss, for the purposes of this case, the issues of this case.

The Court: Motion is denied.

Q. Mr. Kyne, how was this out-of-town business handled, that is, by what means of communication?

A. Telephone.

Q. And when you were placing bets with various of the individuals whose names are set forth hereon, in what manner did you communicate those bets? A. By phone.

Q. And do I understand correctly that such business was conducted on a mutual trust business?

A. Yes, sir.

Q. And that periodical settlements would be had? A. Yes, sir.

Mr. Campbell: I think that is all. [1125]

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(Testimony of William E. Kyne.)

Recross-Examination

By Mr. Gillen:

Q. Mr. Kyne, do I understand then that these cashier's checks that are represented on these sheets of paper that are identified now as prosecution's Exhibit 116 in evidence, do not represent specific bets but represent rather settlements of accounts made from time to time, is that correct?

A. One or the other.

Q. It might represent both; it might represent a specific bet or it might represent a series of transactions being settled, is that true?

A. That is true.

Q. And it is true, is it not, all the instances where you purchased cashier's checks doesn't mean that they represented courtesy bets where you were simply passing money through, you were sort of a conduit? A. All with respect to lay-off.

Q. I understand, but it would either be courtesy transaction where you collected some money and sent it off in cashier's check or whether you actually accepted a lay-off yourself and were sending him the amount you lost, is that correct?

A. Yes, sir.

Q. In other words, you wouldn't naturally be obtaining cashier's check and sending a man money that you had won, is that true? A. No.

Q. Now when you say that these cashier's checks represent [1126] courtesy and lost bets under the lay-off plan, do you mean by your answer that it

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(Testimony of William E. Kyne.)

is your recollection that most of the cashier's checks here represented courtesy bets?

A. Lay-off bets, yes.

Q. By the way, let me, with the Court's permission, show you this exhibit. Are some of these duplicate sheets here or are they all individual sheets? You understand what I mean—are there some duplications where two sheets were received by you?

A. I think they are all monthly sheets.

Mr. Campbell: There might be some duplicate sheets there.

Mr. Gillen: I think I observe some duplications.

Mr. Campbell: I think the document speaks for itself.

Q. Mr. Kyne, in regard to the power of attorney under date of February 13, 1945, which is now plaintiff's Exhibit 123, which is written power of attorney which we presented to Mr. Campbell for his use, it is a fact, is it not, that this power of attorney was executed and dated and acknowledged by a notary public the day before you left for the service, is that correct? A. Yes, sir.

Q. In other words, you left for the service on February 14, 1945, isn't that true? A. Yes.

Q. Now, Mr. Kyne, the various shops that are named there, four [1127] in number, in this power of attorney, namely 50 Mason Street, B & R Smoke Shoppe, 52 Mason Street, Warehouse and Office, 110 Eddy Street, tavern; and 186 Eddy Club, card room and liquor store, it is true, is it not, that as

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(Testimony of William E. Kyne.)

of that date those were the only going enterprises in San Francisco in which you and Mr. Remmer had a mutual interest? A. Yes, sir.

Q. That was before the Menlo Club and before the Transit Smoke Shop, is that correct?

A. That is correct.

Q. Now let me ask you, isn't it a fact that from the very inception of your business with Mr. Remmer that you and Mr. Remmer both had mutual powers of attorney, you to act for him in his absence and he to act for you in your absence, covering any enterprises that you were interested in together? A. Yes, sir.

Q. And isn't it a fact that you were advised, despite the existence of that power of attorney, just before you entered into the service that because of the fact that you were going away to war that it might be well for you to execute a power of attorney naming the enterprises that were actually your mutual enterprises at that time and just before you entered the service, isn't that a fact?

A. Yes, sir.

Q. And of course, Mr. Kyne, since you were going into the army [1128] and Mr. Remmer was not going into the army, there was no reason why Mr. Remmer should have executed an additional power of attorney to you?

Mr. Campbell: Objected to as argumentative.

The Court: You may answer the question.

A. That is correct.

Q. Now Mr. Campbell, in redirect examination,

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(Testimony of William E. Kyne.)

showed you certain income tax returns and asked you if you recalled supplying the particular figures, or any figures that appeared in those income tax returns, do you recall that? A. Yes.

Q. And particularly he showed you an income tax return for the year 1944, returned in 1945. Do you recall that?

Now, you, of course, had left almost exactly a month before that income tax was due; in other words, it was due on March 15th and you left on February 14th.

Mr. Campbell: To which tax are you referring?

Mr. Gillen: I said 1944.

Q. And then in regard to the income tax return for the year 1945, which was returned in the year 1946, you were away until June of 1946, isn't that true? A. Yes, sir.

Q. Now in the year 1945, that was the year, was it not, that for the first five months of the year no race tracks were operating any place in the United States, isn't that true? [1129]

A. I think it was four and a half months.

Q. It was from the first of the year until some time in May, was it not?

A. I don't remember the exact dates.

Q. When you took the money out of the Menlo account to repay Mr. Remmer for a share in the Transit Smoke Shop, you were asked by Mr. Campbell in redirect examination whether or not that was reflected on the books of the Menlo Club and you said you didn't know, is that correct?

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(Testimony of William E. Kyne.)

A. That is correct.

Q. Tell me what was it that you did to make it known that you had borrowed or taken money from the funds of the Menlo Club, outside of putting on the check for Menlo Club Loan Transit Smoke Shop?

A. I believe that was the only notation I made.

Q. Did you put a marker in addition to that into the Menlo Club? A. No, sir.

Q. Do you recall, was that check issued by you, Mr. Kyne? A. Yes, sir.

Q. Do you remember whether or not you told Mr. Maundrell about this check, that is, that you had taken $16,005.50 out of the Menlo Club account to put into the Transit?

A. I believe I did.

Q. Now instead of then putting a marker down Mr. Kyne, the [1130] Menlo bank account, that the Menlo Club by William E. Kyne had issued check to William E. Kyne as loan for the Transit, is that correct?

Mr. Campbell: Objected to as not the best evidence. The bank record would be the best evidence as to what that showed. I think the question incomprehensive, in that the bank account wouldn't show that.

The Court: I think he asked him what appeared from the check. Objection overruled.

Mr. Campbell: If that is the question, but that is not the way it is propounded.

The Court: That is what your question meant?

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(Testimony of William E. Kyne.)

Mr. Gillen: Yes, your Honor, and it is prosecution's Exhibit 120 I am referring to and I am handing it, with your Honor's permission, to Mr. Kyne to examine to refresh his memory. Do you have the question in mind now?

Mr. Campbell: If the Court please, I make the further objection that the document speaks for itself as to what it says.

The Court: He may explain it. Objection will be overruled.

A. Read the question please.

(Question read.)

A. That is correct.

Q. Mr. Kyne, at the time you issued that check to yourself, did you know what credit there was or what equity there was to your credit derived from your working agreement in the profits [1131] of the Menlo Club?

Mr. Campbell: Objected to as not the best evidence. The books and records are the best evidence.

The Court: Objection will be sustained.

Mr. Gillen: That is all.

Redirect Examination

By Mr. Campbell:

Q. Now, Mr. Kyne, on this matter of power of attorneys, counsel asked you whether or not, from the very inception of your association with Mr. Remmer, you and Mr. Remmer had mutual powers

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(Testimony of William E. Kyne.)

of attorney, to which you replied yes. Now during redirect examination you stated you had a power of attorney but had no recollection of when it was entered into. Has your memory been refreshed in that regard?

Mr. Gillen: I am going to object to this as improper re-redirect examination and also cross-examining his own witness.

The Court: Objection overruled.

A. I believe there is a card or paper in the Bank of America that explains it.

Q. Now, as to the time that you entered into these powers of attorney, do you recall when that was?

A. It would be when we first went in the business.

Q. And do you now recall whether or not some written power of attorney was entered into?

A. I think there is an agreement in the Bank of America. [1132]

Q. Will you state whether or not that is the usual power of attorney given to a bank to enable another person to endorse checks?

Mr. Gillen: Objected to, that would call for opinion and conclusion, may it please the Court, whether it is the usual thing that the Bank of America does, that would call certainly for his opinion and conclusion. It wouldn't be the best evidence or evidence, what the Bank of America does, if it usually does something.

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(Testimony of William E. Kyne.)

The Court: The form of the question is a little bad, I think.

Mr. Campbell: Very well.

Q. What Bank of America was that delivered to?

A. I believe the Day and Night Branch.

Q. What was the occasion for your delivering that to the bank?

A. That is where we signed it, I think.

Q. Who has possession, or who had possession, of that power of attorney?

A. That I don't know.

Q. That is to say, was it left with the bank?

A. Either the bank or Joseph Haughey.

Q. What is your best recollection in that regard?

A. I am kind of hazy on it.

Q. Who drew the power of attorney?

A. I don't remember. [1133]

Q. Do you recall whether or not it was signed by both you and Mr. Remmer.

A. That I don't remember.

Q. Is there any event, such as the opening of a bank account, by which you can place the time?

A. No, sir.

Q. When was the last time you saw the power of attorney? A. That I don't remember.

Q. I believe you stated you do not know who has possession of it at this time?

A. No, I do not.

Q. What then did the power of attorney state?

A. I think it was in regard to books and checks.

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(Testimony of William E. Kyne.)

Q. And what did it state with regard to books and checks? A. That I don't remember.

Q. To the best of your recollection?

A. I don't remember.

Q. Do you recall whether or not it authorized Mr. Remmer to conduct any businesses in your name?

Mr. Gillen: I offer the objection, may it please the Court, this is improper redirect examination. He is cross-examining his own witness, calling for something not the best evidence and counsel this morning very vehemently objected to my asking this gentleman as to his recollection, in fact this afternoon, as to what amount of credit he had on the books of [1134] the partnership. I think this is in the same category at least.

The Court: Objection overruled. Answer the question.

A. Will you read the question?

(Question read.)

A. No, I don't remember.

Q. Do you recall whether the power of attorney to which you refer was sworn to before a notary public?

Mr. Gillen: Objected to on the grounds as not being the best evidence, improper redirect. The power of attorney itself would be the best evidence.

The Court: Objection overruled.

A. I don't remember.

Mr. Gillen: And also may I add further that

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(Testimony of William E. Kyne.)

power of attorney does not have to be acknowledged by a notary public in California.

The Court: The witness has answered the question. He said he did not remember.

Q. Counsel called your attention, in his recross-examination, as to the fact that in that power of attorney there is a business listed as 52 Mason Street, warehouse and office. Was there such a business in existence February 13, 1945? A. Yes, sir.

Q. What was the nature of that business?

A. Warehouse. [1135]

Q. Now is that the same warehouse that you have previously referred to, used simply for storing merchandise used in your bars? A. Yes, sir.

Q. It was not a public warehouse in any sense?

A. No, sir.

Q. And I take it the offices referred to were the offices of yourself and Mr. Remmer?

A. Yes, sir.

Q. And the others connected with the business?

A. Yes, sir.

Mr. Campbell: That is all.

Mr. Gillen: May I have the Court's permission now to ask Mr. Kyne for his recollection, if he has any, as to what credit he had standing in his name at the Menlo Club?

Mr. Campbell: Objected to as not the best evidence.

The Court: Objection sustained.

Mr. Gillen: I think it is in the same category as refreshing his recollection as to power of attorney and the details.

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The Court: I do not agree with you in that respect. May the witness be excused, subject to call. Will you leave your address with the clerk?

Mr. Gillen: That subject to call is subject to call for either redirect or recross by either side? [1136]

The Court: Yes, for either purpose.

HAROLD H. MAUNDRELL

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name please?

A. Harold H. Maundrell.

Q. Where do you presently reside, Mr. Maunrell? A. In Honolulu, Hawaii.

Q. What is your present business or occupation?

A. Restaurant business.

Q. Incidentally, what is the name of your restaurant there? A. Maundrell.

Q. Now, Mr. Maundrell, are you acquainted with the defendant, Elmer Remmer? A. Yes, sir.

Q. How long have you known him?

A. About 13 or 14 years.

Q. Have you ever heretofore been associated with him in connection with any business enterprises? A. Cal-Neva Lodge.

Q. And when did you first become associated with the Cal-Neva Lodge?

A. I think that was in the summer of 1940.

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(Testimony of Harold H. Maundrell.)

Q. How long did you remain at Cal-Neva [1137] Lodge?

A. Well, I was there through the summer of 1945; that is, I was only there in the summer time.

Q. I was going to ask, that is a seasonable operation, is it not? A. Yes.

Q. During the period of time that you were there, do you recall the months of the year that Cal-Neva Lodge was open?

A. Well, there was one or two years it was opened very early, around the first of May, I believe, or middle of May, but the usual opening date was on or about the middle of June.

Q. And how long each year, approximately, would Cal-Neva Lodge remain open?

A. Usually closed, with the exception of one or two years, after September 9th.

Q. Now what was the nature of your employment or association at Cal-Neva Lodge?

A. I was resident manager, in charge of the dining room and the hotel accommodations.

Q. Will you state whether or not your capacity there was that of an employee or as a owner or operator of the establishment? A. Employee.

Q. And will you state whether or not that was on a salary or percentage or combination of both arrangement? A. Salary basis.

Q. Straight salary basis? [1138]

A. Salary basis only.

Q. And who employed you originally, who originally hired you for that job?

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(Testimony of Harold H. Maundrell.)

A. Mr. Remmer.

Q. Do you know whether or not it was a fact that Cal-Neva Lodge was operated by a corporation during those years?

Mr. Gillen: Objected to as leading and suggestive, may it please the Court.

The Court: Objection overruled.

A. A corporation.

Q. Now during the period of time that you were there at Cal-Neva Lodge, who was, if you know, the over-all general manager of the establishment?

A. Mr. Remmer was the over-all manager.

Q. During the period of time that you were there, did you have any supervision over or any employment in the gambling rooms of the Cal-Neva Lodge? A. No, sir.

Q. And for the purpose of the record, the Cal-Neva Lodge that you are referring to is located where? A. Lake Tahoe.

Q. On the Nevada side of the lake?

A. Well, a portion of it in California, but 95 per cent on the Nevada side.

Q. The building itself, Mr. Maundrell, is on the State Line, is [1139] it not?

A. A small portion of it, part of the dining room, a very small part of the dining room.

Q. And the balance is on the Nevada side, is that correct? A. Yes, sir.

Q. And I presume the gambling room is on the Nevada side? A. Yes, sir.

Q. Now during that period of time that you were

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(Testimony of Harold H. Maundrell.)

there, from 1942 through the season of 1945, who was in charge of the gambling room?

A. Well, they had different managers during that time I was there.

Q. Do you recall who they were?

A. Well, Mr. Parman at one time.

Q. Mr. Walter Parman?

A. Mr. Walter Parman.

Q. Yes.

A. I think one season a Mr. Necheck.

Q. Was that Mike Necheck? A. Yes, sir.

Q. Yes?

A. And I think at one time Mr.—I don't recall his name at the moment.

Q. The two that you mentioned are the only two that you recall by name at this time? [1140]

A. At the moment, yes, sir.

Q. After the season of 1945, did you continue to be associated with Mr. Remmer in any enterprise?

A. Yes, sir.

Q. And will you state in what enterprise and where located?

A. The Menlo Club, Tiny's Waffle Shop, and the Menlo Bar and Cocktail Lounge on Eddy Street in San Francisco.

Q. Now when did you commence your association with those three enterprises, that is, the Menlo Club, the Menlo Bar and Tiny's Waffle Shop?

A. On or about the 20th of May, 1945.

Q. And how long did that association continue?

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(Testimony of Harold H. Maundrell.)

A. I left in 1948, the spring of 1948.

Q. And was it shortly after that that you moved to Honolulu, the following fall? A. Yes.

Q. And it is a fact, is it not, that you were ill for a period of time? A. Yes, sir.

Q. And you severed your connection with Mr. Remmer in the spring of 1948; is that correct?

A. Yes, sir.

Q. Now what were the general nature of your duties with respect to the Menlo Club, the Menlo Bar and Tiny's Waffle Shop?

A. I was the office manager of the two [1141] places.

Q. What were the nature of your duties there as office manager?

A. As office manager, I took care of the books, took care of deposits of the Tiny's Waffle Shop and Menlo Bar, I took care of all the tax returns, took care of——

Q. By tax returns, what tax returns do you refer?

A. Withholding tax returns, federal old age, State social security.

Q. Did those include any income tax returns?

A. I did assist in income tax returns of some of the employees, with the assistance of Mr. Ayton.

Q. Did you assist or take part in the preparation of the income tax returns of Mr. Remmer?

A. Yes, sir.

Q. To what extent?

A. Are you talking about the——

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(Testimony of Harold H. Maundrell.)

Q. Individual income tax returns.

A. Only in this respect, that I talked to Mr. Mooney on one or two occasions. He came into the office and asked me if I could assist him, give him Mr. Remmer's returns.

Q. And did you supply certain figures on those occasions? A. Yes, sir.

Q. What other duties did you have there as office manager? You related keeping books and making out social security and old age pension returns for the Menlo Bar; is that correct? [1142]

A. Yes, sir.

Q. Tiny's Waffle Shop and Menlo Bar?

A. I had charge of all pay roll accounts.

Q. Of what establishments?

A. Of Tiny's Waffle Shop and Menlo Bar. I did not have charge of the paying of the salaries to the Menlo Club. I did have charge of the keeping of the records.

Q. Of the accounts?

A. Of the accounts. I also had charge of the supervision of the Tiny's Waffle Shop. I had charge of the taking of the inventories of both the Waffle Shop and the Menlo Bar.

Q. Now did you have any duties with respect to the books and records of the 186 Club?

A. Not in the year 1945.

Q. During the time of your employment?

A. Yes.

Q. And did you have anything to do, in the course of your employment, with the keeping of

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(Testimony of Harold H. Maundrell.)

books and records of the Day-Night Cigar Store?

A. Yes, sir.

Q. And did you have anything to do, in the course of your employment, with the keeping of the books and records of the 110 Eddy Street?

A. Yes, sir.

Q. And did you have anything to do, in the course of your [1143] employment, with the keeping of the books and records of the Transit Smoke Shop? A. Yes, sir.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [1144]

December 20, 1951—10:00 A.M.

(Defendant present with counsel. Mr. Lohse absent.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, yesterday before recess you described your various employments with Mr. Remmer. Going back for a moment to the period of time that you were employed at Cal-Neva, as you stated, as manager of the bar, restaurant and hotel facilities. That was your employment there?

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(Testimony of Harold H. Maundrell.)

A. Well, I wasn't manager of the bar. I was manager of the dining room and hotel.

Q. During that period of employment did you have anything whatsoever to do with keeping the records of the Cal-Neva, Inc.? A. Yes, I did.

Q. To what extent?

A. Well, in '43 I assisted in keeping the books of the pay roll and the disbursements, and also the income record of the dining room, hotel accommodations and the bar receipts.

Q. Did you keep the general ledgers or the journals of the corporation? A. No, sir.

Q. Will you state, if you know, who did during that period of your employment? [1145]

A. Well, it was Rod Perkins kept the books and I believe they were turned over to Mr. Semenza at the end of the season.

Q. By Mr. Semenza, are you referring to Lawrence Semenza, the certified public accountant at Reno? A. Yes, sir.

Q. And who is seated here at the counsel table?

A. Yes, sir.

Q. Now I believe you did state, after you left the employment at Cal-Neva to commence your association with Mr. Remmer at the Menlo Club, Tiny's Waffle Shop and the Menlo Bar, that you maintained the records of those enterprises; is that correct? A. Not all of the records.

Q. You maintained certain of the records of the services; is that correct? A. Yes, sir.

Q. And with relation to the Menlo Club, what

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(Testimony of Harold H. Maundrell.)

books and records did you keep with respect to that operation?

A. 1945 I took charge of the pay roll records of the Menlo Club and also the withholding tax returns, federal old-age pension and social security returns. The cash returns I did not have charge of them.

Q. You mean recording it in the books of the Menlo Club? A. Not in the 1945 period.

Q. In 1946 what records did you [1146] maintain?

A. I kept the records I just mentioned, plus the recording of the daily sheets of the Menlo Club. By that I mean the poker receipts that were turned in to the cashier's office or made up by the cashiers each day.

Q. You have reference to poker sheets—I am going to show you government's Exhibit 114, 114A and 114B in evidence, and ask you if these are a part of the poker sheets to which you refer?

Mr. Gillen: May it please the Court, these are exhibits that your Honor, following the ruling concerning the 110 series, your Honor said you would hear us and consider whether or not you would revoke your order permitting them.

Mr. Campbell: I am going to lay a further foundation at this time.

The Court: I think the present situation is that 114 stood as admitted exhibits, but if counsel intends to lay further foundation before he attempts to use them as he would if they had been admitted

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(Testimony of Harold H. Maundrell.)

in evidence, I think we can proceed along that line.

Mr. Gillen: I wanted to remind you of your promise to consider the matter further.

The Court: The question was, I think, of foundation and if the foundation as about to be made did establish——

Mr. Gillen (Interrupting): May I suggest this, that the exhibits may be treated now, so far as reference to their contents, as if merely marked for identification? [1147]

Mr. Campbell: I think we should meet that question as we come to it.

The Court: I think counsel has indicated that he was going to lay the foundation.

Mr. Gillen: If your Honor feels the foundation is laid, that is one thing; then will your Honor consider hearing us?

The Court: It depends on the situation. We will see how it appears at that time.

(Question read.)

A. These are some of the poker sheets. I can't state at this time that these are the exact poker sheets.

Q. What is your best recollection?

Mr. Gillen: May it please the Court, the witness has stated that he can't say they are the exact poker sheets.

The Court: You many answer this question.

A. Well, to the best of my ability I would say at this time that I couldn't say that these are the poker sheets.

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(Testimony of Harold H. Maundrell.)

Q. You stated you kept the pay roll records for the Menlo Club? A. Yes, sir.

Mr. Campbell: I am going to ask to have these two bound volumes marked government's Exhibits 124 and 124A, respectively, for identification.

Mr. Golden: Those came out of the box we have been referring to, your Honor.

Mr. Campbell: They did not. [1148]

Mr. Campbell: While counsel are examining those records, I will ask to have marked for identification the following, each of which have been taken from possession of the clerk of this court and were heretofore delivered to the clerk under the order of the Court.

Mr. Golden: Then it will be understood, your Honor, that we have our objection and motion and ruling will be denied.

The Court: Of course they are just marked for identification now.

Mr. Golden: Of course, our objection goes to their use at all and our motion goes to suppressing them, so it should be made now as well as when they are offered in evidence. Will the record show that we made the objection and motion?

The Court: To what is your objection addressed now?

Mr. Golden: The objection is addressed to the use by the prosecution of any of the material which was delivered to the clerk of the court.

The Court: On the grounds heretofore stated?

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(Testimony of Harold H. Maundrell.)

Mr. Golden: Heretofore stated.

The Court: It may appear in the record.

Mr. Golden: And likewise our motion to suppress.

The Court: That may be deemed to have been made. The same ruling.

Mr. Campbell: As government's Exhibit 125 for identification, ledger book bearing the typewritten slip on the cover, [1149] "Menlo Club 1949." As No. 126 for identification, a series of ledger sheets, with a pencil notation on the cover, "Menlo Club 1946." As 126 for identification a bound group of accounting sheets, bearing the typewritten notations "Tiny's Restaurant," and in pen and ink the figures "1946." As 128 for identification, a group of ledger sheets bearing on the cover in pencil the notation "Tiny's Restaurant and Menlo Bar 1945." As 129 for identification a group of bound ledger sheets, bearing on the cover in typing "Menlo Bar" and in pen and ink the figures "1946." Do counsel desire to examine these?

Mr. Gillen: Yes, please.

Q. Mr. Maundrell, I am going to show you government's Exhibits 124 and 124A for identification, and ask you if you recognize those books?

A. Yes, sir.

Q. And what are those books?

A. They are the pay roll account that was kept of the employees of the Menlo Club.

Q. And were those records which were kept in the course of business of the Menlo Club?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Mr. Campbell: They will be offered in evidence at this time as government's Exhibits 124 and 124A.

Mr. Golden: I offer the objection, your Honor, that they are part of the records which we maintain were illegally [1150] obtained and retained by the government. We have no specific objection to offer.

The Court: Objection will be overruled and Exhibits 124 and 124A are admitted in evidence.

Q. Now, Mr. Maundrell, with regard to the poker sheets which you referred to and from which you stated you made entries into the ledgers of the Menlo Club, will you describe such sheets?

Mr. Gillen: I am going to offer the objection, may it please the Court, that that is calling for characterization by the witness, conclusion and opinion, not the best evidence. Mr. Maundrell might have a very perfectly odd view of the matter which might not be the view of your Honor and myself in describing them.

Mr. Campbell: I am not asking for conclusions; I am asking for description.

The Court: Objection overruled.

A. The records in the Menlo Club were kept by various cashiers on poker sheets and they were of a size of the poker sheets which you have in your hand at the present time.

Q. You are referring to government's Exhibit 114? A. Yes, sir.

Q. And what information was contained on those sheets?

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(Testimony of Harold H. Maundrell.)

A. The pay roll, the bills that were paid daily, that is, the bills that were collected and paid by COD, the amount of money that might be owing to any of the players or people that were [1151] members of the club, the amount of money that was collected from the tables as fees from the players, the amount of money that was drawn and the names of the persons who drew money from the cashier to play in the games, and the totals and the final analysis of the whole sheet.

Q. Now will you examine again government's Exhibits 114 to 114B, inclusive, and without reference to the material set forth thereon, will you state whether the information purported to be disclosed thereon is the information to which you refer as having been on the poker sheets given to you for the purpose of making entries in the books?

Mr. Gillen: May it please the Court, of course this has been asked and answered. The witness already said they looked similar to the form used, but he couldn't say they were the exact form or the identical sheets. If the prosecution will disclose where they and how they obtained these particular exhibits, it is possible that the defense would then determine whether or not they were the authentic sheets. We might stipulate that they go into evidence if they care to disclose that to us.

Mr. Campbell: I think my question is proper.

The Court: Objection overruled. Answer the question.

(Question read.)

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. Now do you observe on the sheets which you hold in your hand what purports to be wages paid to employees? [1152] A. Yes, I do.

Q. Now I will ask you to examine government's Exhibits 124 and 124A, which you have identified as pay roll accounts, and see if the same information which is set forth on the three groups of sheets as to the names of employees and amount of wages paid to them is reflected in Exhibits 124 and 124A?

Mr. Gillen: May it please the Court, I think I should at this time, and in the interest of time and to facilitate the progress of this case, again renew my offer, if the government cares to disclose where they obtained these exhibits——

The Court: That has been made and the government has not made any response to it, so I do not see any reason why it should be renewed.

Mr. Gillen: I had in mind we might be able to save considerable time.

The Court: You might have a conference with counsel and any suggestions could be made privately rather than before the jury. May I have the question?

(Question read.)

A. I refer to 12-31-46, that is the date, Exhibit 114A——

Q. Will you point out to me where the wages appear on 114A?

Mr. Gillen: What pages are you referring to? There are two years there.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: That is 12-31-46.

Q. Will you point out to me on this Exhibit 114A where the [1153] wages appear on 114A?

A. On the upper right-hand side of the sheet. Now in referring to the first name, Atkinson, the date, 12-31-46. In our records the name Atkinson shows that he received $23.45, there was $3.45 withheld, which means that he received $20.00, and this sheet here states that Mr. Atkinson received $20.00 on that date.

Q. So that so far as that entry is concerned on Exhibit 114A, it is in conformity, is it not, with the exhibit you hold in your hand, government's Exhibit 124A? A. Yes, sir.

Q. Is that true of the other employees whose names and amounts of wages are set forth on government's Exhibit 114A?

A. That is going to take me some little while. There are quite a few names here. The second name, Maloney, shows that he was paid $12.50. Our records show——

Q. By "our" records, are you referring to the bound volume of the pay roll account?

A. Yes, sir, 124A. The records show $13.85, $1.35 withheld, making $12.50.

Q. So that the two records are in conformity?

A. Yes, sir.

Q. Take just one more at this time, Mr. Maundrell. Take the next one.

A. The third name is Launny. Our records show that on the [1154] 31st he had $11.37 coming, $1.15

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(Testimony of Harold H. Maundrell.)

withheld, which would make $10.22. The sheet shows that he received $10.00.

Q. So that the two records are in conformity in regard to that? A. A little bit off.

Mr. Gillen: They are not in conformity and I am going to object to counsel leading and suggesting they are.

A. There was 25 cents off.

The Court: The objection is overruled.

Q. So that there is a 22-cent difference?

A. That's right.

Q. Well, let's take the next one.

A. The next name is the name of Lefky. Our records show he had $12.14, $1.90 was withheld and the poker sheet shows that he received the sum of $10.00.

Q. There is a difference between the two records of what amount? A. Twenty-four cents.

Q. Now I am going to show you at this time the plaintiff's Exhibit 126 for identification and ask you if you have seen that record before?

A. Yes, sir.

Q. And what is that record?

A. That is the record of the poker sheets starting January, 1946.

Q. And to what period?

A. Through December 31st of the same [1155] year.

Q. Now is the record which you hold in your hands a record kept by you in the course of the business of the Menlo Club? A. Yes.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: This will be offered in evidence as Exhibit 126.

Mr. Golden: The only objection, your Honor, is to its illegal acquisition and retention and never returned to us.

Mr. Campbell: This, at the time of identification, was produced from the clerk's records.

Mr. Golden: We have both objections to it, both the former one and this one.

The Court: Yes, both will be overruled and Exhibit 126 admitted in evidence.

Q. At this time also I show you government's Exhibit 125 for identification and ask you if you have seen that volume? A. Yes, sir.

Q. What is this book?

A. Well, this is the returns from the Menlo Club.

Q. I mean generally, what is the nature of the book? A. It was a simplified ledger.

Q. Was it maintained by you in the regular course of business of the Menlo Club?

A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's Exhibit 125. [1156]

Mr. Golden: Just the standard run of objections and motions. Could it be understood that this entire——

The Court: I would rather have you make your objections as the exhibits are offered.

Mr. Golden: All right, your Honor.

The Court: So the objections are both overruled and the exhibit is admitted in evidence.

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(Testimony of Harold H. Maundrell.)

Q. Now calling your attention, Mr. Maundrell, to plaintiff's Exhibit 126, which you have identified as a record maintained in the course of business of the Menlo Club for the year 1946, and setting forth the returns of the poker sheets for the period 1946, I will ask you to turn to the entries made as of December 31, 1946, under the subdivision headed "Income." Have you turned to that page?

A. Yes, sir.

Q. I call your attention to the fact that there are three columns on that page, headed "Tables," "Returns," and "Loans." What is meant by the column headed "Tables"?

Mr. Avakian: May we have a more specific identification of this page?

Mr. Campbell: I asked him to turn to the page referring to December 31, 1946, under the heading "Income." The pages themselves are numbered, are they, Mr. Maundrell? A. No, sir.

Q. What is meant by that heading, [1157] "Tables"?

A. That is the amount of money that was received from the players.

Q. By that what do you mean?

A. Well, they pay so much to play. Each player at a table paid so much, depending on the size of the game. Some paid a half dollar for 40 minutes. The amounts were collected from the players at different tables.

Q. In other words, I take it a table fee would be picked up from each player at periodic intervals,

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(Testimony of Harold H. Maundrell.)

depending on the size of the game; is that correct?

A. That is correct.

Q. And that is the amount set forth in there under the heading "Tables"? A. Yes, sir.

Q. Now the second column is headed "Returns"; to what does that refer?

A. The returns are the amounts of money that were turned back to the cashier from the amount of money that had been loaned to different players that played during the day or during that specific time of the day.

Q. Will you state whether or not such players were playing for the house?

A. They played for both the house and themselves, if they borrowed the money from the cage.

Q. Will you explain that arrangement? [1158]

A. At times, in order to make up a game—there may be three or four players come in to the card room and they might want to play a dollar game or a dollar limit. If there is no dollar limit game going on at that time, the house tried to accommodate them and will put in some extra players to make up a game. A game usually consisted of six or seven players. Most players like to play with seven players at a table.

Q. With respect to the men the house would put into the game for, you say, the accommodation of the players, will you state whether or not those men were regular employees of the club?

A. Some were regular employees, but the greater majority were not.

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(Testimony of Harold H. Maundrell.)

Q. And what arrangements, if any, were had with those players in the event they won in a game?

A. If they won, the profits would be divided, the house got half and they would keep half.

Q. And if they lost? A. The house lost.

Q. So that the "Returns" column that you referred to refers to amounts turned back to the house by the players who had been financed by the house?

A. Yes, sir.

Q. Now as to the column headed "Loans," to what does that refer?

A. Well, that was the amount of money that was loaned to the [1159] players.

Q. To these same players who were put into the game for, as you say, the accommodation of the players? A. That's right.

Q. Now, I observe under date of December 31, 1946, you have three sets of figures under each of those headings, the first with a notation in the lower left-hand column of 8-4, 4-12, 12-8, to what does that refer?

A. That was the different shifts of the day, eight o'clock in the morning until four, four in the afternoon until midnight, midnight until eight the next morning.

Q. Now I will ask you what is the amount shown on the record which you hold in your hand, government's Exhibit 126, for the 8 to 4 shift under the heading "Tables"?

Mr. Gillen: Is that the same date, December 31st?

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: December 31, 1946.

A. $315.50.

Q. And what is the amount shown under the heading "Loans" for that same period, 8 to 4?

A. $415.00.

Q. And what is the amount shown under the heading "Returns"? A. $182.00.

Q. And will you state what the figures show as to the 4 to 12 shift?

A. On tables, $627.25; on loans, $410.00; on returns, $249.75. [1160]

Q. And will you state what is shown under those columns for the 12 to 8 shift, of December 31, 1946?

A. $419.75 for tables; loans, $233.50; returns, $181.25.

Q. Now, Mr. Maundrell, were records similar to those which you have described kept as to each day's operation?

Mr. Gillen: Objected to as leading and suggestive.

The Court: Objection overruled.

A. Yes.

Q. Mr. Maundrell, I believe you were reading from May 31, 1946, rather than December 31, 1946.

Mr. Gillen: Was that all in error?

Mr. Campbell: I find he was reading from May 31st rather than December 31st, is that correct?

A. That is correct.

Mr. Gillen: What is correct? I don't understand. May I ask the Court through counsel, is it my understanding instead of being December——

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(Testimony of Harold H. Maundrell.)

The Court: Put a question to clear this up.

Q. Mr. Maundrell, I originally asked you to turn to the figures of December 31, 1946. However, did you erroneously turn to the page as to some other date?

A. Yes, I did. There is a blank following that, I thought that was the end.

Q. Now will you turn to December 31, 1946?

Mr. Gillen: Then are those figures all of May 31st, [1161] is that correct? A. Yes, sir.

Q. Now you have December 31, 1946, in mind, do you not? A. Yes.

Q. Now on the 8 to 4 shift, what is the amount shown there as having been received from the table rental? A. $438.25.

Q. I am going to show you the first sheet of government's Exhibit 114, the poker sheet for 12-31-46, and ask you if the same amount appears thereon as table rental for that shift?

A. Yes, sir.

Q. I am going to ask you, Mr. Maundrell, will you state what is shown in government's Exhibit 126 for the shift 8 to 4 as to the amount of returns?

A. $208.00.

Q. Now will you examine the 8 to 4 shift on plaintiff's Exhibit 114 and state the amount that is shown there as to returns? A. $208.00.

Q. Will you state what is shown in Exhibit 126, which you have in your hand, as to the amount of loans for the 8 to 4 shift? A. $252.50.

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(Testimony of Harold H. Maundrell.)

Q. And will you examine the 8 to 4 shift on government's Exhibit 114A and state whether or not that same amount appears [1162] as loans for that shift? A. Yes, sir.

Q. Now as to the second sheet, which appears to be the shift of 4 to 12, is that correct?

A. Yes, sir.

Q. Now will you examine the record which you hold in your hand, government's Exhibit 126, and state what is shown thereon for the shift 4 to 12 as the amount received from rental of the tables?

A. $538.50.

Q. Now will you examine this 114A as to the 4 to 12 shift and state the amount shown thereon as to the amount received from table rental?

A. $538.50.

Q. Will you again refer to Exhibit 126 on the 4 to 12 shift, and state what is shown thereon as to amount of returns? A. $277.

Q. And will you examine the 4 to 12 shift on government's Exhibit 114A and state the amount of returns shown thereon for that shift?

A. $277.

Q. And will you examine government's Exhibit 126 and state what is shown thereon as to the amount of loans to the players whom you have described for the 4 to 12 shift?

A. $405. [1163]

Q. And will you examine again the 4 to 12 shift on government's Exhibit 114A and state what is shown thereon as the amount of loans?

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(Testimony of Harold H. Maundrell.)

A. $405.

Q. Will you examine the corresponding three columns—do this to yourself—on Exhibits 126 and 114A on the 12 o'clock midnight to eight morning shift and state whether or not the same figures appear on the two records? A. Yes, sir.

Q. Now, during the recess, Mr. Maundrell, I am going to ask you to make a similar comparison with the record you hold in your hand, government's Exhibit 126, with Exhibits 114 and 114B, so as to determine whether or not the figures appearing on government's Exhibit 114 and 114B are the same as reflected in government's Exhibit 126, which you hold in your hand.

May I suggest a recess at this time?

(Jury and alternate jurors admonished and short recess taken at 10:55 a.m.)

11:15 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, during the recess did you compare plaintiff's [1164] Exhibit 114, the poker

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(Testimony of Harold H. Maundrell.)

sheets for the date of January 1, 1946, with plaintiff's Exhibit 126, which you have identified as the book maintained in the course of business of the Menlo Club? A. Yes, I did.

Q. And do you find that the same figures as set forth in plaintiff's Exhibit 114 as to the returns from tables, amounts of loans and returns, are the same in each of the exhibits?

Mr. Gillen: Objected to as leading and suggestive.

The Court: Well, it is leading.

Mr. Campbell: I was trying to save time. I can take it through each one.

Mr. Gillen: We offered to save time.

The Court: It is leading, but he may answer the question.

A. Yes, sir.

Q. Now with respect to government's Exhibit 114A, the poker sheets, for December 31, 1946, and directing your attention to the first page thereon, purporting to be the shift from 8 to 4, will you state—I call your attention to the upper left-hand corner, the first entry that appears, amount drawn $100, Miller, returned $81.00, to what does that refer?

A. That means that Miller borrowed $100 and played cards and after he completed his game he returned the $81.00.

Q. Now who was Miller?

A. I don't know.

Q. Do you recall whether or not Miller was an

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(Testimony of Harold H. Maundrell.)

employee of the [1165] Menlo Club as of December 31, 1946?

Mr. Avakian: Your Honor, my understanding was that up to this point counsel was laying further foundation for Exhibit 114 series, but it appears he is now going into the contents of it and if that is so, we would like to be heard on our motion to strike these documents, on the ground no proper foundation is laid.

The Court: What is the situation? Have you finished your foundation?

Mr. Campbell: I think we have certainly shown sufficiently here.

Mr. Avakian: May we be heard?

The Court: I am satisfied with the foundation. The exhibits will stand admitted in evidence.

Mr. Avakian: May we request an opportunity to be heard, your Honor, because we would like to explain to your Honor our feeling as to foundation not laid with respect to other entries. The document has been corroborated as to certain entries, but counsel apparently wants——

The Court: I think that can be taken care of by taking a recess and letting this witness go through and make comparisons of all the different dates that are mentioned in the exhibit.

Mr. Avakian: I respectfully state to your Honor I believe there are entries on those poker sheets which the witness [1166] will not be able to corroborate by reference to the book.

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(Testimony of Harold H. Maundrell.)

The Court: I do not feel each and every one would have to be accurately corroborated.

Mr. Avakian: But, your Honor, it is only those others that are material, but as to those corroborated, they are already in the record and counsel apparently wants to use other entries.

The Court: The purpose I have in mind is whether these 114 are the actual poker sheets entered in the record business of the club.

Mr. Avakian: And both witnesses have said they don't know.

The Court: And if it should appear that the entries correspond to a great extent as to different items, I think the foundation would be satisfactorily laid in that respect.

Mr. Avakian: But, your Honor, the point is counsel apparently wants to use other entries on these poker sheets that are not corroborated.

The Court: It doesn't make any difference whether he does or not, if the Court feels that those are established as the poker sheets of this organization.

Mr. Avakian: Both witnesses have said they don't know.

The Court: That is a matter to be considered. Both witnesses have said, Mr. Kyne and this witness, that [1167] they are similar——

Mr. Avakian: In form.

The Court: He did not say in form. He said similar.

Well, that is the way I feel about it.

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(Testimony of Harold H. Maundrell.)

Mr. Avakian: May the record show that these sheets were produced not by Mr. Kyne or Mr. Maundrell, but by the government's counsel?

The Court: The record certainly shows that now. So the order admitting Exhibits 114, 114A and 114B will stand. They are all admitted in evidence.

(Question read.)

A. No, I do not.

Q. First let me ask you this, do you know what Miller that refers to? A. No, I do not.

Q. I call your attention to the fact that also on government's Exhibits 114 and 114B, sheets for January 1, 1946, and January 1, 1947, also contain the name of Miller as having received a loan and made returns, is that correct? A. Yes, sir.

Q. Does that in any way refresh your recollection as to who was Miller?

Mr. Gillen: May I suggest the name Miller, without any initial or anything?

Mr. Campbell: Just the name Miller [1168] appears.

A. Well, they had a great many employees there and I didn't know them. I would say of all those employees I knew none of them except maybe one or two. I didn't inhabit the place, I was never around there except in the morning.

Q. I call your attention to plaintiff's Exhibit 124A, the pay roll record for 1946, and call your attention to the name of Oliver D. Miller, showing only one day of employment, May 22nd, do you

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(Testimony of Harold H. Maundrell.)

know whether or not that is the Mr. Miller as referred to on these sheets? A. No, I don't.

Q. Now I call your attention to the fact that also under the heading "Return" on this sheet 114A for December 31, 1946, under the heading "Return" appears in blue pencil "Telephone Remit $10.25," do you recognize that writing?

A. No, sir.

Q. Do you know to what that item refers?

A. No, sir.

Q. I call your attention to the upper right-hand corner, where there appear various names with amounts ranging from $20 to $6.00 set against them, to what does that refer?

A. The salaries paid to the men, the employees, whose names appear there.

Q. And I call your attention to three additional items appearing in here, Meals, $20; Linen, $6.25; Trim cards, $60, will you state whether or not those refer to expenses which were paid on [1169] that day and during that shift? A. Yes, sir.

Q. Now I call your attention to the fact that the amount "Loan" shows a total $252.50, is that correct? A. Yes, sir.

Q. Consisting of $100 loaned to Miller, $100 to a man by the name of Caswell, who also appears as an employee, is that correct?

Mr. Gillen: I object to counsel suggesting that he also appears as an employee, because it is just a surname——

Mr. Campbell: I will amend the question.

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(Testimony of Harold H. Maundrell.)

Q. The name Caswell also appears as an employee of the club?

A. Yes, Mr. Caswell as an employee.

Q. And $50 advanced to one Carcilla, and I will ask you if the name Carcilla also appears among employees at the rate of ten dollars?

A. Yes, sir.

Q. And the balance of $2.50 is made up of two items, $1.00 and $1.50, against the word "Players," is that correct? A. Yes, sir.

Q. Now in the right-hand column to which you have referred, upper right-hand portion of the page to which I have directed your attention to the items which you say represent wages paid employees, plus certain expenses, make a total of $279.25, is that correct? [1170] A. Yes, sir.

Q. And also your attention is directed to the amount picked up from tables, $438.25?

A. That's correct.

Q. Now will you examine this page particularly and state whether or not, on the basis of the figures to which I have directed your attention, there was any profit for that shift in the operation of the club, after the payment of salaries and the expenses enumerated, taking into account the amounts advanced to the players whom you have described and the amounts returned by them and taking into account the amount received from the rental of the tables arrived at?

Mr. Gillen: What date is that?

Mr. Campbell: That is December 31, 1946.

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. And is that done in the calculations set forth in the middle column at the middle of the page?

A. Yes, sir.

Q. Now in order to arrive at that, I notice that you have added, have you not, the amount of the returns from players, is that correct, to the amount received from rental of the tables?

A. Yes, sir.

Q. So that you have arrived at a total of $646.25? A. Yes, sir. [1171]

Q. From that you have subtracted, have you not, the amount loaned to players and the amount of expenses paid by way of salary and the other expenses as set forth in the column, incidentals?

A. Yes, sir.

Q. A total of $531.75? A. Yes, sir.

Q. So that for that shift you have arrived at what profit?

Mr. Golden: Your Honor, I do not understand that this witness said he had done this.

Mr. Campbell: I will reframe the question.

Q. So according to that sheet there is shown how much profit from that shift?

Mr. Avakian: May it be understood all prior sheets likewise was not the witness' subtraction on the sheet.

The Court: No, I can't go back over the record.

(Last question read.)

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(Testimony of Harold H. Maundrell.)

The Court: Have you any objection to that question?

Mr. Avakian: Not to that. We would like to strike the answers prior on the ground it assumes something not in evidence.

The Court: There was no objection made at the time they were offered. The answer may be given to this question.

A. $114.50. [1172]

Q. Immediately below that figure appears the figure $10,000, do you know to what that refers?

A. The bank roll.

Q. And imediately below that, after having added $114.50, there appears the figure of 10,114.50, what does that represent?

A. Well, that was the bank roll at the completion of the day, this particular shift.

Q. Now turning to the second page, I direct your attention to similar entries in the nature of those you described on the first sheet appear on the second? A. Yes, sir.

Q. That is as to wages, expenses, loans, to players, and return and tables? A. Yes, sir.

Q. I direct your attention to the figure you referred to, bank roll, at the end of the first shift shows $10,114.50, to the words appearing below, "Top $10,114.50," does that also refer to the bank roll as found at the end of the first shift?

A. Yes, sir.

Q. Now this particular sheet shows a loss, does it not? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: What sheet is that?

Mr. Campbell: Second sheet, government's Exhibit 114A, the shift 4 to 12. [1173]

Mr. Gillen: Is that December 31, 1946?

Mr. Campbell: Yes, sir.

Q. And that loss was in what amount for that particular shift? A. $111.50.

Q. Now it is a fact, is it not, that included in the expenses of that shift were purchase of six gross of Bee cards at $365.50?

Mr. Gillen: Objected to as leading and suggestive.

The Court: It may be preliminary. Answer the question.

A. It is so stated on the poker sheet.

Q. So that according to this sheet the new top for the new bank roll is what at the end of that shift? A. $10,003.

Q. Now referring to the third sheet of the series, also in government's Exhibit 114A, and referring to the shift 12 to 8, of the 12 midnight to 8 in the morning, is that correct? A. Yes.

Q. What does that sheet show as to wins or losses?

A. It shows that they won $156.

Q. What does it show as to the bank roll as at the end of the third shift?

A. It shows $10,159.

Q. I take it from your testimony, Mr. Maundrell, that that amount is arrived at after deduction of all the expenses as set forth on these three

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(Testimony of Harold H. Maundrell.)

sheets, is that correct? [1174] A. Yes, sir.

Q. Now I direct your attention, still referring to Exhibit 114A, to certain notations which appear in the lower left-hand corner under the heading "Floor," Atkinson, Lefky, Anderson, Parrish, and certain amounts set forth opposite each one. Do you know to what that refers?

A. Those are floormen that worked there from time to time, they would go to the cage and get money, usually in chips which they carried in their pockets, and in the event a player wants chips immediately, say $50 or $100 worth of chips, they gave them the chips. At the end of the day that money is returned to the cage.

Q. You say floormen, do you know what their duties were other than cashing chips?

A. Yes, they ran games, each one had so many tables. They got the players for the games, put the games together, kept them going, collected the table fees that were due, sometimes they go in the dining room and buy them a cup of coffee, that is what those charges of meals were for. They supplied them with those.

Q. I call your attention, still referring to plaintiff's Exhibit 114A, to the right-hand lower corner, in which appears various names, this particular one, Hastings, Rice, Chappy, Posey, Smthy, Pesty, Duke, and so on, some 15 names, opposite which are set amounts, some of which have been scratched out, [1175] and ask you to what those refer, if you know?

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(Testimony of Harold H. Maundrell.)

A. Those are the amounts of money that were owed to the club and they had markers in those different figures, different amounts, instead of IOUs.

Q. What, if anything, does it indicate when the figure has been scratched out, as opposite Hastings, there was five hundred, does that refer to $500 or $5.00, do you know? A. That was $500.

Q. And I observe that this is scratched out. What, if anything, if you know, would that indicate? A. He paid back $500 he owed.

Q. Would that be during this particular shift, the 8 to 4 shift? A. Yes, sir.

Q. And I observe opposite the name Chappy there appears $130 scratched out, $200 scratched out and $100, what would that indicate?

A. Well, that means he borrowed $150.

Q. Is that 130 or 150?

A. Well, it might be 130—borrowed $200, he also borrowed $100, but he paid it all back except $100.

Q. And that would be during the course of this shift?

A. Yes, sir. It doesn't necessarily mean that that money was borrowed in the course of that shift, but the scratches would mean it was paid off. [1176]

Q. Calling your attention, still referring to plaintiff's Exhibit 114A, to the fact that similar items appear on each of the shifts, are they amounts owed by the players which they have borrowed, put on each page of the shift for the day?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir. Let me make myself understood. Some of these items were not borrowed on that particular day or shift. They carried over maybe the day before, or maybe a week previous to that.

Q. What I was getting at is this, on each shift is there set forth, if you know, in the lower right-hand corner the amount outstanding, owing to the club, by those who have borrowed from the club?

A. Yes, sir.

Q. So that each cashier, as he goes on duty for the shift, has the entire list before him, is that correct? A. Yes, sir.

Q. And that player may or may not play during that shift or may or may not pay anything on his account during that shift, is that correct?

A. Yes, sir.

Q. Now I call your attention to the fact that in this list on the first page, still referring to government's Exhibit 114A, of the money owed, appears the word "Floor, $100," and apparently scratched out. Do you know to what that refers?

A. No, sir. [1177]

Q. On the second page is carried "Floor, $400," which is on the 4 to 12 shift, and on the 12 to 8 shift it is carried at various amounts, scratched out until there remains $100 with the word "TR" opposite it. Do you know to what that refers?

A. No, I do not.

Q. Now will you glance over briefly at Exhibit 114 and 114B, the poker sheets for January 1, 1946, and January 1, 1947, and state whether or not they

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(Testimony of Harold H. Maundrell.)

contain the same type of information as you have described with relation to plaintiff's Exhibit 114A?

A. Yes, they do.

Mr. Gillen: The question is objectionable on the several grounds, your Honor, but I won't waste the time objecting.

The Court: It has already been answered.

Q. Now referring to plaintiff's Exhibit 126, I will ask you first if there is set forth herein the amount of income derived by the Menlo Club for the year 1946 from the table rentals which you have described? In other words, is there an annual figure or is that set forth in monthly figures?

A. In monthly figures.

Q. Is that also true of the heading "Loans," which you have described as advances to players?

A. Yes, sir.

Q. I believe you stated, did you not, that loans also include the salaries and incidental expenses, is that correct? A. Yes, sir. [1178]

Q. And that is also set forth by monthly figures? A. Yes, sir.

Q. I mean monthly totals.

A. Monthly totals, that is right.

Q. And is that also true of the returns, which you have described as the amount returned by those financed by the house to play the games?

A. Yes, sir.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

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December 20, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Avakian: May we have the last few questions read?

(Questions read.)

Mr. Avakian: I believe Mr. Campbell in advertently made a wrong description.

Mr. Campbell: Yes, I was going to correct that.

Q. Mr. Maundrell, apparently there was some misunderstanding between us this morning concerning one of the records, 1946. I recall you testified there was set forth on the right-hand side of these sheets the pay roll and certain incidental [1179] expenses which in arriving at the day's profit as set forth here, you have deducted from income, is that correct, was deducted on these sheets rather in arriving at the daily profit, is that correct?

A. Yes, sir.

Q. However, in Exhibit 126, in which figures from poker sheets have been transposed into the ledgers of the Menlo Club fund, does the figure

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(Testimony of Harold H. Maundrell.)

"Amount Loan" include the pay roll and other expenses set forth on the poker sheets?

A. No, it does not.

Q. Those were handled separately, were they?

A. Yes, sir.

Q. So I take it then that your monthly total appearing in that record, government's Exhibit 126, under the heading "Income" would represent the gross take prior to the deduction of expenses, such as wages, salaries and other expenses of doing business? A. Yes, sir.

Q. You stated, I believe, that you did not have a yearly total but that you did have, in that government's Exhibit 126, monthly totals of gross statement? A. Yes.

Q. Will you state what they were by months for the year 1946?

A. As of January 31, 1946, the total for the month taken in on tables was $53,293.75; the amount of the returns, $33,923; the [1180] amount of the loans was $48,706.50.

Q. Making a gross income of what amount?

A. The gross revenue is here.

Q. Net revenue?

A. The gross net revenue was $38,510.25. That is monthly. February 28th, 1946: tables, $49,245.25; returns, $29,903.50, and loans, $43,993; gross revenue, $35,155.75. March 31, 1946: tables, $53,509; returns, $32,101.25; loans, $48,223.25; gross net, $37,397.

Mr. Avakian: Your Honor, we are a little bit

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(Testimony of Harold H. Maundrell.)

confused by the term "gross net." I wonder if we could ask counsel to clarify that so we could clarify these figures?

Mr. Campbell: Finish the figures first, Mr. Maundrell.

A. I just gave the figures as of March 31, 1946. I will repeat them. The amount of money taken in on the tables amounted to $53,509. The amount of money taken in on returns was $32,101.25. They are added together and the loans are deducted from that amount. The loans, $48,223.25, which would leave a balance on hand of $37,397.

Q. Proceed.

A. April 30, 1946: tables, $50,455.75; the loans, $45,880.25; the returns were $27,444.25, leaving a gross net revenue of $32,019.75. May 31, 1946: tables, $31,764.50; loans, $22,013.00; returns, $17,193.85, leaving a gross net revenue of $26,945.35. June 30, 1946: tables, $38,307.25; loans, $35,103.10; returns, [1181] $26,049.85; gross revenue, $29,234. July 31, 1946: tables, $48,225.25; loans, $45,028.50; returns, $29,199.50; gross revenue, $32,396.25. August 31, 1946: tables, $55,914; loans, $47,896; returns, $28,351.25; gross revenue, $36,369.25. September 30, 1946: tables, $54,130.25; loans, $44,714.50; returns, $26,695; gross revenue, $36,116.75. October 31, 1946: tables, $52,067; returns, $26,484.50; loans, $41,437.50; gross revenue, $37,114. November 30, 1946: tables, $50,927.25; returns, $26,849.45; loans, $41,645.25; gross revenue, $36,-

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(Testimony of Harold H. Maundrell.)

131.45. December 31, 1946: tables, $50,175; returns, $26,851; loans, $41,872; gross revenue, $35,154.

Q. Now, Mr. Maundrell, did you have a written agreement with Mr. Remmer as to a share in the profits of the operation of the Menlo Club?

A. Yes, sir.

Q. Do you have that with you? This is the original of such an agreement? A. Yes, sir.

Mr. Campbell: I will ask that this be marked with government's next number.

The Clerk: No. 130.

Mr. Avakian: Your Honor, I want to say, by way of explanation, in comparing 130 for identification with our copy, I inadvertently wrote on the original rather than the copy and with the permission of the Court I will strike that out [1182] and it will be understood that was placed on there erroneously.

Mr. Campbell: No objection.

Mr. Avakian: We have no objection to 130 going in evidence.

Mr. Campbell: It will be offered.

The Court: 130 is admitted in evidence.

Q. Now when was it, Mr. Maundrell, that you first started your association with the Menlo Club?

A. I arrived in San Francisco around the 20th of May, I believe it was, 1945.

Q. And was that the time that you commenced your association there?

A. Well, no. I had several conversations with Mr. Remmer. I was living at the time in Beverley

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(Testimony of Harold H. Maundrell.)

Hills in southern California and we had four or five conversations relative to my employment there.

Q. What is your best recollection when you began your active employment?

A. From May 1, 1945.

Q. Now I direct your attention to the fact that this agreement is dated the 4th of November, 1946.

A. Yes, sir.

Q. And I will ask you if there was an agreement prior to that time with Mr. Remmer?

A. Yes, sir. [1183]

Q. Was that a written or oral agreement?

A. Oral agreement.

Q. And I will ask you whether or not the oral agreement was substantially in the same terms as embodied in this written agreement?

A. Yes, I would say yes.

Mr. Campbell: Could it be agreed, rather than read the document, that the document is in the same terms as that heretofore read in respect to to the witness, William Kyne, with the exception that the interest referred to herein is a 10 per cent interest?

Mr. Avakian: And on the second page in the next to the last paragraph the amount——

Mr. Campbell: Yes, whereas Kyne's is 26 thousand, the amount set forth herein is $17,500, but in all other particulars and with the exception this calls for ten per cent rather than 15 per cent, the document is identical.

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(Testimony of Harold H. Maundrell.)

Mr. Avakian: Yes, I believe they are word for word.

Q. Now I am going to show you, Mr. Maundrell, plaintiff's Exhibit 129 for identification, marked "Menlo Bar, 1946," and ask you if you recognize that as a book kept in the regular course of the business of the Menlo Bar?

A. Yes, sir.

Q. Was that book maintained by you?

A. Yes, sir. [1184]

Q. And the entries made by you?

A. Not all of the entries. Some were made by my secretary. There are a great many entries made by me.

Q. Well, were the entries made by you or under your supervision? A. Yes, sir.

Mr. Campbell: This will be offered as Exhibit 129.

Mr. Golden: No specific objection other than the objection we have to all this material, that it has been in the hands of the government.

The Court: It will be understood and the objection will be overruled.

Q. I show you plaintiff's Exhibit 127 for identification, a book entitled "Tiny's Restaurant, 1946," and I will ask you if you recognize that as a book maintained in the regular course of that business and entries made by you or under your supervision? A. Yes, sir.

Mr. Campbell: I will offer this as government's Exhibit 127.

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(Testimony of Harold H. Maundrell.)

Mr. Golden: Same objection and motion, your Honor.

The Court: Same ruling. The exhibit will be admitted in evidence, No. 127.

Q. At this time also I will show you government's Exhibit 112A for identification, a book bearing the title, "110 Eddy Street, 50 Mason," and ask you if you recognize that book? [1185]

A. Yes, sir.

Q. Is that a book maintained by you in the course of your employment, with the entries either made by you or made under your direction and supervision? A. Yes, sir.

Q. And to what enterprise or enterprises does this particular record, 112A for identification, refer? A. 110 Eddy Street tavern.

Q. I notice also the address 50 Mason on the front.

A. There are a few entries I notice in the back kept of my office, have nothing to do with 110 Eddy Street.

Q. Do they relate to the premises known as 50 Mason Street?

A. Yes, only to the office, the office that I maintained.

Q. Without stating the entries, what is the nature of the entries relative to the address 50 Mason Street?

A. Well, the different expenses paid at the office, paid by my office.

Q. Relative to what enterprise or enterprises?

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(Testimony of Harold H. Maundrell.)

A. Well, there are different things, office supplies and stamps.

Q. Well, state whether or not they are expenses of maintaining the office where you were keeping the records of the various enterprises?

A. That is right.

Q. So in a sense they relate to all of the enterprises, is [1186] that correct, for which you kept records?

A. Well, no; 110 Eddy, the Day-Night, the 186 Club.

Q. Those three enterprises?

A. Those three paid a certain fee each month. When I first went to work for Mr. Remmer, I went into the Day-Night Cigar Stand, my original talks and topic of conversation with relation to going there and the other clubs were not mentioned at that time. It was after I came to San Francisco that we talked about it and then I took over the books later on.

Q. Your original employment was with reference to the Menlo Bar and Menlo Restaurant?

A. Yes, sir, Menlo Club.

Mr. Campbell: I offer Exhibit 119 in evidence.

Mr. Gillen: I would like an opportunity to examine Mr. Maundrell on voir dire in regard to 50 Mason Street expenses, to see whether he recalls whether those are his personal expenses or something to do with the defendant.

Mr. Campbell: I don't believe that is a matter for voir dire. If counsel desires to question him,

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(Testimony of Harold H. Maundrell.)

he can go into it at a later time. It is not a matter of voir dire on qualifications.

The Court: You may ask.

Q. (By Mr. Gillen): Mr. Maundrell, in regard to expenses at 50 Mason Street, do you have any recollection whether or not those were personal expenses of your own or expenses to do with [1187] Mr. Remmer?

A. They were expenses of mine. In other words, I collected from 110 Eddy $75 a month for expenses and I collected from the Day-Night Cigar Store a certain amount of money for expenses and those expenses went to pay some of the expenses at 50 Mason Street. They were not charges against any other account.

Mr. Gillen: I think they should be eliminated.

Mr. Campbell: Yes, I am willing to extract those pages from the book which you have identified.

Mr. Gillen: Of course, your Honor, the record should show that we interpose the same objection to the admission of the entire book.

The Court: The same objections Mr. Golden referred to?

Mr. Gillen: That is correct.

The Court: So understood. Otherwise those objections will be overruled and the exhibit admitted in evidence, 112A.

Q. (By Mr. Campbell): Now, Mr. Maundrell, you have extracted one page from the book, is that

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(Testimony of Harold H. Maundrell.)

the only page which referred to personal expenses?

A. It is.

Mr. Campbell: May this be given a number simply for identification?

The Court: 112B for identification, 112 series.

Q. Now, Mr. Maundrell, you stated, I believe, that some time [1188] after you became associated with the San Francisco enterprises of Mr. Remmer's, you also took care of the books and records of the 186 Club, is that correct?

A. Not until 1946. I took care of some of the books.

Q. From whom did you take over the keeping of the records for that enterprise?

A. Mr. Slater.

Q. Do you recall approximately the date in 1946 when you took over those records?

A. It started as of the first of the year.

Q. That is the first of 1946? A. Yes, sir.

Q. And at that time were certain books and records turned over to you for that club?

A. Yes, sir.

Q. What was the nature of those books?

A. They were records kept by Mr. Slater, although at the time he had an agreement——

Q. (Interrupting): No, that is not responsive. I am asking for a description of the books that you maintained during 1946 for the 186 Club.

A. We had a ledger and journal I believe.

Q. Now did you subsequently, Mr. Maundrell, turn certain of those records over to the agents of

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(Testimony of Harold H. Maundrell.)

the Bureau of Internal Revenue who were investigating this case? [1189] A. Yes, sir.

Q. And subsequent to that did you request, and was there returned to you, those records?

A. Yes, I made a request for certain books that I needed and they were returned to me.

Q. I call your attention to plaintiff's Exhibit 122 for identification, and ask you if that is your signature? A. Yes, sir.

Q. And is that the receipt given by you to the agents at the time the records were returned to you? A. Yes, sir.

Mr. Campbell: At this time I will ask that plaintiff's Exhibit 122 for identification be received in evidence.

Mr. Golden: No objection.

The Court: It may be admitted in evidence.

Q. Mr. Maundrell, this document reads as follows:

(Reads Exhibit 122.)

Q. Incidentally, who was R. W. Morgan?

A. He was a man working for the Bureau.

Q. The Internal Revenue agent?

A. Yes, sir.

Q. Now when did you last see those records which are referred to in this receipt, Mr. Maundrell? A. I don't remember.

Q. Do you know whether or not they were at 50 Mason Street at [1190] the time you terminated your connection with the enterprise?

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: Objected to as having been asked and answered. He said he doesn't know.

The Court: Objection overruled.

A. I don't remember.

Q. I believe you stated that in connection with that enterprise——

The Court (Interceding): When you say "that"——

Q. 186 Club—in connection with the 186 Club, you prepared certain of the tax returns, that is to say, the social security returns, is that correct?

A. Yes, sir.

Q. Now with reference to the black book referred to in this receipt, showing daily win and lose from March, 1943, to December 31, 1945, do you know who kept that record? A. No, sir.

Q. Was that a record which was turned over to you at the time you began keeping records of the 186 Club?

A. Those were records that were turned over to me by Mr. Slater and I merely filed them on the shelf.

Q. So far as you know, were there any other records maintained for that period from March, 1943, to December 31, 1945?

A. Not to my knowledge.

Q. Now referring to the ledgers set forth in this receipt, showing daily analysis of take and distribution of expenses for [1191] the period January 1, 1946, to June 30, 1946, was that a record which you kept? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. And as to the loose-leaf sheets showing daily take and distribution of expenses for the period July 1, 1946, to December 31, 1946, was that also a record which you kept? A. Yes, sir.

Q. What was the source of information which went into the record which you kept?

A. The poker sheets and certain bills that were presented to me from time to time.

Q. And by poker sheets, are you referring to poker sheets which were similar in nature to those you have identified with respect to the Menlo Club?

A. Yes, sir.

Q. I am going to show you a group of sheets headed "Poker," being Exhibits 110 to 110F, and using plaintiff's 110F, which bears date December 31, 1946, and ask you if you recognize that document? A. No, I do not.

Q. Can you state whether or not that document is similar to those which you used in posting the books of the 186 Club?

Mr. Gillen: Objected to as leading and suggestive. That question is not cross-examination.

Mr. Campbell: It does not suggest the answer, your Honor. [1192]

The Court: Objection overruled.

A. Yes, sir.

Q. Do you recognize any of the names appearing thereon?

A. Only one name, that is the name of Busterno.

Q. Who was Busterno?

A. He was one of the partners.

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(Testimony of Harold H. Maundrell.)

Q. You stated, I believe, that in connection with your employment you made out the social security and federal insurance contribution returns for the 186 Club? A. Yes, sir.

Q. I will ask that this group, consisting of some five documents, headed "Employers Tax Return," be marked for identification as 131 for identification, as one group.

Mr. Avakian: Your Honor, the defense is agreeable to stipulate that plaintiff's Exhibit 131 may be received in evidence if the prosecution desires to offer it.

The Court: It may be admitted in evidence, Exhibit 131.

Q. Mr. Maundrell, I show you plaintiff's Exhibit 131 and ask you if you recognize these as employer's tax return of the 186 Club for the quarter ending December 31, 1945, and the four quarters of 1946?

A. Well, I didn't prepare these. These were done by Slater, 1945.

Q. I call your attention to the fact that the return is dated December 31, 1945, and the balance are for 1946? [1193]

A. Those in '46 I prepared, yes.

Q. Were those prepared by you?

A. Yes, sir, 1946.

Q. As a matter of fact, isn't that your handwriting thereon, that notation? A. No.

Q. You did, however, prepare them?

A. 1946.

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(Testimony of Harold H. Maundrell.)

Q. Now I direct your attention to the one dated December 31, 1946, and again calling your attention to plaintiff's Exhibit 110F for identification, you have stated that these sheets, I believe, were similar to those which you utilized, is that correct?

A. Yes, sir.

Q. I call your attention to the fact that on each of these sheets there appears opposite various names on that date, December 31, 1946, the word "Wages," together with amounts, and I will ask you to examine these poker sheets as to those names and find if some names are listed as employees of the 186 Club as of the calendar year ending December 31, 1946?

A. There is Stewart here, Bert W.

Q. Is the word "Wages" under his name? I am referring to those that there are amounts listed as wages, to which there is Busterno, 25—do you find Busterno listed as an employee on the [1194] return? A. Yes, sir.

Q. The next I call your attention on the poker sheet, Divodi, wages $25, do you find him listed on the tax return as an employee? A. Yes, sir.

Q. The next is Grafford, wages $15, do you find him listed on the tax return as employee?

A. Yes, sir.

Q. The next is Osnato, $15 wages, do you find him listed as an employee for that quarter? You do not find that one? A. No, sir.

Q. The next sheet of 110F is the name of

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(Testimony of Harold H. Maundrell.)

Shenave, wages $12.50, do you find him on the tax return? Do you find that name?

A. Mike Shenave, yes, sir.

Q. Now you stated you did not find the name Osnato on the one you have before you?

A. What is the date of the return?

A. 12-31-46. I show you the balance of plaintiff's Exhibit 131, Mr. Maundrell, and direct your attention to the fact that on each of the other returns of employers tax returns there is listed as an employee the name Frank C. Osnato, do you see that? A. Yes, sir.

Q. On the second of these documents, as an employee, Frank C. Osnato, do you see that?

A. Yes, sir. [1195]

Q. And the third one of these as an employee the name of Frank Clement Osnato?

A. Yes, sir.

Q. And on the last of these which I hold in my hand, as employee for the quarter ending September 30, 1946, Frank C. Osnato, as employee?

A. Yes, sir.

Q. I am directing your attention to the second page of plaintiff's Exhibit 110F for identification, and the name of Romero, wages $12.50, do you find his name listed thereon? A. Yes, sir.

Q. As an employee on the tax return filed?

A. Yes, sir.

Q. Now I direct your attention to the return for the period ending March 31, 1946, portion of government's Exhibit 131, and I also call attention

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(Testimony of Harold H. Maundrell.)

to plaintiff's 110E for identification, which bears date of Juanry 1, 1946, and the heading "Poker" sheet, calling your attention to certain names appearing thereon with the word "Wages," Reggio, wages $15. Do you find him listed as employee for that period on the tax return?

A. Joseph Reggio, yes, sir.

Q. I call your attention to O'Neil, wages $15, referring to 110E for identification, and I ask you, do you find his name listed as employee?

A. Roma O'Neil. [1196]

Q. I call your attention to the name Osnato, wages $15, and ask you if you find his name listed as employee? A. Frank Clement Osnato.

The Court: I take it when you repeat the names it is on that tax return?

A. Yes, sir.

Q. I call your attention now to the tax return for the quarter ending December 31, 1945, portion of government's Exhibit 131 in evidence, and call your attention to plaintiff's Exhibit 110D for identification, which bears a date 12-31-45, and direct your attention under the name of Riggio, wages $15, was he listed as an employee for that period on the tax return? A. Yes, sir.

Q. O'Neil, $15, was he listed as an employee?

A. Ramon O'Neil.

Q. He was listed on the tax return?

A. Yes.

Q. Estano, $15? A. Right, C. S.

Q. Tasons, $12.50, was he listed as an employee?

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(Testimony of Harold H. Maundrell.)

A. George Tasos.

Q. Gabriel, wage $12.50, was he listed for that period? A. No, sir.

Q. Do you find on here as an employee for that period one Gabriel Sorantino? [1197]

A. Yes, there is Gabriel Sorantino.

Q. Louis Segalio, still referring to 110E for identification, do you find him listed for that period as an employee? A. Yes.

Q. Nick Valle, wages $12.50, do you find him listed as an employee? A. Yes, sir.

Mr. Campbell: At this time, if the Court please, I am going to offer in evidence the poker sheets which form group 110 to 110F for identification.

Mr. Avakian: Your Honor, we have several grounds for objection to that offer. First of all, if these are being offered as purportedly the authentic poker sheets of the 186 Club, we make our usual grounds of objection that we have been making to all documents produced by the prosecution which they have declined to let us see, and make the same motion. Secondly, we object on the ground that no proper foundation has been laid because no witness from the witness stand has testified that he could identify these particular documents as the actual documents of the 186 Club and we are placed, your Honor, in this situation—there has not been produced so far any witness whom we can cross-examine as to whether these are the records. This is a very strange, and to me a very new manner, of introducing documentary evidence. If these ac-

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(Testimony of Harold H. Maundrell.)

tually are poker sheets taken from 186 Club by the government, then we submit the proper [1198] foundation would consist of something from the agents who took them, to the effect that these are records they took, and testimony from any other agent who had custody of them in the interval, to the effect that these are the records that were turned over to him by the prior agent, and we could then establish a chain of authenticity, we could then cross-examine somebody as to whether they are the authentic records or transcripts made up by somebody during the four or five years since they were taken, and if they are transcripts, whether they are complete and accurate in every respect, but if these documents are received in this manner of foundation, then, your Honor, there is no sworn testimony that these are documents of the 186 Club and there is nobody whom we can cross-examine to determine on cross-examination whether these are the actual records which were taken from the 186 Club, and I submit, your Honor, as a matter of proper procedure, since these documents are produced by the prosecution, the prosecution should advise this court, through the witness, not the witness on the stand, who obtained these documents, when and where they were obtained, who has had custody of them from that time until now and then we could properly cross-examine on them.

The Court: Objection overruled and Exhibits

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(Testimony of Harold H. Maundrell.)

110, 110A, 110B, 110C, 110D, 110E, and 110F are admitted in evidence.

Q. Now, Mr. Maundrell, in connection with your employment concerning [1199] the operation of the Menlo Club, the Menlo Bar and Tiny's Waffle Shop, was there a bank account maintained in your name? A. Yes, sir.

Q. And in what bank was that maintained?

A. Crocker National Bank.

Q. I show you plaintiff's Exhibit 27, which has heretofore been produced in evidence, relating to an account at the Crocker National Bank in the name of Elmer Remmer or Harold H. Maundrell, and ask you if that is the account to which you refer? A. Yes.

Q. The witness has called attention to the first document in this account produced here by the representative of the Crocker National Bank, namely, what purports to be a signature card. Now I will ask you if those account ledger sheets which are in the name of Elmer Remmer or Harold H. Maundrell, refer to that account, if you know?

A. Yes, the account was Elmer Remmer or Harold H. Maundrell.

Q. You did have such an account, however, in the Crocker National Bank? A. Yes, sir.

Q. Who were the authorized signators?

A. Elmer Remmer or myself.

Q. When was that account opened, to the best of your recollection? [1200]

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(Testimony of Harold H. Maundrell.)

A. I think that was opened on or about the last of May or the beginning of June, 1945, I believe.

Mr. Gillen: The record would be the best evidence.

The Court: Yes.

Q. There is date appearing June 21, 1945, does that refresh your recollection? A. Yes, sir.

Q. Now, Mr. Maundrell, in respect to what businesses was that bank account used?

A. That was receipts that were taken in from Tiny's Waffle Shop and Menlo Bar and Cocktail Lounge, and then monies that were advanced to me from time to time.

Q. For various purposes?

A. For various purposes.

Q. Now to your knowledge did all of the receipts of the Benlo Bar and Tiny's Waffle Shop go into that account? A. Yes, sir.

Q. With the exception, I presume, of small daily payments?

A. Well, any cash accounts, no.

Q. With that exception? A. Yes, sir.

Q. And from that account did you handle the payment of expenses of those two enterprises?

A. Yes, sir. [1201]

Q. Now did you handle at any time the receipts of the Menlo Club? A. No, sir.

Q. Did you have any bank account, either in your name or to which you had access, in which the receipts of the Menlo Club were placed?

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(Testimony of Harold H. Maundrell.)

A. No, sir.

Q. Were you an authorized signator on any account other than this Crocker National Bank account? A. Day-Night Cigar Store.

Q. And who else was on the Day-Night Cigar Store with you, if you recall?

A. I think Willie Kyne. My signature was on that because of the fact that Willie Kyne was going into the service.

Q. That is when your signature was placed on there?

A. Well, it wasn't put on there until some time in, I think, of 1945, I don't know the exact date.

Q. Aside from those two accounts, did you have access to any of the other bank accounts with respect to various businesses? A. No, sir.

Q. Now did you maintain any safety deposit boxes in your name with respect to any of the businesses? A. No, sir.

Q. Did you have any access to any safety deposit box with relation to these businesses, that is to say, were you an authorized [1202] entrant to any safety deposit box? A. No, sir.

Q. Now you stated that in addition to the receipts of the Tiny's Waffle Shop and the Menlo Bar that from time to time other funds would be given to you to be placed in the Crocker National Bank? A. Yes, sir.

Q. By whom would those funds be given to you?

A. Well, as I needed them they might be given

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(Testimony of Harold H. Maundrell.)

to me by Mr. Remmer or one of the managers of the Menlo Club.

Q. You say as you needed them, was that with respect to the operation of either the Waffle Shop or the Menlo Bar? A. Yes, sir.

Q. From that account did you pay any of the expenses of the Menlo Club? A. Yes, sir.

Q. And upon whose instructions?

A. I would say Mr. Remmer.

Mr. Campbell: I am going to ask to have marked for identification certain exhibits at this time, the first as government's Exhibit 132 for identification, a book consisting of check book stubs, together with certain adding machine tabs, and as 132A for identification a group of some five checks. As 133 for identification, a second group of check stubs, and as 133A for identification a group of 17 checks, together with [1203] document entitled "Office Memorandum for Checks Withdrawn." As 134 for identification a third group of check stubs and as 134A for identification a group of 4 checks. As 135 for identification a fourth group of check stubs, and as 135A for identification a group of 9 cancelled checks. As 136 for identification a fifth book of check stubs, and as 136A for identification a group of 6 cancelled checks. I presume counsel will desire a little time to examine these.

Mr. Avakian: These are documents we have never seen before, your Honor, so it will take a little time.

The Court: We will take a recess for 15 min-

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(Testimony of Harold H. Maundrell.)

utes or longer time if necessary, so counsel may examine those records.

(Jury and alternate jurors admonished and recess taken at 2:17 p.m.)

2.48 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, I will show you what has been marked plaintiff's Exhibit 128 for identification, bearing the pencil heading, "Tiny's Restaurant and Menlo Bar 1945," and ask you if you recognize that as a book of accounts which was maintained by you [1204] or under your direction in connection with the operation of those businesses for the year 1945? A. Yes, sir.

Q. Do you recognize this sheet here?

A. No, I don't recognize that.

Mr. Campbell: Pardon me.

(Shows exhibit to counsel.)

Mr. Avakian: It appears, your Honor, there is a loose sheet which was included in the volume

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(Testimony of Harold H. Maundrell.)

which neither the defense or the prosecution is able to identify now.

Mr. Campbell: I will have it marked for identification. I will ask that Exhibit 128, consisting of one sheet marked Tiny's Restaurant and Menlo Bar, 1945, be admitted in evidence and I will ask to have this yellow sheet, pencil written with the initials E. R. at the top, marked 128A for identification.

Mr. Avakian: May I ask whether this particular set of records were taken from the box deposited with the clerk?

Mr. Campbell: Yes, it was.

Mr. Avakian: We make our usual objection.

The Court: Objection overruled and 128 admitted in evidence.

Mr. Campbell: At this time also I will produce the last book remaining of those in the custody of the clerk and ask to have it marked for identification next in order, being book entitled "Transit Smoke Shop, 1946."

The Clerk: 137. [1205]

Mr. Avakian: Your Honor, with respect to the proposed exhibit 137 for identification, which has been produced from the box of records deposited here by the defense, we are willing to stipulate it is an authentic document and our objection to it goes only to the grounds previously stated in respect to these documents.

The Court: Do I understand it has been offered?

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: Yes, I will offer it in evidence or I can have the witness further identify it.

The Court: Objection overruled and 137 admitted in evidence.

Q. Will you examine this 137, Mr. Maundrell, and state whether or not that is a record kept by you in the course of your duties which you have described, with respect to the various enterprises, or kept under your supervision? A. Yes, sir.

Q. Mr. Maundrell, in relation to the Menlo Club operations, will you state how many poker tables were operated there? A. I believe about 20.

Q. And in that connection will you state, if you know, the manner in which the take from each table of the table rental was arrived at?

A. The floor man in charge of that particular table, they collected the money from each player at the time the allotted time was up. [1206]

Q. Will you describe the allotted times and how the amounts were arrived at to collect from each player?

A. That I don't know at this time. However, there is a book here which has it in here.

Q. One of the books which you have seen?

A. Yes, sir.

Q. Do you recall which particular book it is?

A. Right here, it is in Exhibit 126.

Q. Now will you show me the place. You have called my attention to a pencilled list which has been affixed by Scotch tape to the inside front cover of Exhibit 126, is that correct? A. Yes.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: I will read this if I may: "$2 limit, 50 cents every 40 minutes; $4 limit, 50 cents every half hour; $6 limit, $1 every 40 minutes; $10 limit, $1 every half hour; $20 limit, $3 every hour; $40 limit, $5 every hour; 5-cent ante poker, 25 cents every half hour. The time is collected as stated."

Q. Now referring to the amounts collected half hour, 40 minutes and hour intervals, was that amount collected from each player in the game?

A. Yes, sir.

Q. And that was collected by the house manager? A. Yes, sir.

Q. Now at this time, Mr. Maundrell, I am going to show you plaintiff's Exhibit 132 for identification, and ask you if you [1207] recognize this exhibit? A. Yes, sir.

Q. And what is the book?

A. That is check book of the account of Elmer Remmer and Harold Maundrell in the Crocker National Bank.

Q. Is that the account which you described as being the one in which were placed the receipts of the Menlo Bar and Tiny's Waffle Shop, together with other funds which would be advanced to you for particular purposes? A. Yes, sir.

Q. Were the entries thereon made by you or made under your direction? A. Yes, sir.

Mr. Campbell: This will be offered as government's Exhibit 132.

Mr. Avakian: Your Honor, may the record show that that proposed exhibit was produced by the

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(Testimony of Harold H. Maundrell.)

prosecution from its own files and we object to that on all the grounds which we have heretofore urged, as records of the Menlo Club which were obtained by the prosecution under a promise to return, which was not kept?

The Court: Objection will be overruled. Exhibit 132 is admitted in evidence.

Q. Now, Mr. Maundrell, I am going to extract at this time certain of the cancelled checks which have heretofore been marked [1208] Exhibit 132A for identification. I show you first a check dated June 15, 1945, check No. 1056, and ask you if that is your signature thereon? A. Yes, sir.

Q. And is that a check drawn by you in the course of the employment which you have described? A. Yes, sir.

Mr. Campbell: I will offer this check in evidence as 132B.

Mr. Avakian: Is that in group marked 132A?

Mr. Campbell: That is check No. 1056.

Mr. Avakian: It is now given a new number, is that correct?

Mr. Campbell: That is correct. I am simply withdrawing certain check from 132A.

Mr. Avakian: Your Honor, we offer the same objection with respect to this proposed exhibit as to Exhibit 132.

The Court: Objection overruled and 132B is admitted in evidence.

Q. Mr. Maundrell, I call your attention to this check of June 15, 1945, payable to the Pacific Gas

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(Testimony of Harold H. Maundrell.)

& Electric Company in the amount of $3800. I hand you government's Exhibit 132 and ask you if you will state for what purpose that particular check was drawn?

A. It was for deposit on Pacific Gas & Electric Company for [1209] Tiny's Cafe, Menlo Club, Menlo Bar.

Q. And can you state whether or not that deposit which was made on June 15, 1945, remained as deposit with the Pacific Gas & Electric Company as of December 31, 1945? A. Yes, sir.

Q. It did? A. I believe so, yes.

Q. Are there any records here in which an entry would be made showing that fact, Mr. Maundrell?

A. I don't know at this time. I wouldn't be able to say.

Q. In what book or books was that deposit entered?

A. That would be Tiny's Waffle Shop.

Q. I show you government's Exhibit 127, which is entitled, "Tiny's Waffle Restaurant," and ask you if you will examine that and state whether or not that deposit was outstanding as of December 31, 1945, and whether or not it was also outstanding as of December 31, 1946?

Mr. Avakian: Your Honor, in the interest of saving time, we object to the question as incompetent, irrelevant and immaterial, having no bearing whatsoever on the question of whether this defendant fraudulently evaded his income tax.

The Court: Let me have the question.

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(Testimony of Harold H. Maundrell.)

(Question read.)

The Court: The objection is overruled. Answer the question. [1210]

A. May I have the date of that check?

Q. June 15, 1945.

A. This is the 1946 book.

Q. Will you look at that book and examine to see if that deposit was outstanding as of December 31, 1946?

A. I can't tell from the books whether it was or not.

Q. I call your attention also to 1945 book, plaintiff's Exhibit 128, an entry of this check No. 1056. Are you able to ascertain from that book whether or not it was outstanding as of the dates indicated?

A. Well, to the best of my knowledge I would say yes, it was still in the hands of the Pacific Gas & Electric Company.

Q. As of both dates? A. Yes, sir.

Q. At this time I show you a second check withdrawn from 132A for identification, being check No. 1115, and ask you if that is your signature thereon?

A. Yes, sir.

Q. And was that a check drawn by you in the course of your duties as described by you in your previous testimony? A. Yes, sir.

Mr. Campbell: This will be offered as 132C in evidence.

Mr. Avakian: And to that, your Honor, we make the same objection as to Exhibits 132 and 132B.

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(Testimony of Harold H. Maundrell.)

The Court: Same ruling. Admitted in evidence, 132C. [1211]

Q. I hand you plaintiff's Exhibit 132, check stub book, together with 132C, check for $500, dated July 10, 1945, check No. 1115, payable to Neon Corporation, and ask you for what purpose that check was drawn?

A. That was for a new Neon sign that was erected in front of the Menlo Bar and Cocktail Lounge on the outside of the building.

Q. Can you state upon which book or record an entry was made regarding the purchase of this sign for the Menlo Bar?

A. I would like to see the book of the Menlo Bar, 1945.

Q. You are referring to government's Exhibit 128?

A. 128. It is in government's Exhibit 128, Neon Corporation, $500.

Q. And was that treated in the books, that is to say, as expenses or capital expenditure?

A. Sign for bar, I imagine, was a capital expenditure.

Q. Would you indicate where?

A. It doesn't show in the book here.

Q. Are there other records here which would indicate that?

A. No, sir. I don't know how the auditor treated it finally.

Q. At this time I am going to show you a further check withdrawn from 132A for identification,

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(Testimony of Harold H. Maundrell.)

dated August 18, 1945, No. 1247, and ask you if that is your signature thereon? A. Yes, sir.

Q. And is that a check drawn by you in the course of your official duties as described by you in your previous testimony? [1212]

A. Yes, sir.

Mr. Campbell: This will be offered as government's Exhibit 132D.

Mr. Avakian: Same objection as to the previous one in this series, your Honor.

The Court: Same ruling. Admitted in evidence, 132D.

Q. Will you examine this check, 132D, Fred W. Shell, in amount $2500, and state for what purpose that check was issued?

A. That check was paid on account of new office that was built at 50 Mason Street.

Q. Who, incidentally, was Fred W. Shell?

A. Contractor.

Q. You say a new office was built. By that do you mean new building or interior construction was done?

A. No, it was the old game room they had there, took out the whole front of the building, took out the old cigar stand and main room and built a whole new office in there, composed of four different rooms.

Q. From what source did you obtain the funds for that purpose?

A. I either received this from Mr. Remmer or the manager of the Menlo Club.

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(Testimony of Harold H. Maundrell.)

Mr. Avakian: Objected to, the checks speak for themselves.

The Court: Objection overruled. The answer may stand.

Mr. Avakian: May we have that [1213] stricken?

The Court: The answer may stand.

Q. Now I am going to show you, Mr. Maundrell, plaintiff's Exhibit 133 for identification, and ask you if you recognize that book? A. Yes, sir.

Q. And what is that book?

A. Check book of Elmer Remmer and Harold Maundrell account Crocker National Bank.

Q. That is the same bank account to which you previously testified, is that correct?

A. Yes, sir.

Q. And was maintained by you as part of your duties of your employment which you have described? A. Yes, sir.

Mr. Campbell: I offer this in evidence, 133.

Mr. Avakian: May the record show that the proposed Exhibit 133 was produced by the prosecution from its own records and we object on the grounds heretofore stated with respect to documents obtained from any of these clubs on promise to return and which promise was never kept.

The Court: Objection overruled. 133 admitted in evidence.

Mr. Campbell: At this time I am going to withdraw certain of the checks which have heretofore

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(Testimony of Harold H. Maundrell.)

been marked for identification as government's Exhibit 133A for identification. [1214]

Q. At this time I will show you check dated September 13, 1945, No. 1344, and ask you if that is your signature thereon? A. Yes, sir.

Q. And is that check drawn by you in the course of your duties as you have described them?

A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's Exhibit 133B.

Mr. Avakian: Same objection, your Honor.

The Court: Same ruling. Exhibit 133B is admitted.

Q. Mr. Maundrell, I am going to show you a group of checks, all of which have been withdrawn from 133A for identification, and ask you to examine them and state whether or not those are your signatures appearing thereon and if so, if each of these checks was drawn in connection with the duties of your employment as you have described it? A. Yes, sir.

Q. Each of these was drawn in connection with your duties? A. Yes, sir.

Q. I also show you a document heading of the Crocker First National Bank, Office Memorandum for Checks Withdrawn, referring to check 1565, name of maker, and ask you if you recognize that document?

A. I don't remember this document but I do remember the check.

Q. Do you recall whether or not you withdrew

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(Testimony of Harold H. Maundrell.)

from the bank prior [1215] to the receipt of your monthly statement that particular check?

A. I don't remember that.

Mr. Campbell: I am going to offer in evidence the following checks to take the numbers in the 133 series as 133C, check No. 1396; as 133D check No. 1401; as 133E check 1536; as 133F check 1537; as 133G check 1538; as 133H check 1540; as 133I check 1566; as 133J check 1568; as 133K check No. 1569; as 133L check No. 1572; as 133M check No. 1574; as 133N check No. 1575, and as 133O check No. 1576. Offered in evidence.

Mr. Avakian: As to all those, your Honor, in addition to the objections we have been making to all of these documents offered in these series, I wish to make the further objection that they are incompetent, irrelevant and immaterial to the issue in this case, fraudulent evasion of income tax by this defendant during the years mentioned.

The Court: Objection overruled and exhibits 133C to 133O inclusive are admitted in evidence.

Q. Now drawing your attention first to check No. 1344, payable to the California Jockey Club, in amount of $108, dated September 13, 1945, will you state for what that check was drawn, Exhibit 133B?

A. For the purchase of a box at the California Jockey Club.

Q. By a box you are referring to a box for viewing the races, is that correct?

A. Yes, sir. [1216]

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(Testimony of Harold H. Maundrell.)

Q. And for whom was that purchased?

A. Well, it was purchased for the employees and for the members principally and friends of the members of the Menlo Club. I don't know who occupied it.

Q. Showing you check 133C, No. 1396, dated October 2, 1945, payable to Tinneman Bridgford Company, in the sum of $296.06, will you state for what purpose that check was drawn?

A. That was insurance check. It was drawn for Mr. Remmer's account.

Q. Drawn from Mr. Remmer's account?

A. For Mr. Remmer's account. It was drawn out of the Crocker National Bank.

Q. Was that in payment of personal insurance?

A. Yes, sir.

Q. For Mr. Remmer? A. Yes, sir.

Q. I show you Exhibit 133D, No. 1401, dated October 4, 1945, payable to Fred W. Shell, $1050, will you state for what purpose that check was drawn?

A. That was another payment to Mr. Shell for work done at 50 Mason Street.

Q. For constructing the offices there?

A. Yes, sir.

Q. And do you recall the source of the funds which were used for this purpose? [1217]

A. The Crocker National Bank.

Q. And where did you obtain the funds, from what business or enterprise?

A. That check I would get the money from

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(Testimony of Harold H. Maundrell.)

either Mr. Remmer or the manager of the Menlo Club, deposit it in the bank and then draw a check against it.

Q. Were those offices occupied by the Menlo Club? A. They were the main offices.

Q. For all of the enterprises? A. Yes, sir.

Q. And as to those improvements upon what record or records of what enterprises was that set up?

A. Well, it was set up principally for Mr. Remmer's private office and also for the office of the Day-Night Cigar and 110 Eddy.

Q. The B & R Smoke Shoppe?

A. B & R Smoke, Tiny's Waffle Shop, Menlo Bar.

Q. Which of those enterprises were actually located there?

A. Well, the only enterprise itself located there was the back room, about ten feet wide.

Q. What enterprise was in the back room?

A. That was the B & R Smoke Shoppe.

Q. I show you plaintiff's Exhibit 133E, check No. 1536, dated November 12, 1945, payable to Fred W. Shell, in amount of $2,303, was that also drawn in connection with the construction [1218] work there?

A. I believe that was the final check given Mr. Shell.

Q. That was the same construction work to which you have referred? A. Yes.

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(Testimony of Harold H. Maundrell.)

Q. I show you Exhibit 133F, No. 1537, dated November 12, 1945, in amount $1075.44, Saltzman Stanley, and ask for what purpose that check was drawn?

A. That was for new office equipment.

Q. At the same location, 52 Mason Street?

A. Yes, sir.

Q. What was the source of funds from which you drew that check?

A. Well, that was—all those funds were given to me by either the manager of the Menlo Club or Mr. Remmer.

Q. Incidentally, in what form did you receive the funds in connection with that construction and with the office equipment? A. Cash.

Q. Did you receive any of it by way of check?

A. No, sir.

Q. I show you plaintiff's Exhibit 133G, check No. 1538, dated November 16, 1945, payable to Lou Brice, in amount of $6,000, and ask you for what purpose that check was drawn?

A. Well, that was given to Mr. Brice as payment on night club [1219] Mr. Remmer had an interest in in New York.

Q. What was the source of the funds on which you drew this check?

A. The money was given to me in cash by either Mr. Remmer or the manager of the Menlo Club. If Mr. Remmer wasn't around, I always got the money from the manager.

Q. And this money was given to you in cash?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. I will ask you whether or not a further check for $6,000 was also drawn for that purpose?

A. Yes, sir.

Q. And I will ask you to refer to the record, particularly check No. 1565, and ask you to state the amount of that check and to whom drawn?

A. Six thousand.

Q. On what date?

A. November 26th. Matty Silverman.

Q. Will you state whether or not Matty Silverman was a partner of Lou Brice in the New York night club?

Mr. Gillen: Objected to as leading and suggestive.

A. Yes.

The Court: Yes.

Q. Who is Matty Silverman?

A. He was connected with Lou Brice also in the club in New York. [1220]

Q. Now directing your attention to a portion of government's Exhibit 133A for identification, a memorandum of the Crocker First National Bank as to check overdrawn, do you recall at this time whether or not you obtained that cancelled check from the bank on or about December 11, 1945?

A. No, I do not.

Mr. Gillen: What check is that?

Mr. Campbell: The last check referred to, No. 1565.

Q. I call your attention to plaintiff's Exhibit

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(Testimony of Harold H. Maundrell.)

133H, check No. 150, dated November 20, 1945, payable to John Hagner, $66.45, and ask you for what purpose that check was drawn?

A. It was for carpenter work.

Q. Carpenter work where?

A. At the new office, 50 Mason Street.

Q. That was part of the construction cost there?

A. Yes, sir.

Q. Who supplied you with that money?

A. Got it from the same source.

Q. That is to say, from either Mr. Remmer or the manager of the Menlo Club? A. Yes, sir.

Q. I call your attention to check No. 1566, Exhibit 133I, payable to Habenicht & Howland, $22.87, and ask you if that check was also used for the same purpose? A. Yes, sir.

Q. Was it obtained from the same source?

A. Yes, sir. May I make a statement? [1221]

Mr. Campbell: I think not.

The Court: I think you had better just answer each question. If you want to explain any answer——

Mr. Avakian: I believe that is what the witness wishes.

The Court: We will find out from the witness. Do you want to explain your answer?

A. He asked me every time if the checks were from the same source. They are, but I don't go each time and get $22 or $30. I will get a larger amount.

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(Testimony of Harold H. Maundrell.)

Q. I understand and then drew these checks against it? A. That's right.

Q. I am going to call your attention to a group of checks which are 133J to 133O inclusive, the first five of which are all dated November 2, 1945, Nos. 1568, 1569, 1572, 1574 and 1575, and the last being 133O, dated November 28, 1945, No. 1576, and ask you to examine those and state whether or not those checks also represent costs of the improvements made at 52 Mason Street in regard to the construction of the new office?

A. Check 1568 Tinneman Bridgford for $46.50 was paid for insurance for Mrs. Remmer.

Q. Let us withdraw that. That is 133J. Now as to the others?

A. Check 1569 made to H. C. Evans & Company for $920, was for equipment to be used in the Menlo Club.

Q. That is 133K.

A. Check 1572 to the American District Telephone Company for [1222] $340.85 was to pay for putting in a complete burglary alarm system in the new offices.

Q. That is 133L.

A. Check 1574, John Hagen, $76.46, was for further office repairs at 50 Mason Street.

Q. That is 133M.

A. Check 1575 to Pacific Gas & Electric Company for $650, was for deposit.

Q. Now did that deposit remain with the Pacific Gas & Electric Company——

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. ——at the end of 1945 and end of 1946?

A. Yes, sir.

Mr. Gillen: May the answer be stricken until we can object?

The Court: Yes, sir. The answer will go out.

Mr. Gillen: We object on the ground it is completely incompetent, irrelevant and immaterial to the issue in this case of whether there was fraudulent tax evasion.

The Court: Objection overruled. The answer may stand.

A. Check No. 1576 to John Hagen for $55.06 was for further office repairs. He worked around there for about three or four weeks.

Q. Referring to 1330. Now as to all of these checks which you have just described, what was the source of the funds from [1223] which you drew the checks?

Mr. Gillen: Objected to as already asked and answered.

The Court: You may answer the question.

A. I drew the money from either the manager of the Menlo Club or Mr. Remmer.

Q. At this time I am going to show you plaintiff's Exhibit 134 for identification and ask you if you recognize that book? A. Yes, sir.

Q. And what is that book?

A. That is a check book of the Elmer Remmer and Harold Maundrell account at the Crocker National Bank.

Q. And maintained by you in the course of

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(Testimony of Harold H. Maundrell.)

your employment as you have previously described?

A. Yes, sir.

Mr. Campbell: I offer 134 in evidence.

Mr. Avakian: May the record show that this book was likewise produced from the prosecution's own records and we make the same objection we have been making right along to these records.

The Court: Objection overruled and 134 is admitted in evidence.

Q. I am going to show you plaintiff's Exhibit 134A for identification, consisting of some 4 cancelled checks, and ask you if those are your signatures appearing thereon? A. Yes, sir. [1224]

Q. Were those checks drawn by you in the course of the official duties which you have described? A. Yes, sir.

Mr. Campbell: I am going to offer these checks in evidence as exhibits 134A, 134B, 134C and 134D respectively, checks Nos. 1799, 1805, 1811 and 1874.

Mr. Avakian: We make the same objection as to Exhibit 134 and the additional objection that the expenditures represented by these checks are incompetent, irrelevant and immaterial to the issues in this case.

The Court: Objection overruled. Exhibits 134A, 134B, 134C and 134D are each admitted in evidence.

Q. Showing you Exhibit 134A, check dated February 6, 1946, payable to St. Francis Hotel, $33.21, will you state for what purpose that check was drawn? A. For Mr. Remmer's account.

Q. For his personal account? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. What was the source of the funds with which you paid that check?

A. The Crocker National Bank.

Q. Where did you obtain the funds from which you drew that check?

Mr. Avakian: Your Honor, that has been asked and answered. The witness has testified that in the Crocker National Bank account he deposited regularly the proceeds of certain of [1225] these businesses and from time to time he obtained money from Mr. Remmer or the manager of the Menlo Club, additional funds, and I object to it, being repetition.

The Court: Objection will be overruled.

Q. What is your answer?

A. Well, the funds were derived from either the manager of the Menlo Club or Mr. Remmer.

Q. In what form? A. Cash.

Q. I show you 134B, check in favor of the California Jockey Club, No. 1805, in amount of $108. Is that expenditure similar to that which you described regarding another check in the same amount?

Mr. Gillen: Objected to as calling for conclusion.

Mr. Campbell: Very well.

Q. What is the check and for what purpose was it drawn and what was the source of the funds?

A. This was drawn for the season, this was for a later season. The other was for 1945 and this

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(Testimony of Harold H. Maundrell.)

is for 1946; it was drawn for the California Jockey Club for box.

Q. And the source of the funds upon which that check was drawn?

A. Crocker National Bank.

Q. Well, who supplied the funds from which you drew this check from the Crocker National Bank?

Mr. Gillen: Same objection. [1226]

The Court: Same ruling.

A. Either the manager or Mr. Remmer.

Q. Calling your attention to 134C, check dated February 15, 1946, No. 1811, in the amount of $830, payable to Bernhards, I will ask you for what purpose that check was drawn?

A. Bernhards Furniture Company on Mission Street in San Francisco.

Q. For what purpose?

A. That was, I believe, for a new carpet and booths for the Menlo Bar.

Q. And what was the source of the money against which that check was drawn?

Mr. Avakian: Same objection.

The Court: Same ruling.

A. I received the money for payment of this check from either the manager of the Menlo Club or Mr. Remmer.

Q. I direct your attention to Plaintiff's Exhibit 134D, check No. 1874, dated March 6, 1946, to W. C. Finley Company, in amount of $644, and ask you for what purpose that check was drawn?

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(Testimony of Harold H. Maundrell.)

A. That was for office furniture.

Q. At what location?

A. At 50 Mason Street.

Q. And what was the source of the money in the Crocker Bank against which you drew that check? [1227]

Mr. Avakian: Same objection.

The Court: Same ruling.

A. I received the money either from one of the managers of the Menlo Club or Mr. Remmer.

Q. And in what form? A. Cash.

Q. At this time I am going to show you plaintiff's Exhibit 35 for identification and ask you if you recognize that book? A. Yes, I do.

Q. What is that book?

A. That is a check book of the account of Harold H. Maundrell and Elmer Remmer for the Crocker National Bank, San Francisco.

Q. That is the same account which you have previously identified? A. Yes, sir.

Mr. Campbell: I offer this in evidence as Exhibit 135.

Mr. Avakian: Your Honor, we make the same objection to Exhibit 135 which I would like to have the record show likewise was produced by the prosecution from its own records, as we have made to 134, 133 and 132.

The Court: Same ruling. Exhibit 135 admitted in evidence.

Q. Mr. Maundrell, I am going to show you a group of checks marked 135A for identification,

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(Testimony of Harold H. Maundrell.)

and ask you if that is your signature as to each one of those checks? A. Yes, sir. [1228]

Q. And were each of those checks drawn by you in the course of the duties which you have described as being your official duties in your association with Mr. Remmer? A. Yes, sir.

Mr. Campbell: I will offer these checks in evidence in the following order: 135A check No. 1929; 135B check No. 1954; 135C check No. 1955; 135D check No. 1981; 135E check No. 1982; 135F check No. 1986; 135G check No. 2037; 135H check No. 2085; 135I check No. 2106.

Mr. Avakian: Your Honor, we make the same objection to that group as to Exhibit 135, and the additional objection that the expenditures represented by those checks are incompetent, irrelevant and immaterial as they would not indicate anything with respect to the issue in this case of fraudulent tax evasion.

The Court: Objection overruled and exhibits 135A to 135I inclusive are admitted in evidence.

Mr. Avakian: Would your Honor care to look at the checks before ruling?

The Court: No, I don't think so. The ruling will stand.

Q. I am going to show you, Mr. Maundrell, plaintiff's Exhibit 136 for identification, and ask you if you recognize that exhibit?

A. Yes, I do.

Q. What is that? [1229]

A. That is a check book on the Crocker Na-

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(Testimony of Harold H. Maundrell.)

tional Bank of Elmer Remmer account and Harold Maundrell.

Q. That is the same account to which you have previously referred? A. Yes, sir.

Mr. Campbell: This exhibit will be offered in evidence as 136.

Mr. Avakian: May the record show that that likewise was produced by the government from its records and we make the same objection which we have been making to other documents which have been presented here by the government, which were obtained on promise to return, which was not kept.

The Court: Objection is overruled. 136 is admitted in evidence.

Q. Mr. Maundrell, I am going to show you a group of checks which have heretofore been marked 136A for identification, and I will ask you to examine those and state whether or not that is your signature appearing on each of those checks? A. Yes, sir.

Q. Were those checks drawn by you upon the account at the Crocker National Bank which you have identified? A. Yes, sir.

Q. Were those checks drawn by you in the course of the employment which you have described? A. Yes, sir. [1230]

Mr. Campbell: These checks will be offered in evidence as follows: As 136A check No. 2226; as 136B check No. 2251; as 136C check No. 2311; as 136D check No. 2426; as 136E check No. 2436; as 136F check No. 2465.

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(Testimony of Harold H. Maundrell.)

Mr. Avakian: We object to this group of exhibits on the same grounds as the objection made to 136, and the additional objection that these checks are incompetent, irrelevant and immaterial because they have no bearing on the issue of fraudulent tax evasion, and may I respectfully request your Honor to examine the checks.

The Court: Objections will be overruled and exhibits are admitted in evidence, 136A to 136F inclusive.

(Jury and alternate jurors admonished and court recessed at 4:00 p.m.) [1231]

December 21, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

(Absent: Messrs. Lohse, Pike and McDonald.)

MR. MAUNDRELL

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Maundrell, at the close of yesterday's session we were going into the matter of certain checks which you have identified as being checks issued by you in the course of your employment. At this time I am going to refer you to a series of checks which bear the markings 135A to 135I

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(Testimony of Harold H. Maundrell.)

inclusive, and I am going to hand you plaintiff's Exhibit No. 135, the check stub book which you have previously identified as being on the Maundrell-Remmer account, together with plaintiff's Exhibit 126, which you have identified as a record of the Menlo Club. I first direct your attention to plaintiff's Exhibit 135A, a check to John Hagen, dated March 22, 1946, in amount of $178.71, and ask you for what purpose that check was issued?

A. That was for carpenter work that was done at 50 Mason Street.

Q. At the offices? A. Yes, sir.

Q. I notice you refer to the ledger which contains an account of expenses of the Menlo Club of 1946, do you fail to find that check listed there?

The Court: What exhibit number is that ledger? [1232]

Mr. Campbell: That is Exhibit 126.

A. This is the Menlo Club. I have to have Tiny's Waffle Shop.

Q. I hand you government's Exhibit 127, purporting to be a ledger of Tiny's Restaurant, 1946.

A. That was for repair work done at Mason Street, as an expense.

Q. And how did it happen that that was charged on the books of Tiny's restaurant?

A. Well, that 50 Mason Street was the headquarters and main office for Tiny's Restaurant and the Menlo Club and the Menlo Bar. That was the head office there.

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(Testimony of Harold H. Maundrell.)

Q. None of those, however, were located on the premises of 50 Mason Street, were they?

A. No, sir.

Mr. Avakian: May I ask the answer be stricken for the purpose of objection?

The Court: Yes, sir.

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial whether the main office is located on the same premises or other premises. He has testified it was the main office of that enterprise against which he charged it, so the location would be immaterial.

The Court: Objection overruled. The answer will stand.

Q. Did you make any entry in connection with that expenditure on the books of all the other enterprises which you say had their main [1233] office there? A. Yes, sir.

Q. Will you examine the Menlo Club books and state whether or not any entry was made with respect to that expenditure?

A. No, no entries were made in the Menlo Club book itself.

Q. And is that true of the other enterprises?

A. All expenses for 50 Mason Street were entered into the book of the Tiny's Waffle Shop and the Menlo Club Bar.

Q. Can you state the nature of repairs you refer to there?

A. I believe this was for fixing up the back room and a lot of carpenter work was done in there.

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(Testimony of Harold H. Maundrell.)

Q. Was that in connection with the construction of the offices there which you have referred to in your testimony? A. Yes, sir.

Q. Now I refer you to plaintiff's Exhibit 135B, check dated March 23, 1946, payable to Bullock & Jones, in amount of $569.44, and ask you for what purpose that check was issued?

A. Well, that was issued for Mr. Remmer's account to Bullock & Jones and if my memory serves me right, a good portion of that was for merchandise orders that he purchased.

Q. Was that a personal account or an account of one of the enterprises?

A. This was a personal account at the time.

Q. And was it so charged on the books?

A. Yes, sir.

Q. I call your attention to plaintiff's Exhibit 135C, a check [1234] in the amount of $100.01, issued to the Transcontinental & Western Air Incorporated, dated March 23, 1946, and I will ask you for what purpose that check was issued?

A. That was to pay transportation.

Q. For whom? A. For Mr. Remmer.

Q. I show you plaintiff's Exhibit No. 135D, check dated March 31, 1946, No. 1981, in the amount of $79.60, to United Studios, and ask you for what purpose that check was issued?

A. That was for electric work that was done on the new offices at 50 Mason Street.

Q. And was that paid from funds furnished to you as you have heretofore described?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. I call your attention to plaintiff's Exhibit 135E, check dated March 31, 1946, No. 1982, payable to Saltzman Stanley Company in amount of $208.13, do you know for what purpose that check was issued?

A. I believe that was for an icebox that was put in the office at 50 Mason Street.

Q. And will you state whether or not that was paid from funds which were furnished you in the same manner in which you have previously described? A. Yes, sir.

Q. I call your attention to plaintiff's Exhibit 135F, a check [1235] dated April 5, 1946, No. 1986, payable to Edward M. Dobkin, in amount of $1500, and ask you for what purpose that check was issued?

A. This check was issued at Mr. Remmer's request.

Q. And who provided the funds against which that check was issued?

A. It came from the same source as before.

Q. That is to say, either Mr. Remmer or from the manager of the Menlo Club? A. Yes, sir.

Q. And how was that entered on the books?

A. Charged against Mr. Remmer.

Q. Mr. Remmer's personal account?

A. Yes, sir.

Q. Do you know Edward M. Dobkin?

A. No, I don't. I remember the check at the time because he owed somebody some money and asked me to make out a check for $1500.

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(Testimony of Harold H. Maundrell.)

Q. Do you know anything about the transaction which this represents? A. No, sir.

Q. I call your attention to plaintiff's Exhibit 135G, check dated April 19, 1946, No. 2037, payable to Gene Murphy, in amount of $200, and ask you for what purpose that check was issued? [1236]

A. Well, that was a donation to the campaign fund they had over in Oakland, going to change some statute on the books.

Q. And what was the source of the money on which you drew this check? A. Same source.

Q. As the other checks which you have described? A. Yes, sir.

Q. I draw your attention to plaintiff's Exhibit 135H, dated May 10, 1946, No. 2085, payable to J. W. Sneed, in amount of $60.00, and ask you for what purpose that check was drawn?

A. That was drawn for Mr. Remmer's account, personal account.

Q. And so charged on the books?

A. Yes, sir.

Q. Do you know who J. W. Sneed is?

A. No, sir.

Q. Or do you know anything about the transaction which this represents? A. No, I do not.

Q. And what was the source of funds against which this check was drawn?

Mr. Avakian: Your Honor, to save time we are willing to stipulate as to all checks in the 135-136 series, that the source of the funds in the bank account——

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(Testimony of Harold H. Maundrell.)

The Court: I think these offers to stipulate should be made privately. [1237]

Mr. Avakian: We will be glad to do it in any way you suggest, in order to save time.

The Court: If counsel wants to consider the stipulation, all right, but I do not think it should be made openly.

Mr. Campbell: As to that stipulation, I will accept it in the interest of time. That the source of funds in that bank account were cash given to him either by Mr. Remmer personally or by the manager of the Menlo Club.

Mr. Avakian: Or deposit of receipts of the business known as Tiny's Restaurant.

Mr. Campbell: No, I will not say so.

Mr. Avakian: So we are getting into difficulties. May we ask that instead of saying the same source, the witness state what the source is.

The Court: I am not going to direct counsel how to try the case.

Mr. Avakian: No, sir, but the same source means nothing unless it is related to something and we would like to make that request.

The Court: Very well, but I still say I am not going to instruct counsel as to the manner of presenting his case. If you have objections, I will entertain them.

Q. What was the source of the funds on which the Sneed check was drawn? [1238]

A. Same source I previously stated.

Q. What was that source?

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(Testimony of Harold H. Maundrell.)

A. It was funds that were given to me either by the manager or Mr. Remmer.

Q. By manager, you are referring to the manager of what business?

A. Of the Menlo Club.

Q. As to all the checks which you have identified here, are the source of any of those funds receipts coming into your hands from Tiny's Waffle Shop or the Menlo Bar?

A. The receipts I received from Tiny's Waffle Shop or the Menlo Bar were not enough to pay the expenses of the bar and Tiny's Waffle Shop and also pay the rent, so from time to time I had to go to the Manager of the Menlo Club and draw from them, in order to replenish my bank account.

Q. Yes, and as I understood you also from time to time funds would be given to you and you would be instructed to issue checks, is that correct?

A. Yes, sir.

Q. Now calling your attention to plaintiff's Exhibit 135I, dated May 10, 1946, No. 2106, drawn to S. Peterson & Sons, in amount of $232.64, I will ask you for what purpose that check was drawn?

A. May I have the check book, please?

Q. You have the check book before you, do you not? [1239]

A. Oh, I beg your pardon. That was for installing of a lavatory for the employees.

Q. At what location?

A. This was at, I believe, 18 Turk Street.

Q. And what business was located there?

A. The Menlo Bar and Cocktail Lounge.

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(Testimony of Harold H. Maundrell.)

Q. And from what source did you receive these funds?

Mr. Avakian: Just a minute. Could we have permission to question the witness on voir dire as to his knowledge regarding this matter, so we can make an objection?

The Court: No.

Mr. Avakian: It hasn't been established he had knowledge of this particular item.

The Court: I can't see the necessity of such examination at this time. You can take it up on cross-examination.

Mr. Avakian: May the record show the request?

Q. What was the source of funds from which this check was paid?

A. Same source as previously stated.

Q. That is to say, from either Mr. Remmer or the manager of the Menlo Club?

A. It is out of funds of the Crocker National Bank.

Q. I know, but where were the funds obtained which were placed in the Crocker National Bank?

A. The funds for that particular bill were given to me by [1240] either the manager of the Menlo Club or Mr. Remmer.

Q. At this time I am going to hand you Exhibit 136, stub book which you have previously identified, and I call your attention to a group of checks which are numbered 136A to 136F inclusive, and I first direct your attention to a check No. 136A which is dated June 15, 1946, No. 2226, payable to

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(Testimony of Harold H. Maundrell.)

S. Peterson & Sons, in the amount of $356.90, and ask you for what purpose that check was issued?

A. That was issued for the installation of a new bar at 18 Turk Street.

Q. That is the Menlo Bar? A. Yes, sir.

Q. What was the source of the funds against which you issued that check?

A. This is dated June 15, 1946. On or about this date I received the funds from either Mr. Kyne or the manager of the Menlo Club. I am not quite sure as to what time Mr. Kyne started taking over the money, but it was on or about this time and from then on I received the money from Mr. Kyne.

Q. Rather than Mr. Remmer?

A. Yes, he had charge of the money at that time.

Q. Now will you refer to the next of the series, 136B, check dated June 24, 1946, No. 2251, to United Studios, in the amount of $105. Will you state for what purpose that check was issued?

A. That was for installation of Neon tubing in the bar at 18 [1241] Turk Street, the Menlo Bar.

Q. What was the source of the funds from which that was issued?

A. Either the manager or to the best of my knowledge at this moment from Willie Kyne.

Q. And when you state the manager in each instance, do you refer to the manager of the Menlo Club? A. Yes, sir.

Q. Who was that that time?

A. Oscar Nelson.

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(Testimony of Harold H. Maundrell.)

Q. I direct your attention to plaintiff's Exhibit 136C, dated July 3, 1946, No. 2311, payable to cash, in the amount of $126.40. Will you state for what purpose that check was issued? I call your attention also to the endorsement, S. Peterson & Son.

A. The endorsement on the check is William E. Kyne.

Q. For what purpose was that issue?

A. That was buying an adding machine.

Q. For use in connection with what business or premises?

A. For use of the Menlo Club, Tiny's Waffle Shop and the Menlo Bar. I might state that Mr. Kyne bought this machine and paid cash for it——

Q. That was reimbursement?

A. Beg pardon.

Q. Was that check to reimburse him? [1242]

A. Yes, sir.

Q. What was the source of the funds against which you issued that check?

A. The funds were supplied me by Mr. Kyne or the manager.

Q. I call your attention to plaintiff's Exhibit 136D, check No. 2426, dated August 30, 1946, payable to the United Studios in amount of $105, and ask you for what purpose that check was issued?

A. That was for electrical work that was completed in the Menlo Bar on Turk Street.

Q. And the source of the funds from which it was drawn?

A. Either Mr. Kyne or the manager of the Club.

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(Testimony of Harold H. Maundrell.)

Q. Of the Menlo Club? A. Yes, sir.

Mr. Gillen: There is another item of $105, Exhibit 136B, I would like to know the date of that check.

Mr. Campbell: The Exhibit 136B is dated June 24, 1946.

Mr. Gillen: And this is August 30th, for $105, the same Studio?

Mr. Campbell: Yes.

Q. I call your attention to plaintiff's Exhibit 136E, a check dated September 6, 1946, No. 2436, payable to B. & H. Refrigeration Service, in amount of $276.89, and I will ask you for what purpose that check was issued? Do you find that check, Mr. Maundrell? [1243]

A. I do not find it at the moment.

Q. The book you are examining is plaintiff's No. 127. Are you looking under date of September 6th, check No. 2436?

A. I find August 30th, check 2439.

Q. In that connection, on August 30th, check 2439, to whom does it show that check was issued, check No. 2439?

A. It was issued for payment of the bar.

Q. To whom? A. It doesn't show here.

Q. And in what amount?

A. It doesn't show. Just shows bar check.

Q. It doesn't show how much it was issued for?

A. No, sir.

Q. Calling your attention to the fact that in government's Exhibit 136, check No. 2439 is dated

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(Testimony of Harold H. Maundrell.)

September 6, 1946, and is payable to the California General Linen Company?

A. That is a bar check, linen supplies.

Q. But in the ledger to which you refer it is shown under an August date, is it not?

A. That's right.

Q. Will you examine in government's Exhibit 136 the stub of that check No. 2439?

A. Date September 6th.

Q. Now will you refer back to the exhibit which you have in your hand, which is check [1244] No. 2436. A. Yes, sir.

Q. I direct your attention to the fact that in the check stub, plaintiff's Exhibit 136, it also is dated September 6, 1946, payable to B. & H. Refrigeration Service, in amount of $276.89, which is the same payee and same amount as set forth on government's Exhibit 136E. Are you able to find that in the ledger, government's Exhibit 127, of Tiny's Restaurant?

A. No, I don't find it at this time.

Q. Very well. Do you recall for what that check was issued?

A. I believe that was issued for—it was a monthly service charge and installation of a new unit which was ordered in August for the bar on Turk Street, the Menlo Bar.

Q. And what was the source of the funds from which that was paid?

A. Either from Mr. Kyne or from the manager of the Club.

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(Testimony of Harold H. Maundrell.)

Q. The Menlo Club? A. Yes, sir.

Q. I call your attention to plaintiff's Exhibit 136F, check dated September 12, 1946, check No. 2465, payable to B. & H. Refrigeration Service, in amount of $322.27, and ask you for what purpose that was issued?

A. That was also for refrigeration service on the bar, Menlo Bar.

Q. Wasn't that for a complete new unit?

A. Well, it is a new unit. There are four or five bills for [1245] the new bar installation that we put into the bar.

Q. Was that the purpose of that check?

A. Yes, sir.

Q. Is that entered on the ledger which you hold in your hand, government's Exhibit 126?

A. Yes, sir, charged to the bar.

Q. And as an expense?

A. Not on the ledger here.

Q. How was it charged on the ledger?

A. Just to the bar.

Q. Well, will you state whether or not it is shown in those books as an expense or as an investment, capital investment?

A. I think it was charged to capital investment.

Q. Will you point to me where it is so charged?

A. May I have the ledger of the Menlo Bar?

Q. I hand you government's Exhibit 128, Menlo Bar of 1946.

A. May I see the last two checks, please?

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(Testimony of Harold H. Maundrell.)

Q. I am handing to you government's Exhibits 136E and 136F.

A. Check No. 2465, dated September 12th, was charged as repairs and replacements.

Q. Yes. That is Exhibit 136F?

A. That's right.

Q. All right, sir.

Mr. Gillen: I assume that would be the Menlo Club that was charged to? [1246]

A. The Menlo Club Bar.

Mr. Gillen: Rather the Menlo Bar I meant to say.

Q. Do you find the other check on the Menlo Club bar which you are examining; that is to say, 136E?

A. No, I don't find it charged to the bar.

Q. Now with regard to the further operation of the Menlo Club, Mr. Maundrell, do you recall who was the first manager of the Menlo Club after you came to San Francisco and accepted the employment in connection with this enterprise?

A. Masse Ditto.

Q. And how long did Mr. Ditto remain as manager?

A. Well, it was up until about the first of the year, 1946.

Q. And who succeeded Mr. Ditto as manager?

A. Mr. Nelson.

Q. You refer to Mr. Oscar Nelson?

A. Yes, sir.

Q. Did he remain manager throughout 1936?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. Now, during the time that Mr. Ditto was the manager what, if anything, was done with the daily receipts of the Menlo Club?

A. Well, Mr. Ditto kept them in the safe over at the Menlo Club and at times he would bring them over to 50 Mason and they were deposited in the safe at 52 Mason Street.

Q. 52 Mason Street was the warehouse, was it not?

A. Yes, and a small office in the [1247] front room.

Q. And the safe was maintained in those premises? A. Yes, sir.

Q. At 52 Mason Street? A. Yes, sir.

Q. Now in order that we understand the physical set-up at 50 and 52 Mason Street, could entrance be obtained from one premise into the other without having to go out to the street?

A. Yes, sir. There was a door from the front office of 50 Mason Street directly into the front office of 52 Mason Street.

Q. And you refer to the front office at 50 Mason Street, was that the front of the B & R Smoke Shoppe? A. Yes, sir.

Q. And was the location of the cigar store which Mr. Kyne and Mr. Lando described?

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(Testimony of Harold H. Maundrell.)

A. The same location.

Q. Now you say at times Mr. Ditto kept the money at the Club, is that correct?

A. Yes, sir.

Q. There was a safe there? A. Yes, sir.

Q. What then was done with the money? To whom was the money delivered?

A. I beg your pardon?

Q. To whom did Mr. Ditto deliver the money?

A. When he came to 50 Mason Street with it, he would give it [1248] to Mr. Remmer, or at times when Mr. Remmer wasn't in, I would put the money in the safe.

Q. And in what manner was the money brought there? That is to say, was it in a package or envelope or how?

A. Yes, it was usually in an envelope.

Q. And on the occasions, while Mr. Ditto was manager and he brought the money over and it was handed to you, did you on those occasions count the money? A. No, sir.

Q. Will you state whether or not the envelope in which the money was brought was sealed or unsealed? A. Sealed.

Q. And when the envelope would be handed to you, what would you do with it?

A. I would give it to Mr. Remmer if he was present, or put it in the safe if he wasn't there.

Q. What subsequently would happen to the envelope containing the money, do you know?

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(Testimony of Harold H. Maundrell.)

A. Mr. Remmer would take it and put it in—he had a private box in the safe.

Q. In regard to that safe, was there more than one box in that safe? A. Yes, sir.

Q. How many?

A. Well, 12 small boxes and there was one box built across the [1249] top of the safe.

Q. How large was the large box you refer to?

A. It was about 6 to 8 inches in height, about maybe 14 inches wide by 12 inches deep.

Q. You say 8 inches in height and then you say 12 inches deep?

A. In width, maybe 14 inches in width.

Q. And how far in length?

A. Well, that is the length. In depth, going back, it was about 12 inches.

Q. And how high was it, did you say?

A. About 8 inches.

Q. Now did you have access to that box?

A. No, sir.

Q. Will you state whether or not that was a locked box? A. Had a combination lock on it.

Q. On the box itself? A. Yes, sir.

Q. Will you state whether or not that was in addition to the combination on the safe itself?

A. Yes, sir.

Q. Did you have the combination to that box?

A. Not the box, no.

Q. Simply to the safe? A. Yes, sir.

Q. So that, in the event Mr. Remmer was not there, when Mr. [1250] Ditto brought the receipts,

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(Testimony of Harold H. Maundrell.)

where would you put those in the safe until you turned them over to Mr. Remmer?

A. Well, there were about four or five empty boxes in the safe. I would utilize one of those boxes.

Q. Until such time as you turned the receipts over to Mr. Remmer? A. Yes, sir.

Q. After Mr. Ditto left there, you say the end of 1945 or beginning of 1946—incidentally, that was by reason of illness, was it not? A. Yes, sir.

Q. And Oscar Nelson became manager of the Menlo Club, did that same arrangement continue?

A. Well, Mr. Nelson, during the times he was there, kept the money most of the time in his own safe in the Menlo Club.

Q. What would he do with it after he put it in his own safe? A. I don't know.

Q. At any rate, it was not brought to you?

A. No, sir.

Q. How long did that continue?

A. That continued until such time as Mr. Kyne came back from the armed services in '46. I would say until somewhere around the middle of June.

Q. What change was made in the arrangement at that time?

A. Well, Mr. Kyne took care of [1251] the money.

Q. You say he took care of the money. Did he then manage the Menlo Club?

A. No, he wasn't the manager. Mr. Nelson was

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(Testimony of Harold H. Maundrell.)

the manager but Mr. Kyne had charge of the receipts.

Q. Well, do you know whether or not Mr. Nelson delivered the receipts to Mr. Kyne?

A. Well, Mr. Kyne either received the receipts from Mr. Nelson or in the morning he received them from the day manager. Mr. Nelson didn't arrive until late afternoon. He worked evenings.

Q. You were present on such occasions?

A. I was never present on those occasions.

Q. How did you learn Mr. Kyne received the money?

Mr. Gillen: Objected to as argumentative. This is his own witness on direct examination.

The Court: You may answer the question.

A. From conversation with Mr. Kyne.

Q. Do you know, of your own knowledge, what was done with the money after Mr. Kyne received it?

A. No, I do not, outside of the fact that sometimes he would bring it over and put it in the safe at 52 Mason Street.

Q. You would observe that from time to time?

A. Yes.

Q. And in what box in the safe would Mr. Kyne put the money?

A. Well, I didn't observe. It had several small boxes in the safe. [1252]

Q. You say you didn't observe what box he used?

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(Testimony of Harold H. Maundrell.)

A. No, it was in the other office. I didn't go over there.

Q. Now during the year 1945, Mr. Maundrell, if you know, who were listed as partners in the Menlo Club?

Mr. Gillen: Just a moment. We have exhibits that were introduced by the prosecution as to partnership and I think they would be the best evidence.

The Court: He may answer the question if he knows.

A. Mr. Remmer, Kyne, Mr. Nelson, Mr. Ditto, Mr. Fricker, Mr. Turner and myself.

Q. And do you know the respective working percentages of each?

Mr. Gillen: Same objection, the records would be the best evidence, the exhibits that have been introduced.

The Court: I think that is true, Mr. Campbell.

Q. By reference to any of the records which you kept in the course of the business, Mr. Maundrell, would you be able to state the purported percentages of each of the parties to whom you have referred? A. Yes, sir.

Q. And to what particular records?

A. I would have to refer to the ledger.

Q. I hand you plaintiff's Exhibit 126, Menlo Club for 1946, and ask you if that is the ledger to which you refer?

Mr. Gillen: Counsel asked — I don't know whether it is going to conflict with the information

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(Testimony of Harold H. Maundrell.)

he is seeking—but counsel [1253] asked regarding partners during the year 1945. I think there were some changes, deaths, and various things.

The Court: Of course that book was suggested to counsel by the witness. Counsel inquired of the witness what record would show.

Mr. Gillen: It may not mean any confusion at all, but counsel's question is directed to 1945 and this is 1946.

The Court: We will find it out in a moment and see.

Q. There is also a ledger headed "Menlo Club 1947," plaintiff's 125, if that will be of any assistance to you. Well, Mr. Maundrell, let us pass that for the time being and you can look at this during the recess this morning. Now during the year 1946 will you state, if you recall, who the individuals were having a working interest in the Menlo Club?

Mr. Gillen: I lost what happened to the last question.

Mr. Campbell: I told him to look it up during the morning recess.

A. Mr. Remmer, Mr. Kyne, Mr. Nelson, Mr. Turner and myself.

Q. Now you have named the same individuals with the exception of Mr. Ditto and Mr. Fricker. Will you state whether or not they dropped out at the end of the year 1945?

A. Yes, sir, they were both ill.

Q. I was going to ask you that. I believe you stated Mr. Ditto was ill. Was Mr. Fricker also ill?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir. [1254]

Q. Incidentally, what is Mr. Fricker's first name? A. William.

Q. You are referring to——

A. Memorandum.

Q. That is a memorandum which you made yourself?

A. Yes, sir. He was known also as Mr. Fisher. I made that memorandum after looking through the books here the other day.

Mr. Avakian: May we also see the memorandum?

The Court: Yes.

Mr. Campbell: Yes, it may be marked for identification.

The Clerk: 138 for identification.

(Jury and alternate jurors admonished and recess taken at 11:00 o'clock.)

11:15 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, just before the recess I asked you as to the percentages as shown by the records

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(Testimony of Harold H. Maundrell.)

as to each of the persons you described as having a working interest in the Menlo Club in 1945, and during the recess you examined certain records. Are you able to state at this time what the records disclose as to the percentages of each of the people whose names [1255] you gave.

A. I find that the capital accounts of the different partners in the Menlo Club was taken out of the Menlo Club ledger and put into this Menlo Club return. This was not made up by me at all. This was made up by some auditor or bookkeeper in 1948. However, there——

Q. (Interrupting): May I ask you this in connection—you say this was not made up by you and you have called attention to two small sheets which are contained in government's Exhibit 125, which is entitled "Menlo Club 1947," the first of which bears the heading, "Maundrell, Harold H." on the upper right-hand corner, and the second of which bears the heading, "Remmer, Elmer F." Are those the two sheets to which you refer?

A. Yes, sir, those were made up by me.

Q. These were made up by you?

A. Yes, sir.

Q. And at the time you left the business there, in what records were they contained?

A. They were contained in, I believe, 1946 Menlo account book they brought in here.

Q. The Menlo Bar account. Are you referring to the loose pages, which is government's exhibit?

A. The loose pages, I believe they are in here.

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(Testimony of Harold H. Maundrell.)

Q. And you have referred to Exhibit 126?

A. Yes, sir. [1256]

Q. I think you will observe that the size of the pages in government's Exhibit 126 are the same size and type of accounting pages as the two pages to which you have made reference and which are now bound in plaintiff's Exhibit 125.

A. Yes, sir.

Q. You say, however, these pages were made up by you. I am referring to those in the bound ledger.

Mr. Gillen: Are those the same two pages, the Maundrell page and the Remmer page?

Mr. Campbell: Yes.

A. These were made up by me somewhere. They were taken out some time in 1948.

Q. After you left? A. Yes, sir.

Q. Now by referring to each of those pages, will you state what the percentages were of the various individuals in 1945, the working percentage?

A. Well, on the first was Harold Maundrell 10 per cent, Thomas Turner 5 per cent, I believe William Kyne had 15 per cent, Oscar Nelson 15 per cent.

Q. May I ask you first, what did you say your percentage was? A. Ten.

Q. And Mr. Turner?

A. Five. Now I am only calling this from memory because it is not noted here in [1257] the book.

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(Testimony of Harold H. Maundrell.)

Q. Does this book refresh your recollection as to percentages?

A. No, it wouldn't unless we deciphered these figures down.

Q. What is your best recollection?

A. That is what I am trying to give you.

Q. All right, proceed. You have not yet referred to Mr. Remmer, Mr. Ditto and Mr. Fricker.

A. I think Mr. Fricker had 10 per cent.

Q. And Mr. Ditto?

A. I believe he had likewise.

Q. Ten per cent, and what did Mr. Remmer have?

A. Mr. Remmer, I believe, at that time had—I am not quite sure whether he had 50 or 55 per cent.

Q. Now from the figures which you have given, Mr. Maundrell, you have accounted for over 100 per cent. I am going to call your attention to the partnership return of income of 1945, government's Exhibit 89, and call your attention to certain percentages set forth thereon. Have you seen that return previous to this time? A. Yes, sir.

Q. And I call your attention to the percentages and ask you if that refreshes your recollection as to percentages? A. Yes, sir.

Q. What are those percentages?

A. Elmer Remmer 40 per cent, William Kyne 15 per cent, Masse Ditto 10 per cent, Oscar Nelson 10 per cent, Harold Maundrell 10 [1258] per cent, William E. Fricker 10 per cent, Thomas Turner 5 per cent.

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(Testimony of Harold H. Maundrell.)

Q. Now, in 1946 what were the percentages as shown by your records?

A. 1946 William Kyne 15 per cent, Oscar F. Nelson 15 per cent, Thomas Turner 5 per cent, Harold Maundrell 10 per cent.

Q. And Mr. Remmer?

A. Mr. Remmer 55 per cent.

Mr. Avakian. May the record show from which exhibit the witness was giving these figures?

A. Menlo Club 1947, Exhibit 25.

Mr. Campbell: I am going to ask at this time that the two sheets concerning which the witness has testified be given numbers 125A and 125B, being the sheets respectively headed "Maundrell, Harold H." and "Remmer, Elmer F."

The Court: They are out of exhibit already admitted in evidence?

Mr. Campbell: Yes, your Honor, and I am giving sub-numbers to those particular portions so they may be identified, 125A and 125B respectively.

Mr. Gillen: They are sheets out of a ledger?

Mr. Campbell: Yes.

Q. Now, Mr. Maundrell, during the period of time that you worked there, what salary or wages did you receive?

A. The year 1945 I received $2100. [1259]

Q. At what rate per month, do you recall?

A. I think it was $300 a month.

Q. During 1946 what was your rate of compensation?

A. I received, I believe, either $4500 or $4600.

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(Testimony of Harold H. Maundrell.)

Q. Was that by way of salary?

A. Yes, sir.

Q. During that time that you were there, particularly in 1945 and 1946, did you have any interest or working percentage arrangement as to any of the organizations other than the Menlo Club?

A. Yes, in 1946 Day-Night Cigar Store paid $75 a month and the 110 Eddy paid $75 a month.

Q. Was that by way of a percentage or by way of a salary?

A. No, it was charge for taking care of their books.

Q. A charge which you made against them?

A. Yes, sir.

Q. My question was—you have produced here an agreement whereby purportedly you had some working arrangement on percentage basis and ultimately you would become a full partner in the Menlo Club. Did you have any such arrangements as that as to any of the other concerns?

A. No, sir.

Mr. Gillen: I move the answer go out.

The Court: That may go out.

Mr. Gillen: I object to the form of the question and use [1260] of the word "purportedly."

Mr. Campbell: I will withdraw the question and reframe it.

Q. You have produced an agreement here between yourself and Mr. Remmer, with relation to the Menlo Club. Did you enter into any similar

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(Testimony of Harold H. Maundrell.)

contracts with respect to any of the other businesses? A. No, sir.

Q. Either in writing or orally? A. No, sir.

Q. Now during the years 1945 and 1946 did you receive any percentage or was there paid to you any percentage of the income of the Menlo Club?

Mr. Avakian: Object to the question as complex. First he asked whether he received any percentage and then asked whether anything was paid to him. Those are two different words which may have the same ultimate meaning, but I think the question should be such as a clear answer should be given to it. I object to the form.

Mr. Campbell: I will reframe it.

Q. During the years 1945 and 1946 was there paid over to your interest any percentage or portion of the net profit of the Menlo Club?

A. Not in actual cash, but it was paid on my capital account on the books.

Q. There was set up, was there not, a capital account on the [1261] books to which certain of the profits were credited? A. Yes, sir.

Q. However, was any of that money actually paid over to you?

Mr. Avakian: Objected to as asked and answered.

The Court: Objection overruled.

Q. In the years 1945 and 1946?

A. I received no cash.

Q. Now at the time you ultimately left your association with Mr. Remmer and his various busi-

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(Testimony of Harold H. Maundrell.)

nesses, which I believe you stated was in 1948, did you at that time receive some cash settlement?

A. Yes, I did.

Q. What was the amount of that?

A. Twelve thousand dollars.

Q. At the time you left in 1948 was the Menlo Club still in operation?

A. Yes, it was. I became sick thereafter.

Q. But at the time you left was it still in operation, the time you left the active employment?

A. I don't remember at the moment.

Q. Will you state whether or not the Menlo Club operated throughout 1947? A. Yes, sir.

Mr. Campbell: Now at this time I wish to have marked for identification this document headed "Sales Order," to be marked [1262] 139 for identification.

Q. Now referring to government's Exhibit 125, marked "Menlo Club 1947" and to the sheets herein which have been marked 125A and 125B, will you state whether or not, at the time that Mr. Masse Ditto and Mr. Fricker left at the end of 1945 if any settlement was made or any payments made to them with respect to the capital accounts shown under their names?

A. Not to my knowledge.

Q. And up until the time that you left there in 1948 had any settlement been made?

Mr. Avakian: If he knows.

Mr. Campbell: If he knows.

A. I don't know.

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(Testimony of Harold H. Maundrell.)

Q. Do the records disclose any settlement made?

Mr. Avakian: The records speak for themselves, your Honor, they are in evidence.

Mr. Campbell: This is a negative fact.

The Court: He may answer the question.

A. They do not.

Q. Now I am going to show you plaintiff's Exhibit 139 for identification and ask you to examine it. Can you state whether or not that refers to the safe on the premises at 52 Mason Street?

Mr. Avakian: Objected to, no proper foundation laid as to the witness' knowledge of the transaction—long before [1263] he came there. If your Honor will examine the document, I think you will see my point. You will observe the date and recall this witness' testimony as to the date of his employment.

The Court: He may answer the question.

(Question read.)

A. It appears to be the same safe that we had there at that time.

Q. Do you recognize the description set forth thereon? A. Yes, sir.

Q. And that is the safe to which you referred as having the 12 boxes?

Mr. Gillen: I think this is pretty much calling for his opinion and conclusion. I mean, there is no harm in the matter one way or another, but it is asking him to speculate on something that was purchased a year before he went to work there.

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(Testimony of Harold H. Maundrell.)

(Question read.)

He may answer the question.

A. Yes, sir.

Q. And do you recognize the signature hereon over the sub-heading "Purchaser"?

The Court: Answer that yes or no.

A. Yes, sir.

Q. And whose signature is that?

A. William Kyne.

Mr. Campbell: This will be offered in evidence, No. 139. [1264]

Mr. Avakian: Your Honor, we object to the introduction on the ground no proper foundation has been laid for the document. The witness simply states it seems to describe a safe similar to the one that they had when he later came there and the introduction of the document in this manner deprives us of the opportunity to cross-examine regarding it. Your Honor will recall Mr. Kyne, the witness for the prosecution, was on the stand for four days and if they had presented that when Mr. Kyne was here, we could have cross-examined Mr. Kyne at that time.

The Court: I think Mr. Kyne was excused subject to call.

Mr. Avakian: Yes, but if we had tried to cross-examine Mr. Kyne on this document, we would have been met with the objection it was not within the scope of his direct examination.

The Court: I will permit you to cross-examine him.

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(Testimony of Harold H. Maundrell.)

Mr. Avakian: And you will also instruct that he is brought back at the prosecution's expense?

The Court: The objection is overruled. I will not make any commitments now on the expense.

Mr. Avakian: Then we would have to bring him back at our expense to cross-examine him?

The Court: Very well. Objection overruled. If you want to bring him back, you may.

Mr. Avakian: We request that he be brought back at government's expense.

The Court: These discussions should be had outside the [1265] presence of the jury. They have no place in the record at this trial of the case.

Mr. Avakian: We have to take them up as they come.

The Court: Just suggest it to the Court and we will take it up later. Objection overruled.

Q. Mr. Maundrell, was a change fund kept at the Menlo Bar in connection with the operation of that business? A. Yes, sir.

Q. Will you explain what a change fund is?

A. That was a fund that was used in the Bar to pay petty cash receipts and also for the money for the bartenders to make change in the cash registers.

Q. And will you examine your books and records and state the amount of the change fund of the Menlo Bar as of December 31, 1945, and December 31, 1946?

(Jury and alternate jurors admonished and noon recess taken at 11:45.)

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December 21, 1951—2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, during the period of your employment, will you enumerate the safes that were maintained in the various [1266] businesses and the locations of those safes?

A. Well, there was a safe at 52 Mason Street.

Q. That is the one to which you referred?

A. That is the one.

Q. Who had access to that safe?

A. Well, I had access, Mr. Kyne, Mr. Remmer, Mr. Pritchett, I think Mr. Nelson. That is all I can think of at the time.

Q. Now by access, did each of the individuals that you have enumerated have a combination to the safe? A. No, sir.

Q. Who had the combination to the safe?

A. Only Mr. Remmer, Mr. Kyne and myself.

Q. Now as to the various boxes which were in that safe which you have described, you have described a large box with a combination on it, which Mr. Remmer used, is that correct?

A. And Mr. Kyne.

Q. Did Mr. Kyne also have access to that box?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. And is that before he left to go into the service or after he returned?

Mr. Gillen: Just a minute——

Q. Was that after his return from the service?

A. Well, as soon as he came back to the office.

Q. Now were the other boxes in the safe—incidentally, were they lock boxes? [1267]

A. Yes, sir.

Q. Did they have combinations or key to open them? A. Key.

Q. And who utilized those boxes?

A. Well, Mr. Remmer had one of them he kept papers in.

Q. One of the smaller boxes?

A. Yes, sir. Mr. Kyne had, I think two of them he kept most of his papers in, and Mr. Pritchett had one and Mr. Nelson had one and I had the keys to all the rest of them, but they were not used.

Q. But now as to the boxes which belonged to it, first the combination box, the large box, and then as to the boxes which you say the others used, did you have the keys to those and the combination to the combination box?

A. I didn't have any key to the combination box.

Q. As to the lock boxes though?

A. Oh, the keys were left right in the boxes. The person that had a box kept their own keys but the empty boxes the keys were left in the box.

Q. But the people who had a box, did you have a key to their boxes? A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. And as to the combination box, did you have the combination to that? A. No, sir. [1268]

Q. What other safes were maintained in connection with those businesses?

A. The safe maintained at Tiny's Waffle Shop, a small safe in the office of the Waffle Shop.

Q. Was that utilized for anything other than keeping receipts over night?

Mr. Gillen: Objected to as calling for opinion and conclusion, what was the safe used for.

A. That was a small safe and kept petty cash and change.

Q. In regard to petty cash, I asked you before the recess if you would ascertain the amount of petty cash kept on hand at Tiny's Waffle Shop. What was that? A. Why, I don't know.

Q. Do the books show?

A. No, sir; because I have the 1945 books.

Q. You examined the books which are here, did you not? A. 1946.

Q. Now as to 1946, what did they show as to the amount of petty cash at the beginning and end of the year? A. They don't show.

Q. What is your best recollection as to the amount of petty cash maintained?

Mr. Gillen: Objected to, he said he didn't know.

The Court: I think he said he didn't know.

Mr. Campbell: I am asking him for his best recollection. [1269]

The Court: You may answer the question. Do you have the question?

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(Testimony of Harold H. Maundrell.)

A. Yes. We had, I believe, $300 in the Menlo Bar.

Q. Was that cash fund kept constant at all times?

Mr. Gillen: Just a moment—he was asking a moment ago about Tiny's Waffle Shop and he answered he doesn't know what cash was in the fund at Tiny's and he jumped from that to the bar.

Mr. Campbell: I will come back to that.

Q. You refer to $300 kept at the Menlo Bar, was that a constant fund? A. Yes, sir.

Q. It is, is it not, the general practice with a petty cash fund to renew it as bills are paid, isn't that correct? A. Yes, sir.

Q. Now with respect to the Waffle Shop, what is your recollection as to the cash fund there?

A. They had a $500 cash fund.

Q. And was that maintained as a constant fund?

A. Yes, sir.

Q. Now at the time you gave an answer with respect to this cash fund, you were enumerating the safes and stated there was a safe at Tiny's Waffle Shop, in which you kept books and petty cash. What other safes were maintained in connection with those businesses? [1270]

Mr. Gillen: They are talking about two things, change fund and petty cash fund.

The Court: Let me get the question.

(Question read.)

Mr. Campbell: I will ask that question.

Q. Are petty cash and change fund one and the

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(Testimony of Harold H. Maundrell.)

same thing or are they different funds?

A. They are one and the same thing.

Q. Now, will you enumerate other safes that were maintained in connection with the businesses, if you know?

A. There was a safe in the Menlo Club.

Q. How large a safe was that?

A. It was a small safe.

Q. Who had access to that safe?

Mr. Gillen: I am going to offer an objection, your Honor, that the answer is not clear—it is a small safe.

Q. Well, approximately how large a safe was it?

A. It might have been 30 inches wide and about 35 or 40 inches high.

Q. Are you referring to outside or inside dimensions?

A. Outside dimensions; and about maybe 24 or 30 inches deep.

Q. Did that safe contain any boxes?

A. That I don't know.

Q. Did you ever see the interior of that safe?

A. No, sir. [1271]

Q. Do you know who had access to that safe?

A. I think the only one that had the combination to that was Mr. Nelson.

Q. And prior to Mr. Nelson coming there, the manager?

A. I don't think it was used prior to Mr. Nelson's time.

Q. What other safe was maintained?

A. There was a safe at 110 Eddy Street.

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(Testimony of Harold H. Maundrell.)

Q. That was a bar operation? A. Yes, sir.

Q. How large a safe was that?

A. About the same size I just described.

Q. And who, if you know, had access to that safe? A. Mr. Cavani.

Q. Did you have access to that safe?

A. No, sir.

Q. Did you ever see the interior of that safe?

A. No, sir.

Q. What other safes were maintained?

A. That is all I know.

Q. Do you know whether or not a safe was maintained at the 186 Club? A. No, I do not.

Q. Or the Day-Night Cigar Store?

A. No, sir.

Q. Or at the B & R Smoke Shoppe? [1272]

A. No, sir.

Q. Now, I don't recall whether I asked you this or not—did you have access to any safety deposit box in connection with the operation of these businesses? A. No, sir.

Q. Were any safety boxes, if you know, maintained in your name in respect to any of these businesses? A. No, sir.

Q. Were you at any time given any slips or other records with relation to money placed in safety deposit boxes? A. No, sir.

Q. By any one? A. No, sir.

Q. Were you at any time given any records as to money kept in the various safes which you have described? A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. I am going to call your attention to government's Exhibit 110, which is one of a series being a poker sheet of the 186 Club, and in the lower left-hand corner of each sheet appears the notation "Tax box $700." Now, do you know what the tax box was with relation to the 186 Club? A. No, sir.

Q. Do you know if some box was kept which was known as tax box? A. No, sir.

Q. Do you know for what purpose money designated on these [1273] sheets as tax box was used?

A. No, sir.

Q. You stated, I believe, that after you commenced the keeping of records with relation to the 186 Club, poker sheets were delivered to you, is that a fact? A. Yes, sir.

Q. And do you recall observing that expression, "tax box" with a sum of money set forth on those sheets? A. No.

Mr. Avakian: Objected to, the records are the best evidence.

The Court: It is already answered.

Q. Do you know whether or not, in the conduct of these various businesses, if there was any method utilized of segregating the withholding taxes or social security taxes?

A. The 186 Club paid me their withholding and old age pension and social security direct.

Q. Now, as to the other businesses?

A. As to 110 Eddy, that was charged against the 110 Eddy bank account. As to the Tiny's Waffle Shop, Menlo Bar and Menlo Club, those funds to

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(Testimony of Harold H. Maundrell.)

pay those taxes were given to me, during the time Mr. Kyne wasn't there, by one of the partners, occasionally by Mr. Remmer, or he would order them given to me. During the time Mr. Kyne was there, he gave them to me.

Q. Do you know whether or not that money was kept separately [1274] daily or weekly?

A. That I do not know.

Q. Now, referring again to the records of the Menlo Club, and particularly to plaintiff's Exhibit 126, the Menlo Club records for 1946, I believe you stated, did you not, that that was a record in which the entries were either made by you or under your direction, is that correct? A. Yes, sir.

Q. Now, when were entries made therein with relation to the dates recited?

A. Well, some of these entries were made the day after or two days after, some of them were not made until the week after.

Q. And were some made later than that?

A. Some of these entries may have been made as late as two weeks perhaps.

Q. Now, you identified government's Exhibit 125, headed "Menlo Club 1947," what are now plaintiff's Exhibits 125A and 125B, which you stated were maintained by you as part of the record which is now marked 126, is that correct, referring to these two sheets marked 125A and 125B?

A. These sheets were out of the 1946 ledger.

Q. Which is 126, is that correct?

A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. Were those sheets made up by you?

A. These sheets were put in by my secretary, according to the [1275] writing.

Q. The entries thereon are hers?

A. Yes, sir.

Q. Now, referring to the further partners' account, as the succeeding three pages are labelled, which immediately followed 125A and 125B, were those sheets prepared by you? A. No, sir.

Q. Do you know by whom they were prepared?

A. These were put in by my secretary.

Q. And were they prepared during the time of your employment, do you know?

A. Not all of them.

Q. Up until what time?

A. Up until on or about May 1, 1948.

Q. And after that you had terminated your employment, is that correct? A. Yes, sir.

Q. Although the entries after that date, do you recognize the handwriting on those?

A. Same writing.

Q. What was your secretary's name?

A. Miss DeGregoria.

Q. Did she remain employed there after you terminated your connection?

A. Yes, sir. [1276]

Q. When you say your secretary, will you state by whom her wages were paid?

A. Her wages were paid by the Menlo Club, Tiny's Waffle Shop and the Menlo Bar.

Q. You say your secretary, did she perform sec-

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(Testimony of Harold H. Maundrell.)

retarial duties as well as making entries in the books? A. Yes, sir.

Q. And who originally engaged her services?

A. I did.

Mr. Campbell: I am going to ask to have a photostat marked for identification as Exhibit 140 for identification.

Q. I am going to show you 140 for identification, which is a photostat, and ask you if you recognize the writing and entries thereon? A. Yes, I do.

Q. And whose writing is that? A. Mine.

Q. And were those entries made by you in the course of your employment? A. Yes, sir.

Q. And when were they made?

A. Well——

Q. (Interrupting): I will ask you this, were the entries made on or about the date which the entries bear? A. Yes, sir. [1277]

Q. And as a part of your business there?

A. Yes, sir.

Mr. Campbell: I offer this in evidence as plaintiff's Exhibit 140.

Mr. Avakian: Your Honor, may I preliminarily inquire whether that is simply a photostat of a record already in evidence?

Mr. Campbell: No, sir, it is not.

Mr. Avakian: May we then inquire this, your Honor, is that a photostat of some document produced by the prosecution from the records obtained originally from the Menlo Club? If so, we would

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(Testimony of Harold H. Maundrell.)

want to make our usual objections to that category of records.

Mr. Campbell: I will state that that photostat was made from records which were in the government's possession, returned to Mr. Semenza, and subsequently record which was deposited in this court but that that particular sheet is not here in evidence.

Mr. Gillen: May we have a moment?

Mr. Avakian: Your Honor, we have no knowledge of any such record having been included in any of those we have returned. Perhaps this is a matter we ought to delve into further before your Honor rules on that.

The Court: That isn't a very good ground for objection.

Mr. Avakian: Well, your Honor, we do not want any impression [1278] left that we removed any document from any of these books and it is a matter that perhaps should be explored with counsel.

The Court: I do not understand that counsel——

Mr. Gillen (Interrupting): Mr. Campbell did say when it was returned to Mr. Semenza and it is not there now. Now, that statement has implications that might be unfavorable.

Mr. Campbell: I am simply offering this at this time for what it may be worth and I am going to follow it with questions of this witness.

Mr. Avakian: Well, your Honor, our point is simply this—the statement Mr. Campbell made carried certain implications which may have been in-

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(Testimony of Harold H. Maundrell.)

advertent or may be just counsel's state of mind. Whatever it is, we want to clarify any such implications.

The Court: I think it is not at all unlikely that in such a mass of material a record could be lost. Anybody could have lost that.

Mr. Avakian: Yes, it could have been lost by the government before it was returned to Mr. Semenza.

The Court: It might be lost by somebody. I think that could be considered as probable.

Mr. Avakian: I think that could be clarified.

The Court: I don't see any implication there is any wrong doing. [1279]

Mr. Avakian: As long as that is understood.

The Court: It hasn't appeared yet.

Mr. Avakian: Fine. We just have our usual objection on that ground.

The Court: So it will be admitted in evidence, Exhibit 140.

Mr. Gillen: I wonder if we could have Mr. Campbell's statement read?

(Statement read.)

The Court: This photostat, the original is not already in evidence, that is what I understood him to mean.

Mr. Gillen: He didn't mean it wasn't found?

The Court: No, he meant to tell you it wasn't a duplication, isn't that it?

Mr. Campbell: That is correct.

Q. Now, I will ask you, Mr. Maundrell, if the original sheet, of which that purports to be a copy,

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(Testimony of Harold H. Maundrell.)

whether or not it was maintained by you also as a portion of plaintiff's Exhibit 126, the 1946 records of the Menlo Club?

A. I won't say positively that it was in the Menlo Club, it may have been in the Tiny Waffle Shop record.

Q. I am going to show you those 1946 records of Tiny's Restaurant and Menlo Bar and you have before you the 1946 ledger of the Menlo Club, and ask if you will examine those and see if the original, of which that is a photostatic copy, was [1280] maintained there?

A. This would have been in the 1945 ledger. This was a copy of the 1945.

Q. The 1945 ledger which is not here present?

A. Yes, sir; that is, I haven't found it.

Q. I call your attention to the fact that certain 1946 entries are there on the last entry. Now, Mr. Maundrell, is the information as set forth thereon accurate information as entered by you from information then in your possession at the time of the entries? A. Yes, sir.

Q. I am going to direct your attention to plaintiff's Exhibit 125, Menlo Club ledger, with the notation 1947, and under the heading "Assets," the second sheet thereof, which bears a typewritten notation, "Tiny's Restaurant, Menlo Bar, Menlo Club Furniture, Fixtures, Equipment and Lease" and ask you if that was a record kept by you?

A. Yes, sir.

Q. Is that your writing?

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(Testimony of Harold H. Maundrell.)

A. No, my secretary's writing.

Q. When was that written?

A. That was written August 8, 1945, up to and including May 1, 1947.

Q. And when did you prepare that? When did you make each entry?

A. Those were made all about the time of the date. [1281]

Q. I call your attention to compare the two sheets and to observe that the entries are different on each of them.

Mr. Gillen: I move the question be stricken. I object to the form.

The Court: Objection sustained.

Mr. Gillen: May it be stricken?

The Court: Any answer to it will be stricken. The question will remain in the record but the objection will be sustained.

Q. Mr. Maundrell, I am going to direct your attention first to plaintiff's Exhibit 140, which you have identified as being made by you in the course of the business and that the entries are correct, and that first entry appearing thereon appears to be as of April 30, 1945. Now, referring to plaintiff's Exhibit 125, the ledger of the Menlo Club, to which your attention has been directed to the account of furniture, fixtures, equipment and lease, and ask if you find thereon any entry or entries under date of April 30, 1945?

A. No, the date is not there for that particular entry.

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(Testimony of Harold H. Maundrell.)

Q. Do those two sheets, Mr. Maundrell——

Mr. Avakian (Interrupting): I thought the witness was continuing his answer.

The Court: Was your answer interrupted?

A. I think so.

(Question read.) [1282]

Mr. Campbell: If the Court please, that can be answered yes or no.

Mr. Avakian: Your Honor——

The Court: We are wasting so much time over things that do not amount to anything. I am going to have the question and answer read as so far given and let Mr. Maundrell add to it if he desires to. Read the question and answer as given and see if he wants to add anything to it.

(Question and answer read.)

The Court: You were about to finish.

A. There is quite a little explanation, Judge.

The Court: You can make it if you want to.

A. It seems at the time of purchase of the property—I wasn't there—but there was 25 thousand dollars, as I understand it, given in cash which was afterwards taken up and paid for by a check which was issued on August 8th to Mr. Schriber. In other words, it was just washing the original 25 thousand dollars, as I understand it, so when it was set up on the books it was set up that way. The original credit was in there for 25 thousand dollars, but that was drawn down and a check given for that 25 thousand.

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(Testimony of Harold H. Maundrell.)

Q. Now, which of those two exhibits which you hold in your hand, Mr. Maundrell, represent your original entries with regard to those [1283] transactions? A. The photostatic copy.

Q. Now, to what general transaction do both of the ledger sheets relate?

A. They relate to the description of the property, the cost of the lease, cost of inventory, and the balance at that time of 175 thousand dollars.

Q. And with whom was the transaction had?

A. With Gene Schriber.

Q. Now, the photostat which you hold in your hand, as I understand your testimony, you first set up, is that correct? A. Yes, sir.

Q. And I notice the last entry is February 28, 1946? A. Yes, sir.

Q. So that was there any other record made up until the time of that last entry of February, 1946?

A. With reference to the purchase?

Q. In reference to the transaction with Gene Schriber, as described by this photostatic copy?

A. No, sir, that was up to that time, up to the last payment I made.

Q. Did you have any other ledger sheet up until February, 1946, of this last payment, relating to that transaction?

A. That was transferred then to this sheet here, when that payment was made.

Mr. Campbell: May I have the question read?

(Question read.) [1284]

A. I don't know at that time.

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(Testimony of Harold H. Maundrell.)

Q. Can you state whether or not the page which is a part of 1947 Menlo records, Exhibit 125, was made up before or after February, of 1946?

A. No. I believe it is a copy of the record.

Q. Will you look at the two and see if the record, which is the account in the ledger, is a copy of the original record?

A. With the exception of that 25 thousand dollars dated April 30th, I wasn't there at the time that transaction took place.

Q. It is a fact, is it not, that on the ledger sheet before you there are no entries as of April 30, 1945, while on the photostatic copy there are two entries under date of April 30, 1945?

A. Well, the first entry is the description of the property, cost of the property, which is in here.

Q. The first entry by date on the ledger sheet is August 8, 1945, is it not? A. Yes, sir.

Q. And the first entry by date on the photostatic copy is April 30, 1945, is that correct?

A. Yes, sir.

Q. And the second entry on the photostatic copy is April 30, 1945, is that correct? A. Yes, sir.

Q. And there are no entries whatsoever as of April 30, 1945, on [1285] the ledger sheet which is part of plaintiff's Exhibit 125, is that correct?

Mr. Gillen: May it please the Court, I am going to offer an objection—I do not know just what counsel is doing, he is cross-examining his own witness, and your Honor will well recall that the prosecution introduced as their witness one Mr. Gene

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(Testimony of Harold H. Maundrell.)

Schriber, who described this entire transaction in detail, the amount of money he received for the purchase of the Menlo Club and its fixtures and operation and the two adjoining businesses, restaurant and bar, and went into considerable detail. Frankly, your Honor, I am at a loss to follow counsel. I do not know whether he is trying to impeach a witness that he earlier in the trial introduced, who gave some explanation of how——

The Court (Interceding): Perhaps if he answers this question we will get on the right track and let us see what it is.

Mr. Gillen: I object to the form of examination as cross-examination of the witness.

The Court: Objection overruled. We will see what this question will bring forth.

(Question read.)

Mr. Gillen: I think I will offer the objection it has been asked and answered by what Mr. Maundrell described as a long explanation of the transaction. [1286]

The Court: You may answer the question. Objection overruled. A. No, there is not.

Q. Now, I wish to draw your attention to another matter. On plaintiff's Exhibit 140, the photostat, the cost of the lease is set up at 100 thousand dollars and the cost of equipment and inventory is set up at 75 thousand dollars, is that correct? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. I draw your attention to Exhibit 125, the ledger of the Menlo Club 1947 and will you state the figures shown as the cost of the lease on that account? A. $143,801.50.

Q. And what is shown as cost of the equipment and inventory? A. $31,895.50.

Mr. Gillen: What is the total shown?

A. 175 thousand.

Mr. Avakian: On both sheets counsel, same total on both?

Mr. Campbell: Yes.

Q. I call your attention to the fact that as of the end of the year 1945, on plaintiff's Exhibit 140, the balance due on that account is shown as 100 thousand dollars, is that correct?

A. No, it is not correct.

Q. What was the balance due according to plaintiff's Exhibit 140 at the end of 1945, according to Exhibit 140? [1287]

A. According to that exhibit it is 100 thousand dollars.

Q. Now, according to the ledger sheet, which is a part of plaintiff's Exhibit 125, what was the balance due at the end of 1945? A. 125 thousand.

Q. Now, I am going to show you plaintiff's 132A for identification, which consists of two checks, one dated June 11, 1945, No. 1033, in amount of four thousand dollars——

Mr. Gillen: Just a moment—we might as well have it in evidence as read it in.

Mr. Campbell: I beg your pardon.

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(Testimony of Harold H. Maundrell.)

Q. I show you signatures on those checks, are these your signatures? A. Yes, sir.

Q. And were they issued by you in the course of your duties? A. Yes, sir.

Mr. Campbell: I am going to offer these checks in evidence as 132A.

Mr. Avakian: Same objection as to the 132 series.

The Court: Objection overruled and Exhibit 132 is admitted in evidence.

Mr. Campbell: As 133A for identification I am going to withdraw a pink slip and ask that that be given a number for identification in the 133 series, which would be 133P for identification. [1288]

Q. I now show you 133A for identification, consisting of three cancelled checks, and ask you if that is your signature on each of those checks?

A. Yes, sir.

Q. And were those checks drawn and signed by you in the course of your duties which you have described? A. Yes, sir.

Mr. Campbell: We will offer these three checks in evidence, No. 133A.

Mr. Avakian: Same objection as to all checks of the 133 lettered series.

The Court: Same ruling and the exhibit now offered is 133A admitted in evidence.

Q. Now, referring to government's Exhibit 132A, which consists of two checks, one dated June 11, 1945, payable to Gene Schriber, in amount of four thousand dollars, signed Harold Maundrell,

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(Testimony of Harold H. Maundrell.)

being check 1033, the second check dated August 8, 1945, being check No. 1242, payable to Gene Schriber, in amount of 25 thousand dollars, I will ask you to state for what purpose those checks were drawn?

A. The first check for four thousand dollars, check No. 1033, was drawn for deposit on the lease with Mr. Schriber; check No. 1242 to Mr. Schriber, 25 thousand dollars, was the first payment on the purchase price of the property.

Q. I show you government's Exhibit 133A, consisting of three [1289] checks, each bearing date of September 8, 1945, each payable to Gene Schriber, and being numbered respectively 1334, 1335, and 1336, and being in the respective amounts of 15 thousand dollars, 8500 dollars and 1500 dollars, and ask you for what purpose those checks were drawn?

A. Check No. 1334 to Gene Schriber was payment of the purchase price of the property. Check 1135, September 8th, the same date as the previous check, made to Gene Schriber, for $8500, was to apply to the purchase. Check No. 1336, same date, to Gene Schriber, was to be applied on purchase price, making total of 25 thousand dollars.

Q. Now, with reference to Exhibit 132A, four thousand dollars and 25 thousand dollar check, and 133A, three checks totalling 25 thousand dollars, what was the source of the funds against which you drew those checks?

A. These funds were given to me by either the manager or Mr. Remmer, of the Menlo Club.

Q. What is your recollection?

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(Testimony of Harold H. Maundrell.)

A. Well, I don't know offhand. It was either one of the two that gave it to me.

Q. In what form did you receive it?

A. Cash.

Q. Which you subsequently deposited in the Crocker National Bank? A. Yes, sir. [1290]

Q. Now, at the time of the first entry on plaintiff's Exhibit 140, April 30, 1945, had you then entered your employment with reference to the Menlo Club? A. No, sir.

Q. Now, I call your attention on government's Exhibit 140 to an entry under date of February 28, 1946, in amount of 25 thousand dollars to Gene Schriber, and ask you in what manner that was paid?

A. All the payments that I made to Gene Schriber were checks.

Q. Well, did you issue a check for that payment?

A. May I see the check book.

Q. Yes indeed. I am handing you government's Exhibits 134, 135 and 136.

The Court: Perhaps we had better take our recess. We will recess now in this case until Thursday, December 27th, at 10:00 o'clock, and the members of the jury and alternate jurors please bear in mind this admonition you have heard so many times. You are admonished do not discuss among yourselves or with any one else any matters connected with the trial of the case or form or express any opinion of the case until the case is finally submitted to you. When I admonish you to report

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any one to the Court who might talk to you, after being informed that you are a member of the jury or alternate juror, I do not want you to have the idea that I am inferring [1291] that any one connected with this case would do anything of that kind or have anything to do with it, but some person might busy themselves in other people's business and try to talk to you. If any person talks to you or persists in talking to you, any one connected with this case or not connected with this case, it is your duty to inform that individual you are a member of the jury or alternate juror and if that individual then persists in talking, you should report him or her to the Court.

All witnesses under subpoena and present here will be instructed to appear at that time, December 27, 1951, at 10:00 o'clock.

(Recess taken at 3:00 p.m.) [1292]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled, United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at Carson City, Nevada, commencing November 28, 1951, and concluding February 21, 1952, and that the foregoing pages, numbered 517 to 1292

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inclusive, dated Dec. 10, 1951, to Dec. 21, 1951, inclusive, being Vol. II of four volumes, constitutes a true and correct transcript of my said shorthand notes, not including arguments in the absence of the jury, to the best of my knowledge and ability.

Dated at Carson City, Nevada, February 22, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter. [1292A]

December 27, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, I am going to direct your attention to check stubs of the Crocker First National Bank for the period June 4, 1945, to September, 1945. I direct your attention to check stub No. 1240, in amount of 50 thousand dollars, date August 8, 1945, payee Gene Schriber, across which is written the pen notation "cancelled," and appended to it is the upper portion of a check bearing the same number and date, with the lower portion torn off, so the only writing appearing there is "Gen" and ask you for what purpose that check was drawn?

A. As I understand it, at that Mr. Remmer was

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(Testimony of Harold H. Maundrell.)

to have paid 75 thousand dollars for the Menlo Club and the Menlo Bar and Tiny's Waffle Shop.

Q. Did you draw that check? A. Yes, sir.

Q. And did you thereafter cancel it?

A. Then afterwards I cancelled the check.

Q. Do you know, of your own knowledge, whether or not the sum of 25 thousand dollars was paid in cash at that time?

A. I was not there when that transaction took place. [1293]

Q. Then did you know whether or not 25 thousand dollars in cash was paid?

A. I was told it had been paid, yes, sir.

Q. In cash? A. Yes, sir.

Q. I call your attention to the next check stub, No. 1241, in amount of 25 thousand dollars, dated 8-8-45, Gene Schriber, across which is written the word "Cancelled" and attached to it is a portion of check of the same number, 1241, pay to the order of Gene Schriber, 25 thousand dollars, with the printed portion signature Harold H. Maundrell, but the written signature torn off. Now, was that a check which was drawn by you? A. Yes, sir.

Q. And was that cancelled under similar circumstances? A. Yes, sir.

Q. And were you present at that time?

A. At the time it was cancelled?

Q. At the time it was drawn?

A. Yes sir, I drew the check.

Q. Do you know whether or not cash in that amount was paid to Mr. Schriber in lieu of that check? A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. I draw your attention to stub No. 1242, in amount of 25 thousand dollars, also dated August 8, 1945, pay to Gene Schriber, now was that a check also issued by you? [1294] A. Yes, sir.

Q. Is that the check to which you refer where the check was cashed and the cash turned over to Mr. Schriber?

Mr. Gillen: Just a moment—the check was cashed and turned over to Mr. Schriber?

Mr. Campbell: The proceeds.

Mr. Gillen: I am going to object as assuming something not in evidence.

Mr. Campbell: I will withdraw the question.

Q. What was done with that check?

A. That check was given to Mr. Schriber.

Q. And withdrawn? A. Yes, sir.

Q. Now, Mr. Maundrell, directing your attention again to plaintiff's Exhibit 140, which is a photostatic copy of a ledger sheet entitled "Furniture, Fixture, Equipment and Buildings," referring to certain payments made to one Gene Schriber and which you testified, I believe, was in your writing, is that correct? A. Yes, sir.

Q. All of that is in your writing?

A. Yes, sir.

Q. And were the entries that appear thereon made by you on the dates which are set forth thereon? A. No, sir. [1295]

Q. When were they made?

A. That I don't remember.

Q. What is your best recollection?

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(Testimony of Harold H. Maundrell.)

A. As to the date of April 30th, I wasn't there at that time. That was made some time in the month of May, I would say.

Q. Of 1945? A. Yes, sir.

Q. Now, as to the subsequent entries, subsequent filing entries?

A. I wouldn't say it was made the same day.

Q. Well, were they made on or about the same day, that is, within a day or two?

A. The entries may have been put in the book maybe after a week or two weeks. At that time I was spending more of my time at Cal-Neva Lodge.

Q. Did any longer period of time elapse between the transaction you have set forth there and your entry on the records of that transaction, longer than two weeks' time?

A. Well, it may have been a month. I don't know. I don't remember at this time.

Q. What is your best recollection as to how soon the entries were made there with relation to dates thereon?

Mr. Gillen: I think this whole subject was explored last week, may it please the Court, and I offer the objection it has been asked and answered.

Mr. Campbell: No, your Honor. [1296]

The Court: Objection will be overruled.

A. I don't remember.

Q. I am going to show you ledger, plaintiff's Exhibit 125, which is headed "Menlo Club 1947" and call your attention to a sheet upon which is typewritten, "Furniture, Fixtures, Equipment and

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(Testimony of Harold H. Maundrell.)

Lease," and for the purpose of this examination I will ask to have this marked 125C in evidence.

Mr. Avakian: That is the second sheet?

Mr. Campbell: It is the second sheet under the heading "Assets." I ask to have this given a number, 125C. Now, I direct your attention to this page marked 125C—I may have asked you this Friday but if so I will ask you again—is the pen and ink writing thereon your writing? A. No, sir.

Q. Whose writing is it?

A. I believe that is my secretary's.

Q. To whom do you refer?

A. Mrs. DeGoria.

Q. As I understood you Friday, she remained in the employ of the organization after you left, is that correct? A. Yes, sir.

Q. Were you present when those entries were made?

A. Well, when the actual entries were made, I wouldn't say I was present.

Q. That is what I am referring to, when the figures were put [1297] down here in pen and ink, were you there?

A. I had charge of the office at the time but I wouldn't say I was there when the actual typing was put on it. I wouldn't know.

Q. Can you state, Mr. Maundrell, whether or not that sheet was made up during the time you were still employed there? A. Yes, sir, it was.

Q. When did you first see that sheet?

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(Testimony of Harold H. Maundrell.)

A. I don't remember that.

Q. I observe that the last entry thereon purports to be as of May 1, 1947. Can you state when you saw it with reference to that date?

A. No, I don't remember.

Q. Can you state whether or not that sheet was actually made up at that time?

Mr. Gillen: Of course, I think that would be calling for his opinion and conclusion.

Mr. Campbell: Yes, that may be stricken.

Q. At the time you first saw that sheet, Mr. Maundrell, will you state whether or not all the entries that appear there now were on that sheet?

A. That I don't remember.

Q. Do you have a recollection of ever having seen the sheet?

A. As a matter of fact, I don't know whether I ever saw that sheet or not. [1298]

Q. You don't know whether you ever saw it?

A. No, I don't.

Q. But as to government's Exhibit 140, which purports to relate to the same general transaction, does it not? A. Yes, sir.

Q. That is in your handwriting?

A. Yes, sir.

Q. And was made up by you? A. Yes, sir.

Q. In connection with your employment?

A. Yes, sir.

Q. Now, with regard to the books and records which you maintained for the Menlo Club, will you

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(Testimony of Harold H. Maundrell.)

state, Mr. Maundrell, whether they were a double or single entry system?

A. They were simplified double entry system.

Q. Will you state what you mean by that?

A. Well, I mean by that it showed the receipts and it also showed the disbursements.

Q. Did the record which you kept show inventories for 1944, 1945 and 1946 for the Menlo?

A. There was inventory made for the Menlo bar and also for Tiny's Waffle Shop.

Q. So far as the Menlo Club was concerned?

A. There was one entry made of the furniture and fixtures and also the inventory of the bar supplies and the Tiny's [1299] Waffle Shop grocery supplies.

Q. So far as the Menlo Club was concerned, do you have any record of cash on hand?

A. The Menlo Club, as I understand, started out with a bank roll.

Q. My question was, did you maintain any record of cash on hand for the Menlo Club?

A. No, sir.

Q. That was not reflected in the records which you kept? A. No, sir.

Q. Did you have access to the cash on hand?

A. No, sir.

Q. Was that reported to you from time to time by any one?

A. It was only reflected in the daily sheets, daily poker sheets.

Q. Did you ever at any time check the daily poker sheets against the cash? A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. So that I take it, in making such entries as you made, you relied upon the accuracy of the poker sheets which were handed to you, is that correct? A. Yes, sir.

Q. Now, is that also true of the other businesses for which you kept books, so far as the cash on hand is concerned?

A. Well, Tiny's Waffle Shop and the Menlo Bar a complete record [1300] was kept.

Q. By you? A. Yes, sir.

Q. But now as to the Day-Night Cigar Store?

A. A complete record was kept.

Q. Did you receive the cash from the Day-Night Cigar Stand or count it?

A. No, sir, I did not.

Q. What was the source of your information as to the daily receipts and cash on hand?

A. The Day-Night Cigar Stand had a manager.

Q. Who was that? A. Mr. Taylor.

Q. What years was he there?

A. He was there during the period of time that I was there, 1945-'46.

Q. How often did he report those matters to you? A. Every day.

Q. Now, did you count and check the cash as against the figures given you?

A. I didn't count the cash personally because he banked his own money every day, but he brought into my office the take of the cash register, the

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(Testimony of Harold H. Maundrell.)

total receipts of the day and plus any petit cash items he had to pay out.

Q. Now, as to 110 Eddy Street, what information did you receive [1301] as to receipts and cash on hand?

A. The same condition existed there. Every day I would receive from Mr. Carvani, the manager, the takes of the cash registers, or I would say cash register, and also any petit cash that he had paid out during the day, that is, receipts for petit cash, and he banked his own money. I didn't count the money, and a report was made each day on a slip of paper.

Q. And you accepted that, I take it, for your purposes? A. Yes, sir.

Q. Now, you testified Friday that from time to time sums of money would be handed to you either by Mr. Remmer or from some one at the Menlo Club and you would be requested to draw checks for various purposes, do you recall that testimony?

A. Yes, sir.

Q. What entries would you make and in what books regarding such transactions?

Mr. Gillen: May it please the Court, I think it is a repetition of what was carefully gone into on Friday with Mr. Maundrell. He was shown a whole series of checks, he was asked where he got the money to cover those checks, and they were checked against his books as to the ledger on his check book and the checks themselves. I think this is repetition of something we have probed thoroughly.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: I do not believe so, no, sir. He checked as to what checks were issued for. I am asking him now how [1302] those were charged on the various books.

The Court: Objection overruled. Answer the question.

A. May I have the question, please?

(Question read.)

A. The bank account that I had was at the Crocker Bank and all the checks were put in the ledger of the Tiny's Waffle Shop.

Q. Yes; now that money you say was advanced from other sources, were they shown as liability for funds advanced or funds loaned to Tiny's Waffle Shop?

Mr. Gillen: May I offer the objection that it is not the best evidence. The books would be the best evidence.

Mr. Campbell: I am asking a general question first. I have the books with me if you desire to see them.

The Court: Objection overruled.

A. As I stated, from time to time the amount of money that I would receive to deposit for the benefit of the Tiny's Waffle Shop and the Menlo Bar was not enough to take care of the bills that were presented to me from time to time and as I needed that money I would present the bills and tell them the amount I needed and they would give me that amount and I would deposit that to the Tiny's Waffle Shop account in the Crocker Bank.

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(Testimony of Harold H. Maundrell.)

Q. And would you set up any liability for funds for Tiny's Waffle Shop for the money advanced for that operation?

A. No, only the checks themselves would show in the ledger as to what the checks were for and for what acount they were [1303] for.

Q. Was there set up any loans payable or similar account in the records? A. No, sir, no.

Q. Now, with relation to the type of expenditure which you testified which had no relation to Tiny's Waffle Shop and the money which passed through that account where you issued the check, how would those be handled on the books of Tiny's Waffle Shop?

A. As I stated before, each check was entered on the books and for what purpose the check was issued. There was an explanation for every check that was issued.

Q. Well, was any liability account set up?

A. No, sir.

Q. Or were any entries made on the books of any of the businesses from which you received that money?

Mr. Avakian: We object to that as assuming facts not in evidence because the evidence shows that these three types of businesses, the Menlo Club, bar and Tiny's Waffle Shop, were only one partnership, in one business, they were one business entity and Mr. Campbell's question assumes they were different and that is contrary to the evidence.

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(Testimony of Harold H. Maundrell.)

The Court: Let us have the question.

(Question read.)

The Court: Objection overruled. You may answer the question. [1304]

A. Tiny's Waffle Shop, the Menlo Bar and Menlo Club were all one business, all doing business under the name of William Remmer, doing business as——

Q. Each of the three? A. Yes, sir.

Q. And where were they shown in that record?

A. Well, the tax return and the license was taken out in the name of William Remmer.

Q. And who was William Remmer?

A. William Remmer was a nephew of Mr. Elmer Remmer.

Q. Did he, to your knowledge, have anything to do with the business other than the use of his name?

A. No, sir. It was Mr. Remmer's intention——

Mr. Campbell: Just a minute, you can't state——

Mr. Gillen: I ask that the witness be permitted to explain his answer.

The Court: That objection is sustained, to this last statement——

Q. Now, let us take an example——

Mr. Gillen: May it please the Court——

The Court: Let us have the last question read.

(Record read.)

The Court: There is nothing before the Court.

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: Your Honor, I direct the witness to explain his answer. [1305]

The Court: I have already ruled, that that statement he was about to make will not be allowed. There is nothing before the Court.

Mr. Gillen: Mr. Campbell shut him off and I ask that he be permitted to explain.

The Court: Yes, and the Court feels the matter should not be given in the record.

Q. For example, Mr. Maundrell, let us refer to two of these checks, being 136E and 136F, dated September 6 and 12, 1946, respectively, both payable to B. & H. Refrigeration Service Company, in amounts of 276 some odd cents and 322 and some odd cents. I believe you testified that those were used for the purchase of refrigeration equipment for the bar, is that correct? A. Yes, sir.

Q. And I believe you also testified that the money to pay that was given to you either by Mr. Remmer or the manager of the Menlo Club, is that correct? A. Yes, sir.

Q. Now, it is a fact, is it not, that so far as these three businesses were concerned, Tiny's Waffle Shop and the Menlo Bar and Menlo Club, separate sets of books were kept for each of those businesses?

Mr. Gillen: Objected to as leading and suggestive. The exhibits are the best evidence. [1306]

The Court: That may be——

Mr. Campbell: It is a preliminary question.

The Court: Yes, I do not believe it is going to be injurious, as far as the leading matter is concerned.

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(Testimony of Harold H. Maundrell.)

So you may proceed. Objection will be overruled.

A. Yes, sir.

Q. Now, I am going to hand you records which have heretofore been introduced in evidence. I am going to show you plaintiff's Exhibits 125, Menlo Club 1947, and 126, Menlo Club 1946, together with plaintiff's Exhibit 127, Tiny's Restaurant for 1946, Exhibit 128 Tiny's Restaurant and Menlo Bar 1945, and Exhibit 129 Menlo Bar for 1946, and I will ask you to refer to the expenditure as set forth on the two checks which I have handed you, payable to the Refrigeration Company, and ask you to point out what entries were made in the records with respect to that payment apparently made on or about September 12, 1946?

Mr. Gillen: May I inquire 128A, which is not in evidence, I do not know whether that was handed to the witness, marked for identification—was that handed to the witness?

The Clerk: No, I have it.

Mr. Campbell: Counsel has referred to 128 for identification. I believe you stated, did you not, that you did not know whose handwriting that was in?

Mr. Golden: I just got mixed up in the numbers.

Mr. Campbell: As I recall his testimony, he didn't [1307] identify it.

Mr. Golden: That's right.

A. Check dates September 12, 1946——

Q. You are referring to plaintiff's Exhibit 136F?

A. May I refer first to check No. 2465, dated September 12th?

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(Testimony of Harold H. Maundrell.)

Q. I thought that was the one you were referring to, plaintiff's Exhibit 136F.

A. That was a check issued for the account of bar, which appears in Tiny's Waffle Shop ledger.

Q. How does it show on Tiny's Waffle Shop ledger?

A. It shows that it was issued for account of bar. It is "paid to" and it is a bar check. In other words, the check number is entered in the book as of the same date check No. 2465, it is marked "bar," referring to the bar, the account that was set for the bar.

Q. Now, the first book to which you refer is the Waffle Shop, exhibit 127. You are now referring to Exhibit 129, books of the Menlo Bar?

A. And referring to the Menlo Bar it shows check No. 2465 paid to the B. &. H. Refrigeration Service for $322.27, and charged against repairs and replacements.

Q. Now, was any asset account set up on the books of the Waffle Shop reflecting an indebtedness from the Menlo Bar to the Waffle Shop?

A. No, sir. [1308]

Q. Now, with respect to that refrigeration equipment which was purchased, was any capital account set up in the books of the bar to reflect that purchase?

A. No, sir, because this was put in for repairs and replacements, was put in as direct charge.

Q. As I understand your testimony, that was for the purchase of new equipment?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. Now, is your testimony the same as to the second check to which I referred?

A. Yes, sir.

Q. Handled in the same manner?

A. Yes, sir.

Q. Now, so far as the three businesses were concerned, that is, the Waffle Shop, the Bar and the Menlo Club card room, I believe you have previously identified, have you not, returns which were filed for each of those enterprises?

Mr. Avakian: No, your Honor, that is assuming facts contrary to the evidence. The partnership returns which Mr. Campbell had introduced show return in the name of the Menlo Club only, the return covers all three businesses combined and it is in Mr. Campbell's exhibit; Menlo Club returns, both 1945 and 1946.

Mr. Campbell: Mr. Avakian may be right. Yes, I will withdraw that question. I think that is correct. I withdraw [1309] it.

Q. Now, Mr. Maundrell, referring again to plaintiff's Exhibits 114 and 114A and 114B, I believe you identified as the poker sheets of the Menlo Club for the dates shown thereon and from which I believe you testified you obtained the information which was entered by you in the Menlo Club books, is that correct?

Mr. Avakian: Objected to again assuming facts not in evidence because Mr. Maundrell's testimony was not that he identified these sheets, but simply

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(Testimony of Harold H. Maundrell.)

that these were similar to sheets which he had seen.

The Court: Objection overruled.

(Question read.)

A. Partially so. My testimony, as I remember it, is the fact that these were similar sheets and that a great many entries on these I did testify to——

Q. Were the same entries as you made in your books, is that correct? A. Yes, sir.

Q. Now, I direct your attention to the fact that in the lower right-hand corner of each of these sheets appear certain names with amounts set opposite them. What do they represent?

Q. Well, they represent IOUs, or markers as we call it in the business.

Q. Were they IOUs which were owing to the Menlo Club on the dates which they were entered on the sheets? [1310]

A. Yes, I would say they were owing at that time.

Q. Now, other than the poker sheets themselves, did you set up any records of the amounts owing to the Menlo Club by way of IOUs or markers?

A. No, sir.

Q. Is it correct then that the only record in that regard would be that set forth on the poker sheets?

A. Yes, sir.

Q. Mr. Maundrell, in your testimony Friday you identified a number of checks which are parts of Exhibits 132, with its various subdivisions, 133,

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(Testimony of Harold H. Maundrell.)

134 and 135, as being checks drawn to pay for constructing an office on the premises at 50 or 52 Mason Street, do you recall that? A. Yes, sir.

Q. Now, I believe you testified that money for that purpose against which to draw those checks, was given to you by either Mr. Remmer or the manager of the Menlo Club, as you required the funds, is that correct? A. Yes, sir.

Q. Will you state whether or not entries were made in the Menlo Club books reflecting those advances for that purpose?

Mr. Gillen: Objected to, the books are the best evidence.

The Court: Objection overruled.

A. The entries for it were in Tiny's Waffle Shop books. The reason for that was that the Crocker bank account was all [1311] handled through the Tiny's Waffle Shop accounts.

Q. I am going to hand you the records which refer to Tiny's Waffle Shop, being government's Exhibit 127, Tiny's Restaurant for 1946 and 128, Tiny's Restaurant and Menlo Bar for 1945, and ask you the nature of the entries made with respect to such expenditures for setting up of the office at 50 and 52 Mason Street.

A. The entries were put in the books because—I am referring to Exhibit 128—for instance, Fred Shell, contractor, $2,500, he was given a check for $2,500.

Q. How was that recorded on the books of the Waffle Shop?

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(Testimony of Harold H. Maundrell.)

A. Well, it was on the right-hand side of the page under "Payments," that was account of Mr. Remmer, $2,500. He had given me the $2,500 to pay for this carpenter work.

Q. Do you know the source of that money?

A. Well, I presume that came out of the receipts of the Menlo Club.

Q. You say you presume that. Did you make any such entry in the Menlo Club books?

A. No, sir.

Q. Did you set up any capital account with respect to improvements in the records?

A. No, sir.

Q. Did you set up any liability account or any asset account in any books and records in regard to that expenditure? [1312] A. No, sir.

Q. The entry to which you refer simply reflects the expenditure of that $2,500 through the bank account which you maintained, does it not?

A. Yes, sir.

Q. Now, were the other expenditures to which you refer carried in a similar fashion?

A. Yes, sir.

(Jury and alternate jurors admonished and 10 minute recess taken at 10:50.)

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11:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Maundrell, I will ask you whether or not in the course of your employment by Mr. Remmer, you prepared any personal income tax returns for him or for his wife, Helen Remmer?

A. No, sir.

Q. And did you, at any of the years of your employment, supply figures to any one for the purpose of preparing the returns?

Mr. Gillen: Objected to as asked and answered on Friday. He said he gave the information to Mr. Mooney.

The Court: He may answer the question. Objection overruled. [1313]

A. I did. I talked to Mr. Mooney on two or three occasions.

Q. And do you recall now in respect to returns for what years?

A. I believe that the '45 returns I assisted him, and also the '46 returns. I know I supplied him some information for both of those years because we had several conversations about it.

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(Testimony of Harold H. Maundrell.)

Q. I am going to show you plaintiff's Exhibit No. 3, the individual income tax return for the year 1945 of Elmer F. Remmer and ask if you will point out what figures that are set forth on that return that you supplied to Mr. Mooney?

A. I believe I supplied him with the Menlo Club, the 110 Eddy and Day-Night Cigar Store.

Q. I direct your attention to this language with respect to the San Diego Social Club and 21 Club; "Deduct 10% commission to the following: re J. Billington, doing business as San Diego Social Club; deduct 10% Anthony Riggardo, 110 Eddy, $1,982; Andy Desmoni, 110 Eddy, $1,982.97; Dave Billington, 110 Eddy, $198.97," did you supply him with those figures? A. No, sir.

Q. Do you know any of those individuals?

A. I know who they are. I met some of them.

Q. Who is Anthony Riggardio?

A. Well, he went to Cal-Neva one season when I was there.

Q. You knew him there?

A. Yes, sir. [1314]

Q. That is when you were employed, I believe, by Mr. Remmer? A. Yes, sir.

Q. Who is Andy Desmoni?

A. He was one of the managers of the game room. As a matter of fact, he is the man I didn't remember his name the other day.

Q. Who is Dave Billington? A. Dave?

Q. Yes, Dave Billington, 110 Eddy. J. Billington is referred to right immediately above there, the

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(Testimony of Harold H. Maundrell.)

person in whose name was conducted. This is Dave Billington set forth 10 per cent income from the San Diego Club?

A. Dave Billington I don't know.

Q. I call your attention that all three of those names listed as receiving 10 per cent were of the San Diego Social and 21 Club and addresses were listed as 110 Eddy Street, and I believe you testified that you kept the records with respect to 110 Eddy Street. Do you know whether or not any of those individuals were employed by or had any connection with the business of 110 Eddy Street?

A. No, sir, they did not.

Q. Have you ever heard of a Dave Billington in connection with your employment?

A. The only Billington I know is a man named as Frankie Denny. I didn't know of Dave.

Q. Frankie Denny, you saw him in the courtroom? [1315] A. Yes, sir.

Q. And he identified himself as Joseph Billington? A. Yes, sir.

Mr. Gillen: May I ask counsel through your Honor, his mention of J. Billington, is that just the initial or Joseph Billington?

Mr. Campbell: Initial J period Billington, doing business as.

Mr. Gillen: It is obvious you could say Dave for J.

Mr. Campbell: I object to argument.

The Court: It will be stricken from the record.

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(Testimony of Harold H. Maundrell.)

The remarks will be stricken from the record. There is nothing before the Court.

Q. I am going to call your attention to plaintiff's Exhibit 5, 1946, individual income tax return of Elmer F. Remmer, Cal-Neva Lodge, Lake Tahoe, Nevada, and ask you what figures, if any, you supplied in connection with the preparation of that return?

A. I supplied the Menlo Club return, 110 Eddy Street, Transit Smoke Shop and Day-Night Cigar Store.

Q. Now, what was the source of the figures which you supplied Mr. Mooney, both with respect to the 1946 return and to the 1945 return?

A. Statement that was made up by Mr. Ayton and the partnership returns that were filed.

Q. Now, which was it that you utilized giving Mr. Mooney the [1316] information, that is to say, the figures given you by Mr. Ayton or the figures taken from the partnership returns, or both?

A. Both figures for the Menlo Club were made up by Mr. Ayton.

Q. Do you know the source from which he made up those figures? A. The books.

Q. The books which you kept?

A. Yes, sir.

Q. And those are the books which you identified here? A. Yes, sir.

Q. And is that also true with respect to figures

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(Testimony of Harold H. Maundrell.)

of the other enterprises, those were made up from the books?

A. 110 Eddy, Day-Night Cigar Store and Transit Smoke Shop, yes, sir.

Q. I call your attention to figure on income return, "Net gambling gains $5,000," did you supply that figure? A. No, sir.

Q. Did you maintain any records regarding such matters? A. No, sir.

Q. With regard to the Day-Night Cigar Store and the 110 Eddy Street, did you maintain books and records for the calendar year 1946 with respect to the assets and liabilities of those two businesses?

A. The only records I kept were reflected in the books of both institutions.

Q. Let us take the 110 Eddy Street, and I call your attention [1317] to government's Exhibit 112 and 112A and ask you to examine them and state whether or not records of assets and liabilities were kept for the calendar year 1946?

A. Exhibit 112 is kept by Mr. Slater.

Q. Well, did you keep records for 1946 of the assets and liabilities?

A. The only records I kept were the income and the expenses.

Q. And you kept no asset and liability accounts for 1946 for that enterprise?

A. Only as to the partnership.

Q. I am asking you as to the year 1946, did you make any entries in regard to the capital accounts in 1946?

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(Testimony of Harold H. Maundrell.)

A. Well, they would be reflected in the books of 1947.

Q. Well, did you make any entries in 1946?

A. Yes, sir.

Q. Other than January 1st entry?

A. No, sir. As to Kyne, as to Turner and Cavani, I did.

Q. Did you keep any other asset or liability accounts? A. No, sir.

Q. Did you maintain any, for example, inventory account for the year 1946 at 110 Eddy Street?

A. Yes, there was monthly account that was kept.

Q. Is that reflected in the books?

A. It was reflected in the work sheets that went with the books. [1318]

Q. Do you know where those work sheets are?

A. No, sir.

Q. I am going to hand you records of the Day-Night Cigar Store, Exhibits Nos. 117 and 117B.

A. 117 was kept by Mr. Slater. That is the 1945.

Q. I am referring to 1946?

A. Yes, I kept it in 1946.

Q. Did you keep records of the assets and liabilities in 1946?

A. Yes, there is an explanation——

Q. Other than what purport to be the capital accounts of the partners?

A. That's all, just the capital accounts were taken off.

Q. Were any other assets or liabilities reflected in those records? A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. I am going to show you government's Exhibit 118 for identification and ask you if you recognize the documents that are there? Do you recognize those?

A. Yes, I recognize some of them. Some of them I made at the time before I was employed.

Q. Now, as to those which you do recognize, Mr. Maundrell, what is the general nature of the documents?

Mr. Gillen: May it please the Court, the exhibit is only in for identification so we may not go into the contents.

Mr. Campbell: I am not going into the [1319] contents.

Q. ——of the various businesses by which you were employed? A. Yes, sir.

Q. And as to those which you say were before your time, had you seen those previous and in connection with your employment? A. Yes, sir.

Q. Were all of those records records which were maintained there in the course of the various businesses to which they refer? A. Yes, sir.

Mr. Gillen: Of course, he couldn't answer as to those he didn't prepare himself or familiar with.

The Court: Read the question.

(Question read.)

Mr. Gillen: My point is that some of those were prepared before he became identified with the organization.

The Court: Objection overruled. Answer the question.

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(Testimony of Harold H. Maundrell.)

(Question read.)

A. I can only answer that as to the inventories that I made up personally or had made under my supervision. I notice just one, at a glance, made up January 1, 1945. I would not be employed there at that time.

Q. Well, will you answer this—was that a record which you found there among the books and records when you accepted your employment?

Mr. Gillen: Objected to as leading and suggestive. [1320]

The Court: Objection overruled.

A. Yes, those were the records that were turned over to me by Mr. Slater.

Q. And you have previously identified Mr. Slater as the bookkeeper from whom you took over, is that correct? A. Yes, sir.

Mr. Campbell: I will offer these in evidence as government's Exhibit 118.

Mr. Gillen: May we see them?

Mr. Campbell: Oh, I beg your pardon. I thought you had seen them when they were marked for identification.

Mr. Gillen: May it please the Court, as to this entire exhibit, we offer the usual objection as has been heretofore made, that the exhibit is improperly before the Court for the reasons heretofore given, and then as to the specific portions of the exhibit referred to as "inventories" that were put there, not either by Mr. Maundrell or under his

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(Testimony of Harold H. Maundrell.)

supervision, but prepared by some other person, we offer the objection that no proper foundation has been laid as to those.

The Court: Objection overruled and Exhibit 118 is admitted in evidence.

Q. I believe you stated, did you not, Mr. Maundrell, that these represented inventories of various businesses and on the dates set forth, is that correct?

Mr. Gillen: Objected to as asked and [1321] answered.

The Court: Objection overruled.

Mr. Gillen: The exhibits speak for themselves and as to certain of those exhibits, he said he couldn't state when they were made.

The Court: Objection overruled.

A. I can only answer that by stating that the inventories that were made under my supervision or by myself would be as of the dates marked on the inventories, but there are inventories here that I had nothing to do with.

Q. But after your employment, did you personally take the inventories? A. Yes, sir.

Q. I am going to show you plaintiff's Exhibit 120, check dated December 2, 1946, payable to Wm. E. Kyne, in amount of $16,005.50, signed Menlo Club, the signature of William E. Kyne and the endorsement of William E. Kyne, with the notation on the front in handwriting, "Loan for Transit," and ask you if you ever saw that check before?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. When was the first time you ever saw it?

A. The date it was drawn.

Q. Now with respect to this check, did you make any entry in the books of the Menlo Club?

A. No, sir. Mr. Kyne had charge of that. He kept those entries himself. [1322]

Q. Now as I understood you, on December 2, 1946, you were keeping the records of the Menlo Club?

A. Yes, sir, but that particular account on the Menlo Club was handled by Mr. Kyne. I had nothing to do with that.

Q. Did the account which was handled by Mr. Kyne and against which this was drawn, was that entered into the Menlo Club record which you kept? A. No, sir.

Q. So that books or ledgers of the Menlo Club which you have identified as keeping here, I take it, would have no reference to this check; is that correct? A. No, sir.

Q. Now do you know the source of the funds which went into the bank account of the Day-Night funds under the name of the Menlo Club?

A. Those were the funds from the Menlo Club.

Q. Were you given any record as to the amount of those funds?

A. Only from the poker sheets that I received each day which were recorded in the books of the Menlo Club.

Q. Did you ever check the poker sheets which

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(Testimony of Harold H. Maundrell.)

you received with the amount of monies which were being placed in the bank account?

Mr. Gillen: Objected to as asked and answered this morning.

The Court: Objection overruled.

A. No, sir. [1323]

Q. Did you ever examine the bank account, for the purpose of determining whether or not all of the money reflected in the poker sheets was deposited there? A. No, sir.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Maundrell, you were educated as a lawyer, were you not? A. Yes, sir.

Q. And practiced law for a time in California?

A. Yes, sir.

Q. And still maintain your status as a licensed practitioner under the State Bar of California; is that right? A. Yes, sir.

Q. And aside from your association with the enterprises that we have been discussing here, did you engage in the management of any other hotels or restaurants other than Cal-Neva and places we have talked about here? A. Yes, sir.

Q. Will you relate what enterprises you have been identified with during the years and what capacity?

A. Well, I was executive manager for Mr. Cliff for the Cliff Hotel for a number of years.

Q. In San Francisco? [1324]

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(Testimony of Harold H. Maundrell.)

A. Yes, sir. Assistant manager of the St. Francis Hotel.

Q. In San Francisco?

A. Yes, sir. I was manager of the Amona Mission Inn about six years.

Q. At Boyes Springs in California?

A. Yes, sir. Manager of the Antlers Athletic Club in Oakland four years.

Q. Similar to the Olympic Club in San Francisco?

A. Yes, sir. I had an operating agreement in the management of a hotel in Palm Springs for two years, called the Colonial.

Q. That is Palm Springs, California?

A. Yes.

Q. Now in addition to the restaurant enterprises which you mentioned here, such as Cal-Neva, Tiny's Waffle Shop, have you ever managed any other restaurants and been identified with them?

A. Cliff Hotel, I had direct charge of the dining room.

Q. Were you identified with the Trader Vic enterprises?

A. Well, in Honolulu I was a partner there. That is how I happened to go to Honolulu in '48.

Q. That is how you happened to leave Mr. Remmer's association to take over the partnership of Trader Vic; is that correct?

A. That's right.

Q. Now you presently own your own restaurant,

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(Testimony of Harold H. Maundrell.)

known as Maundrell's on Waikiki Beach; is that correct? [1325] A. That is correct.

Q. Mr. Maundrell, you were asked this morning by Mr. Campbell whether or not you had furnished any information to assist in the preparation of individual income tax returns for Mr. Remmer and his wife, Mrs. Helen Remmer, and you stated, as I recall, that you had furnished some information and had had conversations with Mr. Mooney with reference to the 1945-1946 individual income tax returns of Mr. Remmer and Mrs. Helen Remmer; is that correct? A. That is correct.

Q. While Mr. Campbell is examining that document, I will ask you whether or not——

The Court (Interceding): I think we had better wait until Mr. Campbell finishes his examination.

Mr. Gillen: I will ask that this be marked for identification.

Q. I ask, Mr. Maundrell, if you recall having any written correspondence with Mr. Mooney with regard to the individual income tax returns of Elmer Remmer and Helen Remmer?

A. Yes, I believe Mr. Mooney wrote me and——

Mr. Campbell: We object, the correspondence is the best evidence.

The Court: This portion of your answer may stand.

Mr. Campbell: I mean the further answer.

Q. Do you recall writing him? [1326]

A. I may have, but——

Q. I show you here what purports to be a carbon

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(Testimony of Harold H. Maundrell.)

copy of letter and it has been marked as defendant's Exhibit for identification "X." I will ask you to examine that, please, and tell us whether or not that refreshes your recollection as to whether you at any time wrote to Mr. Mooney on that subject or topic? A. Yes, I did.

Mr. Gillen: I will offer the letter, may it please the court, as defendant's Exhibit "X" in evidence.

The Court: It may be admitted in evidence.

Mr. Campbell: Mr. Gillen, I presume you are going to lay it further that it was sent to Mr. Mooney?

Mr. Gillen: All right.

Q. Do you recollect whether or not the original of this letter was sent to Mr. Mooney?

A. Yes, I remember the incident.

Mr. Gillen: With the Court's permission, I would like to read this letter to the jury at this time.

The Court: Yes, sir.

Mr. Gillen: The carbon copy of the letter is dated March 12, 1947, Mr. Pat Mooney. (Reads Exhibit "X.")

Q. Now the data that you have referred to here, relative to the individual income tax returns of Elmer Remmer and Helen Remmer, you obtained, did you not, depending upon what year it was, from Mr. Kyne, Mr. Slater, the public accountant, [1327] now deceased, who prepared the accounts of the various enterprises from the inception of the Menlo Club, and Mr. Ayton, who prepared the Menlo Club

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(Testimony of Harold H. Maundrell.)

returns, and whatever other records were furnished you in the way of daily sheets, etc.?

Mr. Campbell: Objected to as a compound question.

The Court: Do you understand the question?

A. Yes, sir.

The Court: You may answer it.

A. I received my data from Mr. Slater and from Mr. Ayton for filing of the different income tax returns.

Q. Now, Mr. Maundrell, can you tell us in detail what your personal duties were in connection with these various enterprises from the time you went to work?

A. Well, when I was first approached by Mr. Remmer, I was in Beverly Hills at the time and he told me that he——

Mr. Campbell (Interrupting): I am going to object as not responsive. He was asked what certain duties were.

The Court: Don't state what Mr. Remmer told you—I withdraw that remark—just proceed and state the duties.

A. Mr. Remmer asked me to go to San Francisco to take care of the Menlo Club, Tiny's Waffle Shop and Menlo Bar. He was about to purchase the same. This was my first conversation with him——

Q. Those three enterprises in one had not yet been acquired?

A. Not at the time, not consummated. [1328]

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: Objected to as not responsive to the question. He was asked to enumerate the duties he had to perform. He is referring now to various conversations he had with Mr. Remmer.

The Court: Just state your duties, Mr. Maundrell, please.

A. I was to take care of the books. I was to take care of the supervision of the Waffle Shop; I was to take care of all the inventories.

Mr. Campbell: Same objection. He is stating what he was supposed to do. The question calls for what he did.

The Court: Objection overruled. He may proceed.

Mr. Gillen: I think he is trying to tell us that later additional work was put on his shoulders.

The Court: You may proceed.

Q. Try to confine yourself to what your actual duties were, what you did.

A. Take care of all pay roll accounts for the three different branches of the Menlo Club; take care of all filing of tax——

Q. When you say pay roll accounts, you mean you prepared deductions and so on necessary for social security?

A. Prepared income returns, old-age pension returns, social security returns; had to do all those things that were pertaining to the business such as the bar and the coffee shop and the card room.

Q. How many employees were there in the

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(Testimony of Harold H. Maundrell.)

Menlo, the three [1329] entities in one, approximately, if you recall?

A. I don't recall how many.

(Jury and alternate jurors admonished and noon recess taken at 11:45.)

December 27, 1951, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumed the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Maundrell, at the close of the morning's session, I believe I had questioned you regarding the recollection on your part as to how many employees there were whose pay roll and social security deductions and so on you took care of during the time that you were working there?

A. Well, it was approximately about the Menlo——

Mr. Campbell: Do I understand that is an overall territory during the time he came and left, or a particular time?

Mr. Gillen: I was going to break it down.

Q. I mean the average pay roll, and by that I might tell you, to assist your memory, you can

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(Testimony of Harold H. Maundrell.)

break it down as to the three Menlo units you took care of.

A. I would say the three Menlo units altogether 200.

Q. About 200, you believe?

A. Yes, sir. [1330]

Q. How many of those businesses ran 24 hours a day?

A. The Menlo Club, Tiny's Waffle Shop, the Bar from eight in the morning until two in the morning, closed at two o'clock.

Q. So that in the three Menlo units, that is, the social club, the bar and Tiny's Waffle Shop, there were approximately 200 employees; is that correct?

A. Yes, sir.

Q. Now when you originally became associated with the Menlo units, was that originally supposed to be your exclusive employment?

A. Yes, sir.

Q. Subsequently, did you undertake to look after the books and pay rolls of other units, other enterprises? A. Yes, sir.

Q. And those were what—the Day-Night Cigar Store?

A. Yes, sir; 110 Eddy and afterwards the Transit Smoke Shop.

Q. The Transit Smoke Shop; and how soon after you became identified with the Menlo Club did you take over the additional work?

A. Not until 1946.

Q. Now you went to work in what, May of 1945?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. And then within the year you took over these other obligations, these other enterprises?

A. Yes, sir. [1331]

Q. How many additional employees did that make, approximately? I don't expect you to remember exact.

A. Made about 60 or 65, approximately; I don't know the exact number.

Q. Now would it be a fair estimate, in your opinion, based upon your recollection, Mr. Maundrell, to say that when you were looking after all those enterprises that you handled a pay roll or pay rolls, and also the government deductions, for approximately 260 employees?

A. Yes, I would say that is about right.

Q. Now, Mr. Maundrell, you were assisted in that work, of course, by the managers of the various enterprises; is that correct? A. Yes, sir.

Q. And after you had done your work of looking after the pay rolls and making the deductions and so on, then so far as returns were concerned, you were assisted by the public accountants; is that correct? A. Yes, sir.

Q. And those public accountants, as I recall, were Mr. Ayton for the Menlo enterprises, and Mr. Slater for the other organizations?

A. Well, Mr. Ayton also assisted in the other enterprises, and then for 1945 returns I had the assistance of a Mr. Shaw, who was also an accountant.

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(Testimony of Harold H. Maundrell.)

Q. Was he connected with either Mr. Ayton's or Mr. Slater's [1332] office? A. No, sir.

Q. I see. He was an independent accountant. Now did the defendant, Elmer Remmer, during any of the time that you were employed there, from 1945 to 1948, carrying on the duties that you described here, did he at any time have anything to do with the matter of keeping the records or keeping the books or preparing any returns or pay rolls or anything of the sort? A. No, sir.

Q. Did the defendant, Elmer Remmer, ever direct you concerning how the books should be kept or should be charged where, or anything of that sort? A. No, sir.

Q. The matter of the checks that you issued, Mr. Maundrell, and which have been mentioned during the course of your testimony here, and how you charged those checks up to the various accounts, was that done on your own initiative and according to your best judgment as to how the books should be set up and how the charges should be made?

A. Yes, sir.

Q. And without the suggestion of Mr. Remmer or anyone else?

A. He made no suggestions whatever.

Q. Now if I recall your testimony as you described it, Mr. Maundrell, with regard to the social clubs or the cards rooms, each card room, namely, the Menlo Club, the 186 Club, operated [1333] 24 hours a day; is that correct? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. And there were three shifts of employees headed by three cashiers; is that correct?

A. Yes, sir.

Q. And then there was an over-all manager; is that true? A. Yes, sir.

Q. Now the so-called daily sheets, or poker sheets, that have been referred to here, they were prepared by whom?

A. They were prepared by the cashier on his particular shift.

Q. In other words, each cashier worked eight hours; is that correct? A. Yes.

Q. And at the beginning and end of his time he made out his sheets; is that correct?

A. Yes, sir.

Q. As to money taken in, receipts and disbursements; is that true? A. Yes, sir.

Q. And showed the balance at the end of his time? A. Yes, sir.

Q. And the next man took up from there, I take it; is that correct? A. Yes, sir.

Q. And those were the sheets that were ultimately turned over [1334] to you, from which you obtained the information that you put in the books?

A. Yes, sir.

Q. Now do you know of your own knowledge, Mr. Maundrell, how the markers or IOU's were treated on the accounts?

Mr. Campbell: I do not understand that question, treated on the books of account?

Mr. Gillen: I am asking how they were treated on the poker sheets and carried on the books.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: Objected to. The question is compound.

The Court: We will see if the witness understands it. Do you understand the question?

A. May I have the question again?

Mr. Gillen: I will withdraw the question. I can break it down very easily, your Honor.

Q. You were shown this morning, Mr. Maundrell, some poker sheets or daily sheets; do you recall that? A. Yes, sir.

Q. And I take it those were the sheets that you have described as the sheets which were kept by each cashier on his shift; is that correct?

A. Yes, sir.

Q. And those sheets showed the bank roll he took over when he came on duty and when he left?

A. Yes, sir. [1335]

Q. And it showed any charges in the intervening eight hours while he was on duty?

A. Yes, it did.

Q. Now do you recall Mr. Campbell showing you a list of names on the right-hand side of the page and asking what they referred to?

A. Yes, sir.

Q. And you said IOU's or markers; in other words, names of men who owed money to the Menlo Club or 186 Club, as the case might be; is that correct? A. Yes, sir.

Q. Now do you know, of your own knowledge, how those markers or IOU's were treated on the poker sheets first?

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: Objected to as unintelligible, how they were treated on the sheets. He testified they were put on the sheets.

The Court: Clear that up a little bit as to what you mean by treated.

Q. How were they looked upon and put down, as cash or obligations, or what?

A. They were put down as an obligation against the person whose name was on the sheet.

Q. An obligation against the person, but was that treated as part of the cash bank roll?

A. Oh, yes; that was part of the ten thousand dollar bank roll. [1336]

Q. Now let me see if I got it clear. I said treated—I meant to convey how was it recognized or put down. If the cashier had a full ten thousand dollar bank roll when he came on duty and two thousand dollars worth of markers were taken during his eight hours, the bank roll would still show ten thousand dollars at the end of his eight hours, provided there were no other changes, eight thousand being in cash and the other two thousand put down as part of the bank roll as IOU's or markers; is that correct? A. That's right.

Q. So to reduce it to a word, whatever the bank roll was included the markers?

A. That's right.

Q. Now, Mr. Maundrell, when you obtained these sheets and when you obtained from the bars the cash register tapes and when you entered whatever was reflected in those records in your books,

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(Testimony of Harold H. Maundrell.)

were they, to the best of your knowledge and belief, an accurate and true account of the financial status of the particular enterprise? A. Yes, sir.

Q. Now do you recall, Mr. Maundrell, that reference has been made here in the course of your examination, I believe, to the original 1945 return for the Menlo Club; do you recall that?

A. Yes, sir.

Q. I am going to show you prosecution's Exhibit 89, [1337] Mr. Maundrell, and ask you to look particularly at a letter attached thereto, directed to the Collector of Internal Revenue, San Francisco, California, under date of May 10, 1946, and signed Elmer F. Remmer by initial "M," which I believe you identified as your handwriting. Do you recall the incident of the writing and attachment of that letter to the Menlo Club return of 1945?

A. That is an amended return.

Q. I beg your pardon?

A. I believe it was an amended return.

Q. I may have been in error saying that you identified that as your handwriting. I believe a previous witness identified it as your handwriting, Mr. Kyne. Will you look at that now and tell us whether or not the name under the signature line, Elmer F. Remmer by "M," is your handwriting?

A. Yes, sir.

Q. I believe you said it was an amended return. It does not appear to be designated an amended return. However, Mr. Maundrell, this is the return

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(Testimony of Harold H. Maundrell.)

for the Menlo Social Club, the Menlo Bar and Tiny's Waffle Shop, all in one; is that correct?

Mr. Campbell: Is that an amended return?

Mr. Gillen: It does not say. I think he is in error about that.

A. I made an error on that. I was thinking of another one that was attached to an amended return. No, that is correct.

Q. You were thinking, were you not, Mr. Maundrell, of a [1338] statement that you attached to a return referring to an amortization arrangement?

A. Yes, that is right.

Mr. Gillen: Now with the Court's permission, I would like to read this letter and to invite the witness' attention and recollection to the incident that gave rise to the writing of this letter. This letter, which is part of prosecution's Exhibit 89 in evidence, is typed at the top, Menlo Club, 30 Turk Street, San Francisco, May 10, 1946, Collector of Internal Revenue: (Reads from Exhibit 89.)

Q. Does that refresh your recollection as to what happened in connection with those particular records, Mr. Maundrell?

A. Well, in 1945 I was dividing my time between the Menlo Club and Cal-Neva Lodge for the summer period. The poker sheets were taken over to the office and they were put in a box.

Q. What kind of box?

A. Some boxes that had liquor in them, size of a whiskey box.

Q. Were they wooden boxes or cardboard?

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(Testimony of Harold H. Maundrell.)

A. Cardboard boxes, and they were put in the warehouse at 52 Mason. At that time my office was a front portion of the warehouse at 52 Mason. Then later on we started to build a new office at 52 Mason Street and during that period of time, while we were building, the poker sheets were put in those same boxes in the warehouse after the new offices were completed and we moved in, sometime in the latter part of October, [1339] I believe, or beginning of November; I have forgotten the date.

Q. Was that in 1945?

A. In '45. The warehouse, which was in such a terrible state—I mean it was very neglected and it had a great many boxes filled with sheets from the B & R Smoke Shop, sheets which registered bets, etc., and had accumulated there for a period of years, and these boxes were all in the warehouse and the boxes with the sheets, the poker sheets, were also in the warehouse——

Q. That is the 1945 Menlo sheets?

A. That's right—right next to these other boxes. We had a sort of a flood there. This warehouse was underneath a three-story hotel and someone had turned on the water in their bathtub and the water didn't run, it was turned off at the time, but they left their faucet open and had left and the water flowed up over the bathtub and for some period of time went right down in our room where we had all the records stored, plus these other boxes, and the water dripping over these boxes, a great many of them were broken, fell to pieces, some of the

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(Testimony of Harold H. Maundrell.)

liquor dropped on the floor, a few bottles were destroyed, so I decided I wanted to clean this whole room up and in doing so I got hold of a man we called John the Doorman and asked him if he would clean up the whole room and fix the cases in the proper way, etc., and to get rid of all the old race track sheets and all the rest of the junk that was in the place and clean it all out, and in doing so he called in the scavenger department and [1340] he cleaned the whole room out and he cleaned out along with it the boxes that had the poker sheets in it, not knowing that they had a relative value at that time.

Q. Mr. Maundrell, then the statement that you wrote to the Collector of Internal Revenue, to the effect that you had used the receipts and promotion expenses for a like period of the preceding year of 1944, did you resort to the accounts that had been kept by the predecessor of the new bars, Mr. Remmer and his partners?

A. Mr. Ayton, who had charge of the books for the previous owner for a period of ten years or more——

Mr. Campbell: I submit this statement he is launching into is not answering the question.

The Court: Read the question.

(Question read.)

The Court: Answer that yes or no.

A. Yes, sir.

Q. From whom did you get that data?

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(Testimony of Harold H. Maundrell.)

A. Mr. Ayton.

Q. Mr. Ayton had been the bookkeeper for the predecessor of Mr. Remmer and his partners for a period of some ten years, had he not?

A. Yes, sir.

Q. So he had the 1944 records available; is that correct? A. Yes, sir. [1341]

Q. And was he the one who prepared them, based on the preceding years? A. Yes, sir.

Q. I notice that you mention in your statement that some records you did have available and you used those original records that were available for 1945, is that correct, such as disbursements for rents, salaries, wages, cards, and miscellaneous other expenses? A. Yes, sir.

Q. Now, Mr. Maundrell, during the time that you were acting in the capacity that you have described here, agents of the Internal Revenue Department interviewed you, did they not?

A. Yes, sir.

Q. Concerning the affairs of the Menlo Club and the other enterprises? A. Yes, sir.

Q. Who were those agents, by the way?

A. Well, the first agent, as I remember, was Mr. Ezralow, and then after that Mr. Morgan and another gentleman, I am not sure if his name is Poole or not; Mr. Morgan originally and also a little later on by Mr. Harkness.

Q. Now did you discuss with any of those agents the statement that had been sent in with the 1945 return of the Menlo Club, the manner in which you

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(Testimony of Harold H. Maundrell.)

happened to arrive at certain of the figures? [1342]

A. No.

Mr. Campbell: Objected to as incompetent and immaterial, discussions he had with the agents.

(Question read.)

The Court: Answer yes or no.

A. No, sir.

Q. Did any of those agents, or anybody from the Internal Revenue Department, ever tell you that there was anything wrong about that statement and the manner in which you arrived at certain of the figures in the 1945 return?

Mr. Campbell: Objected to as incompetent and immaterial, calling for hearsay, and the ultimate fact, what we are interested in here, is not statements made back and forth by the agent and this witness, if there was any such conversations.

The Court: Objection sustained.

Q. Well, did anybody ever reject this 1945 return or statement that you made concerning it?

Mr. Campbell: Same objection, same grounds.

The Court: Same ruling, objection sustained.

Mr. Gillen: Your Honor, this case is made up almost exclusively on circumstantial evidence—I should say exclusively—and return is made in a certain way. I think we should be told whether there was any rejection on the grounds this was wrong. There was testimony regarding one enterprise that it should be set up as a corporation rather than a partnership. [1343]

The Court: I will let him answer the question.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: May I be heard on that question, if the Court please?

The Court: Very well. We will send the jury out.

(Jury and alternate jurors admonished and excused at 2:00 p.m.)

(In the absence of the jury.)

(NB 328, pp. 81-91.)

The Court: Objection will be sustained. Bring in the jury.

2:20 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Maundrell, you recollect, do you not, that during a considerable portion of your direct examination Mr. Campbell showed you check stubs and in many instances checks, wherein various accounts or bills were paid by you; do you recall that?

A. Yes, sir.

Q. And then in connection with those checks and check stubs he asked you how they were set up, where they were charged on various ledgers to vari-

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(Testimony of Harold H. Maundrell.)

ous enterprises, how they were reflected on the ledgers; do you recall that?

A. Yes, sir. [1344]

Q. Now in one particular instance I recollect—and I am going to hand you the exhibits which make up the check stubs, which I think have been identified as prosecution's Exhibits 132, 133, 134, 135 and 136—do you have these in mind, counsel?

Mr. Campbell: Yes, I have those — those are Crocker First National Bank.

Q. I will leave these available to you, in case you wish to refer to them, Mr. Maundrell. Do you have a recollection there was one question asked you this morning concerning the manner in which there was reflected, either on your check stubs or on the ledger or both the payment of checks to a refrigeration company for installation of the bar, or portions of bar equipment at the Menlo Bar; do you recall that? A. Yes, sir.

Q. And I believe you stated that your books reflected that you had charged those to repairs and replacements; is that correct? A. Yes, sir.

Q. Now in that particular instance, did anybody tell you how to charge those? A. No, sir.

Q. Did you charge them as repairs and replacements based upon your own personal judgment as to how they should be set up? A. Yes, sir.

Q. Now had there been a bar at the Menlo Bar and some bar [1345] fixtures prior to the time that this installment was made? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. And was the installment that was made a replacement of what had been there before?

A. Yes, sir.

Q. For what reason? For the reason that the previous bar was out of repair or in bad condition?

A. Well, it was worn out; it was leaking, in bad shape, and needed entirely new replacements.

Q. And you replaced the equipment; is that correct? A. Yes, sir.

Q. And you charged that up as a repair and replacement; is that true? A. Yes, sir.

Q. Now with reference to the other charges that you made, Mr. Maundrell, did you in each instance act upon your own best judgment as to how they should be accurately reflected in your records?

A. Yes, sir.

Q. Now were you ever at any time told by the defendant, Elmer Remmer, or anyone else, to charge those charges a certain way, or were all those charges made based upon your judgment as to where they accurately belonged? A. Yes, sir.

Q. What is your answer—it is rather a confusing question? [1346]

A. Based upon my own judgment.

Q. Now I recall on Friday you were asked concerning bills that were paid on behalf of Mr. Remmer, and I believe in a number of instances you said you had charged those to Mr. Remmer's private account; is that correct? A. Yes, sir.

Q. I believe one of those was an insurance bill for some insurance on the home or some personal property; is that correct? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. And in another instance there was—I don't have in mind the other bills now, but there were two or three instances where you did state that you charged those to Mr. Remmer's personal account; is that correct?

A. Yes, there were a few bills that were charged to his account.

Q. In other words, if it was an expense that had nothing to do with the business, but rather had to do with Mr. Remmer's affairs, it would not be charged to his business affairs but charged to his personal account as personal expense; is that correct? A. That is right.

Q. And of course you had in mind that business expenses were deductible and personal expenses were non-deductible expenses under the income tax law; is that correct? A. That's right.

Q. When you did make these classifications of expenses and paid these bills, to the best of your knowledge, your best [1347] judgment, that was where they should have been classified?

Mr. Campbell: Objected to as asked and answered.

The Court: He may answer the question.

A. Yes, sir.

Q. Now I will hand you here, Mr. Maundrell, prosecution's Exhibit 91 in evidence, which is the amended partnership return of the Menlo Club for 1946, together with defendant's Exhibit I for identification, and I will ask you to refer to them so you may possibly refresh your recollection in connection

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(Testimony of Harold H. Maundrell.)

with the next question which I will ask you. I will ask you to look at these documents and tell us whether or not you recall preparing the statement that has been designated defendant's Exhibit I for identification to be attached to the amended return for the Menlo Club?

The Court: Read the question.

Mr. Gillen: I would like to withdraw that question. It has erroneous data in it.

Q. You have in your hand the amended return for the Menlo Club for the year 1946. I will ask you whether or not you recall the incident of having proposed to you a statement to be submitted with that return and the previous year's return, the proposed statement being defendant's Exhibit I for identification?

Mr. Campbell: I am going to object to that question, if the Court please; Exhibit I for identification is not here in [1348] evidence. There has been no foundation laid and the question, I think, is incompetent, in that it asks him to compare an exhibit which is in evidence with an exhibit with which he has not heretofore testified any familiarity and asks him to draw a conclusion therefrom, and I object on the grounds the question is incompetent for that reason.

The Court: You asked him to compare——

Mr. Gillen: No, I am not asking him to compare. I am asking him if he recalls receiving such a proposed statement as is before the Court for identi-

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(Testimony of Harold H. Maundrell.)

fication, with the suggestion that it be attached to the return which is in evidence, Exhibit 91.

Mr. Campbell: Objected to further, it calls for him to state whether he received a similar document to Exhibit I for identification, which, of course, is not in evidence, and prior to any foundation laid that he has either seen it or has knowledge of it.

Mr. Gillen: Perhaps I can clarify this for everybody if I remind your Honor and counsel that the witness Mooney, called by the government, was shown this Exhibit I for identification and he testified, and it is in the record, that he mailed that to Mr. Maundrell, or submitted it to Mr. Maundrell as a proposal, proposed statement, to be attached to the amended return of 1945 and 1946. I am not endeavoring to complete the foundation for admitting that in evidence. [1349]

Mr. Campbell: Then I think we can have a direct question here, whether he ever saw it and where it came from.

Mr. Gillen: In the interest of time, I can withdraw it.

The Court: What I had in mind, this suggestion from somebody else that was embodied in that question. Go ahead, Mr. Gillen.

Mr. Gillen: Let me ask this question, which may not be objectionable.

Q. Mr. Maundrell, would you look at defendant's Exhibit I for identification and tell us whether or not you ever saw that same statement before?

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(Testimony of Harold H. Maundrell.)

A. I do not remember seeing this statement.

Q. Do you recall receiving from Mr. Mooney a proposed draft of a statement to be submitted with an amended return for the Menlo Club, requesting an amortization arrangement for income tax returns?

A. I remember sitting down with Mr. Mooney and discussing it.

Q. And do you remember that Mr. Mooney sent you a proposed statement of what he thought should be put in that and do you remember, instead of taking Mr. Mooney's statement, that you prepared a statement of your own? A. Yes, sir; I did.

Q. Now will you take a look at Exhibit 91 and see if there is not attached to Exhibit 91, which is the 1946 Menlo Club amended return, the statement that you prepared yourself [1350] instead of accepting the proposed statement of Mr. Mooney?

A. Yes, sir.

Mr. Gillen: I would like at this time, may it please the Court, to offer defendant's Exhibit I in evidence.

Mr. Campbell: Objected to on the ground no proper foundation laid. The witness stated he has no recollection of having seen——

The Court: I have not seen any connection between the statement prepared by this witness, as he recollects, as being part of the exhibit, part of Exhibit I.

Mr. Gillen: I will ask one or two more questions.

Q. You say you have a recollection of sitting

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(Testimony of Harold H. Maundrell.)

down with Mr. Mooney and discussing an amortization plan for the Menlo Club to be used in connection with the returns? A. Yes, sir.

Q. And what was the proposal of Mr. Mooney?

Mr. Campbell: Objected to——

The Court: Objection sustained.

Q. What was the amortization plan supposed to do?

Mr. Campbell: Objected to. The return and statement of the witness thereto speaks for itself. The books speak for themselves.

The Court: Let me have the question.

(Question read.)

The Court: Objection sustained. [1351]

Mr. Gillen: Well, here is a man who prepared this statement, your Honor, that accompanied as part of Exhibit 91.

The Court: That statement is in evidence, will speak for itself, but I can't see what that has to do with Exhibit I.

Mr. Gillen: I would be very happy to explain to your Honor what it has to do with Exhibit I. Exhibit I was proposed by Mr. Mooney as to how a request for an amortization plan could be submitted to the Collector of Internal Revenue, in order to adjust payment of income tax as to the club to amortize investment over a period of years. Instead of taking and accepting that and using it, Mr. Maundrell prepared a more comprehensive statement himself, based on the suggestion of Mr. Mooney.

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(Testimony of Harold H. Maundrell.)

The Court: But Mr. Maundrell stated he had never seen the Exhibit I.

Mr. Gillen: He stated he did not recall seeing I.

The Court: Yes.

Mr. Gillen: Now I am asking him whether or not he knew what this amortization statement was supposed to do in the way of any adjustments on income tax returns.

Mr. Campbell: My objection is, so far as Exhibit 91 is concerned, a statement attached thereto, that is in evidence and speaks for itself.

The Court: Objection sustained. [1352]

Mr. Gillen: I have a recollection, your Honor, that this morning Mr. Campbell pursued a number of questions based on recollection of the witness rather than the exhibits themselves, and his reasons for doing certain things.

The Court: I think that was a little different situation than this.

Mr. Gillen: All right.

Q. When you prepared this statement, which is attached to the 1946 amended partnership return of the Menlo Club, for what reason did you prepare that and submit it with the amended return?

Mr. Campbell: Objected to as incompetent, if the Court please.

The Court: You may answer the question.

A. Well, at that time I believed they were entitled to an amortization over a period of five years on the purchase of the Menlo Club.

Q. Now will you tell us what you mean by say-

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(Testimony of Harold H. Maundrell.)

ing that you believed you were entitled to an amortization over a period of five years?

Mr. Campbell: Objected to as asking for a statement or exposition of argument by the witness. The document speaks for itself.

The Court: He may answer the question.

(Question read.)

A. I had been informed by Mr. Mooney that in cases of clubs [1353] or businesses such as the Menlo Club, that we could amortize the business over a period of five years because of the fact that it was a very precarious business. It was a business that could be outlawed perhaps at any time. A new ordinance at that time was being drafted in San Francisco and also the State legislature drafted a new law——

Mr. Campbell: I object to that.

Mr. Gillen: I think the answer should be completed.

Mr. Campbell: I wish to renew my objection to this type of answer and explanation, if the Court please, based upon hearsay, as giving arguments and conclusions. I do not think this type of answer is competent.

Mr. Gillen: May it please the Court, we have a statement I am going to read to the jury in a moment, introduced by the prosecution itself.

Mr. Campbell: I say that is the best evidence.

Mr. Gillen: All right. You pursued a lot this morning that wasn't the best evidence. We are

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(Testimony of Harold H. Maundrell.)

going to read this to the jury, with the Court's permission, of course, but I see nothing in Mr. Maundrell's answer that is objectionable.

The Court: I think he has answered the question now.

Mr. Gillen: I don't know. He was cut off in the middle of a word.

The Court: Any further answer you want to make to that question? [1354]

A. Well, there are quite a few circumstances, although I believe the statement itself is complete.

Mr. Gillen: With the Court's permission, I am going to read the statement that was submitted with the amended return for 1946 of the Menlo Club, which is designated here as prosecution's Exhibit 91.

Mr. Campbell: What is the date of that document?

Mr. Gillen: It is an amended return for 1946, 1946 return — May 2, 1947. That is when the amended 1946 return was prepared. The statement reads as follows: (Reads Exhibit 91.)

Q. Now was that statement prepared by you and submitted with that return for amortization consideration to the Collector of Internal Revenue?

A. Yes, sir.

Q. Was there also a similar statement attached to the 1945 amended return, the previous year?

Mr. Campbell: I submit that the return would be the best evidence. Is that in evidence?

Mr. Gillen: Where is it?

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Mr. Avakian: We are looking for it and can't find it.

Mr. Campbell: May I suggest a recess at this time?

(Jury and alternate jurors admonished and recess taken at 2:50.)

3:05 P.M.

(Defendant present with counsel.) [1355]

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Mr. Campbell: At counsel's request, we have produced the amended return of the Menlo Club, an amended partnership return of 1945, which I will ask to have marked for identification.

The Clerk: Plaintiff's 141.

Mr. Campbell: I have no objection, if you wish to offer it in evidence as defendant's exhibit, having been filed with the Collector of Internal Revenue on the 15th of May, 1947.

Mr. Gillen: We will offer it.

The Court: Exhibit "Y."

Mr. Gillen: That is formerly 141 for identification.

Mr. Campbell: That number will then be removed.

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: Now it is "Y" in evidence.

The Court: That is right.

Q. Mr. Maundrell, with the Court's permission, I will show you defendant's Exhibit "Y" in evidence now, which purports to be amended return for the year 1945 of the Menlo Club, and I will ask you to look particularly to the statement attached thereto, which I believe you will find is identical to the statement which I read attached to the amended partnership return of 1946 of the Menlo Club, and ask you if you prepared that statement likewise? [1356] A. Yes, sir.

Q. And in requesting that consideration for amortization for the reasons that you set forth in that statement, you wanted the depreciation spread over the period of five years; is that correct?

A. Yes, sir.

Q. Mr. Maundrell, with relation to the request for amortization plan as set forth in your statement, attached to the exhibits which you have just looked, prosecution's Exhibit 91 and defendant's "Y," did Mr. Remmer direct you to do this or have anything to do with it, or was it something that you prepared in the belief that you were entitled to such deductions?

Mr. Campbell: Objected to as assuming something not in evidence, that is request for amortization.

The Court: You may answer the question.

A. Mr. Remmer did not have anything to do with it. I discussed the matter with our auditor,

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(Testimony of Harold H. Maundrell.)

Mr. Ayton, and we came to the conclusion that was the proper thing to do.

Q. You concluded that that was something to which that enterprise, under the circumstances, was entitled to; is that correct? A. Yes, sir.

Q. In that statement, Mr. Maundrell, you set forth that the Menlo Club had been purchased—and that included, of course, Tiny's Waffle Shop and the Menlo Bar, did it not? [1357] A. Yes, sir.

Q. (Continuing): ——that the Menlo Club had been purchased for the total sum of 175 thousand dollars, of which $31,985.50 was allocated to the investment in furniture and fixtures and merchandise; is that correct? A. Yes, sir.

Q. And the remaining sum of $143,801.50 toward the capital investment, that is the lease; is that correct? A. Yes.

Q. Now you will recall, Mr. Maundrell, that Mr. Campbell questioned you this morning—I think also on Friday—regarding the transactions, Exhibits 140 and 125, and I will identify those to you as the rewritten ledger page setting up the investment; do you recall that?

Mr. Campbell: Objected to as assuming a fact not in evidence—rewritten ledger page. This witness stated he did not believe he had ever seen the page, Exhibit 125.

Mr. Gillen: I think this has been identified as 125C, this one page of the Menlo Bar and Tiny's Restaurant ledger, and that page is designated "Furniture, Fixture, Equipment and Lease."

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(Testimony of Harold H. Maundrell.)

Q. Now I will ask you if it isn't a fact, Mr. Maundrell, that originally, as of April 30, 1945, the capital set-up of the Menlo units purchased set forth that the lease was designated at 100 thousand dollars, the value of the lease, and the fixtures at 75 thousand dollars? [1358]

Mr. Campbell: Objected to on the grounds the books and records speak for themselves.

The Court: I think that is correct.

Q. Showing you prosecution's Exhibit 140, isn't it so that it shows the set-up to be 100 thousand dollars allocated as costs of the lease and 75 thousand dollars as cost of the furniture and fixtures and merchandise on hand? A. Yes, sir.

Q. Now I will show you also prosecution's Exhibit 125C and ask you if this does not reflect a change in those figures, where in the lease cost was placed at 143 thousand odd dollars and the merchandise, furniture and fixtures cost placed at something in the neighborhood of 31 thousand odd dollars?

Mr. Campbell: Objected to on the grounds the record speaks for itself. Further, the witness testified he did not recall ever having seen 125C.

The Court: Then I think it is just a matter of reading the exhibit, isn't it?

Mr. Gillen: Well, this is preliminary in asking how those matters were arrived at, your Honor, and I think Mr. Maundrell testified that the amended or corrected return was done at his direction and under his supervision.

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(Testimony of Harold H. Maundrell.)

The Court: You may answer the question.

A. May I have the question?

(Question read.) [1359]

A. Yes, sir.

Q. Both of those pages were set up either by you or under your supervision or direction, isn't that correct? A. Yes, sir.

Q. Will you tell us how the first set-up, as it appears in Exhibit 140, where you first set up the respective costs at 100 thousand dollars for the lease and 75 thousand dollars for furniture, fixtures and merchandise, and then how you subsequently corrected that to 143 odd thousand dollars for the lease and 31 thousand odd dollars for the furniture, fixtures and merchandise?

Mr. Campbell: Objected to on the ground—possibly I am confused—I understand the witness testified he had never seen that paper before and didn't know when it was made.

The Court: He said these records were kept under his supervision and he can answer this question if he knows.

Mr. Campbell: May I ask a question on voir dire?

The Court: Yes, sir.

Q. (By Mr. Campbell): Mr. Maundrell, prior to this trial did you ever see that page, 125C.

Mr. Gillen: May it please the court, we object to that as incompetent, irrelevant and immaterial, whether he ever saw the page. I dictate a lot of

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(Testimony of Harold H. Maundrell.)

things to my secretary that I never see after they are dictated, but they are done under my [1360] supervision and direction.

The Court: I think he can answer if he knows. Objection overruled.

A. I don't remember at the moment that I looked at this particular page.

Q. Did you ever dictate to any one the contents of that page, and if so, to whom?

The Court: I mean the question he can answer, the question asked by Mr. Gillen.

(Last question by Mr. Gillen read.)

A. When I first arrived in San Francisco and met Mr. Schriber for the first time and Mr. Remmer in the Menlo Club, and I asked Mr. Schriber how this set up account of the lease was——

Mr. Campbell: Objected to as not in response to the question that was asked.

The Court: Let me have that question again?

(Question read.)

Mr. Gillen: I submit he is explaining how he got his information to set up the first page and I assume he will explain what brought about his changing that to change the allocation of the amounts.

The Court: He may proceed with his answer.

A. ——as to lease and cost of inventory and he told me the lease was 100 thousand dollars and the cost of the equipment and inventory was 75 thousand dollars. [1361]

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(Testimony of Harold H. Maundrell.)

Q. Those were the prices he placed on them for you?

A. The prices he placed on them and I put them in the books at that time.

Q. Now what, if anything, occurred at any later time to cause you to set up a different figure, allocating the respective costs?

Mr. Campbell: Same objection.

The Court: Same ruling. He may answer the question.

A. About maybe two months later—it might have been a little longer than that—the tax department of the State of California came in to see me——

Mr. Gillen: Mr. Maundrell, may I interrupt you —so the jury may be enlightened, it is true in California, in addition to federal income tax, there is also a State income tax, which is handled by the State Franchise Commission, wherein a State sales tax are set? A. That's right.

Q. When you refer to the California Tax Department, you refer to the agents who handle the matter of the State Sales Tax in the State of California?

A. Well, every time a piece of property like a bar, changes hands, has a sale, the State collects 2½ per cent sales tax on it. It seems that they had not paid the sales tax somewhere along the line, we hadn't done so, so he asked us what the cost of our equipment was and inventory. [1362]

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(Testimony of Harold H. Maundrell.)

Q. That was the man from the California State Sales Tax Department?

A. Yes, sir; so I asked him if he would put a value on the property and on the inventory, so he said, "Well, we do that if we have to, that is our business."

Q. Does that Department have regular appraisers that go out and appraise values of properties in addition to figuring California tax sales?

A. Yes, the very next day, or two days later, he came in with another gentleman from the Tax Department, and we went all over the building.

Q. Do you mean the bar and office and Waffle Shop and Menlo bar?

A. And they noted everything in the books they had and finally came to the conclusion that $31,-895.50 was a proper cost of equipment and inventory.

Mr. Campbell: I ask the last be stricken as conclusion of the witness. The report of the record is the best evidence.

The Court: It may stand.

Q. In other words, Mr. Maundrell, the California State Tax man handed you that as their appraisal of the value of the fixtures, furniture and merchandise, is that correct?

A. Yes, sir, and we had to pay tax on that.

Q. And you paid the tax on that?

A. Yes, sir. [1363]

Q. And then the difference between that and

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(Testimony of Harold H. Maundrell.)

175 thousand dollars was allocated as the value of the lease, is that correct? A. Yes, sir.

Q. And based on that you deducted those figures in making your statement to the Collector of Internal Revenue on the amortization plan, is that correct? A. That's right.

Q. And the result of that appraisal that was made and those figures that were arrived at, as a result of that you had to pay taxes on 31 thousand odd dollars for merchandise, furniture and fixtures, is that the reason why you set up the new page using the official figures that were given to you by the State of California? A. Yes, sir.

Q. Now, Mr. Maundrell, you have stated here in direct examination, and it has been shown in the exhibits, that when you affiliated yourself with the Menlo units that you became a one-tenth partner, or rather that you became a partner to the extent of 10 per cent in the Menlo Social Club, is that correct? A. Yes, sir.

Q. And did you have an oral agreement originally with regard to your partnership interest?

A. Yes, sir.

Q. And did you at any later time insist upon, or suggest, that those partnership agreements be reduced to writing? [1364] A. Yes, sir.

Q. And did you do that in regard only to your partnership or with regard to the other partners' interests in the Menlo Club?

A. All of the partners had an agreement.

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(Testimony of Harold H. Maundrell.)

Q. Now who prepared the written agreements setting forth those partnership returns?

A. Mr. Haughey.

Q. Is that Joseph Haughey, the California lawyer who appeared as a witness here?

A. Yes, sir.

Q. Who assisted him with regard to the details and data what sort of agreement was to be drawn?

A. Why I gave him all the facts and all the data and when they were drawn it was submitted to Mr. Remmer.

Q. And did Mr. Kyne have the same kind of an agreement that you had, with the exception of possibly difference in the amount of interest?

Mr. Campbell: The agreement is here in evidence of Mr. Kyne.

The Court: The agreement will show.

Q. Well, let me ask you this—were all of the agreements the same, with the exception of the difference in a percentage part? A. Yes, sir.

Q. I will show you here prosecution's Exhibit 130 and hand it to you, with the Court's permission. This is the agreement [1365] that was signed between you and Mr. Remmer, as defining what would be your interest in the Menlo Club, is that not correct? A. Yes, sir.

Q. Now that sets forth, does it not, that you were to have, retroactive as of May 1, 1945, a 10 per cent working interest in the profits of the Menlo Club, isn't that correct? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: I suggest that the document speaks for itself—well, he answered yes.

Q. And it is also provided in your agreement, is it not, that you hold in your hand, that after your profits had reached the equity of 10 per cent of the cost of the purchase of the Menlo unit, to wit, $17,500, then you would have a one-tenth interest in the physical assets of the property?

Mr. Campbell: Objected to, the document speaks for itself.

Mr. Gillen: He is holding it in his hands. If counsel would rather have me go through the reading again.

The Court: I think it would be better to read that from the document.

Mr. Gillen: I am also thinking of the time involved, your Honor. It will take three-quarters of an hour.

Q. Maundrell, in the original document you hold in your hand it sets forth, does it not, in paragraph 8 thereof: "* * * as of May 1, 1945, first party does hereby assign, transfer, set over [1366] and convey to Harold H. Maundrell, second party herein, a ten per cent working interest in and to the profits derived from the operation of the aforesaid social room and restaurant business situated as aforesaid * * *." That appears, does it not, on the original agreement? A. Yes, sir.

Mr. Campbell: Same objection.

The Court: The answer may stand.

Q. And that 10 per cent interest, as against the

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(Testimony of Harold H. Maundrell.)

total purchase price, required you to build up an equity of $17,500 out of the profits, did it not?

Mr. Campbell: Objected to as calling for his conclusion or interpretation of the document now before the Court.

The Court: Objection sustained.

Q. Now I will ask you to look at the prosecution's Exhibit 113, which is the Kyne agreement, the photostatic copy of the Kyne agreement, and I will ask you if you will compare this Exhibit with the document that you have before you, which is 130, prosecution's Exhibit 130, and tell us if those two agreements are the same, with the exception of the difference in the name of the party of the second part and the fact that Mr. Kyne had a 15 per cent interest as against your 10 per cent interest?

Mr. Campbell: Objected to, the documents speak for themselves. They have both been read before.

The Court: I think it would show in the documents. [1367] Objection sustained.

Q. Well, to your knowledge, did all the partners receive the same kind of agreement with the exception of difference in percentage?

A. That's right.

Q. Now you have prosecution's Exhibit 125, do you not, the books there? Now, will you take and look at the capital accounts appearing in that book —I can't tell you what page—look at your own capital account. A. Yes, sir.

Q. And what shows on that?

Mr. Campbell: The books speak for themselves.

Mr. Gillen: Yes, your Honor, I can walk up and

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(Testimony of Harold H. Maundrell.)

get the book and read it. The cross-examination is being very badly hampered by these technical objections.

Mr. Campbell: It seems to me these entries could be very quickly read to the jury, if there are any particular entries.

The Court: I can't see any reason why the witness or counsel couldn't read it. It doesn't make any difference.

Mr. Campbell: Very well.

A. May I have the question, please?

(Question read.)

Q. Would you be kind enough to read the first entry and the second entry, and so on, and tell us what those entries mean? [1368]

Mr. Campbell: I object to the general interpretive question of that kind. Reading a document is one thing and interpreting it is something else.

The Court: Yes, just have it read.

Q. Will you read the first entry?

A. The heading Harold H. Maundrell, under that is balance of 1945, shows that I had $13,003.37 credit, on the books to my account. Second item, June 14, federal income tax under debit, $3,874.35, which left me a balance of $9,131.02, and then of the same date, June 14, franchise tax—that is for the State of California, debit $123.45, leaving a balance on the books of that date of $9,007.57.

Q. Are those all the entries in regard to you?

A. That is all under Maundrell. The next is Turner.

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(Testimony of Harold H. Maundrell.)

Q. Do you have another Maundrell page there of capital accounts? A. No, sir.

Q. I think that same exhibit you will find another Maundrell page. Will you just go through and pick that. I think it was marked 125A.

A. Yes, I have it here.

Q. Now will you read the first entry there?

A. Partners account Tiny's Restaurant, bar and Menlo Club, Harold H. Maundrell, balance 1945, $13,003.37. 1946 profit 1946 $8,349.65, leaving a balance of $21,353.02. June 14 paid out for my account to the Collector of Internal Revenue [1369] $3,874.35, leaving a balance of $17,478.67. June 14, franchise tax $123.45, leaving a balance of $17,-355.22. 1947, 3-12, Collector of Internal Revenue, estimated tax, $900, leaving a balance of $16,455.22. 7-29 estimated tax $900, leaving a balance of $15,-555.22. 9-11, estimated tax $900, leaving a balance of $14,655.22. 1948, January 14, estimated tax $900, leaving a balance of $13,755.22. January 20, $7500 drawn, leaving a balance of $6,255.22; 19th of February $2500 drawn, leaving a balance of $3,-755.22; February 19, $2000 drawn leaving a balance of $1755.22.

Q. Leaving balance due on the books?

A. Yes, sir.

Q. Now when were those items set up under your name as capital account?

A. That is the amount of money I had coming to me from the partnership.

Q. In other words, that is how you kept track

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(Testimony of Harold H. Maundrell.)

of your profits derived from your working interest, 10 per cent of the profits of the Menlo unit, is that correct? A. Yes, sir.

Q. And that was how you kept track of how your equity was being built up in the physical assets of that property, is that correct?

A. Yes, sir.

Q. And were there similar pools set up for other partners, showing their equities? [1370]

A. Yes, sir.

Q. Then those were furnished to Mr. Ayton, the public accountant, and were included in the returns, were they not? A. Yes, sir.

Q. Now I will ask you to look at prosecution's Exhibits 89 and 90, which are the 1945 and 1946 income tax returns of the Menlo Club and with particular reference to partnership interests, I will ask you if under Schedule I on each of those if the partnership interests as they appear in the ledger are set forth there? In other words, those partnership interests are reflected on the income tax return, are they not? A. Yes, sir.

Q. Now, Mr. Maundrell, will you explain to the jury what was the working interest that was created between the various partners and Mr. Remmer in the Menlo enterprise?

Mr. Campbell: Objected to on the ground that the document speaks for itself; as calling for conclusion, including legal inclusion, as to the nature of the document.

The Court: Objection sustained.

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: I had in mind, your Honor, that this is the man who helped create it and placed it in a crystallized form in writing.

The Court: Yes, but we have the documents here.

Mr. Gillen: That is true, excepting that you had a good deal of difficulty the other day. As your Honor pointed out, [1371] it is a rather complicated document, complicated working arrangement.

Q. It is true, is it not, that you did, between the period of time that was at the starting point of May, 1945, until you withdrew from the organization in 1948, you participated in 10 per cent of the profits of the Menlo Club? A. Yes, sir.

Q. And it is true, is it not, that you drew on your credit to pay your income tax on those profits, is that correct? A. Yes, sir.

Q. And it is true, is it not, that on the occasion of your departure in 1948, your withdrawal from the organization, that you still had a credit on the books, is that correct? A. Yes, sir.

Q. Now let me ask you whether or not you withdrew from the enterprise any cash based on the credit that you had on the books of the organization from the one-tenth working interest in the profits of the organization?

A. Well in the first place I drew down my income tax return.

Q. You did that each year, did you not?

A. Yes, sir, and finally I was paid $12,000 in cash.

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(Testimony of Harold H. Maundrell.)

Q. That was when you withdrew from the organization, is that corect? A. Yes.

Q. Now was there any additional balance on the books that you [1372] left there?

A. Yes, there was.

Q. What was the additional balance you left on the books? A. Seventeen hundred odd dollars.

Q. Did that still remain as a credit in your favor on the books, or did you settle your entire interest for 12 thousand dollars?

A. No, still on the books.

Q. So when you left that organization to go to Honolulu you had some 13 odd thousand dollars credit on the books, is that correct? A. 1700.

Q. I mean before you drew down your 12 thousand, you had 13 or 14 thousand dollars credit coming to you did you not? A. I had $13,755.22.

Q. And when you pulled out to go to Honolulu you drew down 12 thousand dollars of that in cash, is that right? A. Yes, sir.

Q. And left the balance of $1700 odd dollars on the books, is that true? A. That's right.

Q. Now you had invested no money in the business in the way of cash? A. No, sir.

Q. You invested your time in the business and had drawn some [1373] salary for several of the enterprises, is that correct? A. Yes, sir.

Q. Now you have stated, Mr. Maundrell, that originally you were supposed to only identify yourself with and do work for the three Menlo enter-

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(Testimony of Harold H. Maundrell.)

prises which you referred to, namely, the social club, the bar and restaurant, is that correct?

A. Yes, sir.

Q. But at some subsequent time you were asked to do additional work? A. Yes, sir.

Q. It is true then that you undertook to keep the pay rolls and records, insofar as social security, etc., were concerned, for 110 Eddy, Day-Night Cigar Store, 186 Club, and Transit Smoke Shop, is that true? A. Yes, sir.

Q. And the Transit Smoke Shop, I believe, came into existence in 1946, was it?

A. On the first of November, 1946.

Q. Now, I believe you stated that you did draw some salaries for keeping books from several of these, one or more?

A. 1946 I drew down $75 from the 110 Eddy, Transit Smoke Shop, Day-Night Cigar Store, that was expense money.

Q. Do you mean that you drew down those amounts per month? A. Yes, sir.

Q. Would you say that your duties and your work in connection [1374] with those other enterprises, the 110 Eddy, Day-Night, 186 Club and Transit Smoke Shop, were about the same as the Menlo, or did you do more work in the Menlo?

A. Well, the Menlo Club took up the matter of 8 hours a day and the others took up an average of about two or three hours a day.

Q. In connection with your duties in behalf of the Menlo Club, did you have anything to do with

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(Testimony of Harold H. Maundrell.)

suggesting or directing what should be done in connection with the creation of good will towards customers and business manager and employees?

A. Not with the club itself. My work was principally with the restaurant part of it in that respect.

Q. Did you have anything to do with giving out of Christmas presents at the end of the year?

A. Well, I did in this respect, that I helped box them and wrap them up as Christmas presents.

Q. Did you participate at any time in wrapping up any Sulka ties to give away as Christmas presents? A. Oh, yes.

Q. Were you ever given any Sulka ties as presents? A. Oh, yes.

Q. How many times, would you say?

A. Not less than two dozen, 25 Sulka ties.

Q. Did you ever receive as Christmas presents any merchandise orders from Bullock & [1375] Jones? A. Yes, sir.

Q. Did you ever receive as a present of any kind any suit that was made by Greenhouse and Cordova? Of New York?

A. Yes, sir, I have it on.

Q. When did you receive that? A. 1944.

Q. And that is when you were connected with Cal-Neva Lodge, associated with Mr. Remmer in Cal-Neva Lodge? A. Yes, sir.

Q. That was, of course, before the inception of the Menlo Club under the partnership that we are talking about, is that correct? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. You stated you were interviewed by agents of the Internal Revenue, Mr. Ezralow, Mr. Morgan, Mr. Harkness and Mr. Weaver?

A. Only once by Mr. Weaver.

Q. And were you requested at any time by any or all of those agents to turn over any of the books of the various enterprises that you had charge of?

A. Yes, sir.

Q. Can you tell us by whom and when?

A. I believe the request came from Mr. Morgan and Mr. Harkness.

Q. What were you requested to turn over?

A. Well, they asked me—of course, I knew there was an investigation at the time—and they asked me if they could take [1376] certain books. They had books that related back to 1943, '44 and '45 that I had in my possession at that time and were given to me by Mr. Slater, and I turned over everything that I had that they asked for.

Q. When you say everything you had, do you mean in the way of cash books, ledgers, and so on?

A. Ledgers, and everything they asked for, yes.

Q. Now were the books of the year 1946 included in that request?

A. If they were not included, I believe they were the second time.

Q. Isn't it a fact that ultimately you were asked to turn over all the books that you kept for the various enterprises in which Mr. Remmer was interested, from the year 1943 up to the year 1948?

A. I believe—I am not quite positive of the date

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(Testimony of Harold H. Maundrell.)

—I believe the latter part of '46 or beginning of '47 that I turned over all the books up to 1947.

Q. Now was there a subsequent—you said something about subsequent request—was there a subsequent request for additional books?

A. Well, later on—I might state that during this interview I gave them the books with the understanding that I could have back the books whenever I wanted them and occasion arose where I asked them to bring me back certain books, which Mr. Morgan [1377] did. I don't remember just now what the books were. I don't remember what they all were, just certain books I had to have and then at a later date the books were all taken away again, I don't remember the date.

Q. At a later date they were taken out of the possession of Mr. Kyne, isn't that correct?

A. I believe they were. I believe he turned them over at that time.

Q. Now when you say you gave them the books with the understanding that they were to be returned to you when, if, and as you needed them, I take it from that that they actually took them physically away, is that correct? A. Yes.

Q. And when you had to refer to some of the books, they had to bring them back to you, is that correct? A. That is right.

Q. That meant in other words, when they left the office, they took them away?

A. Yes, the first time they took them away in two large boxes. I mentioned to Mr. Morgan at the

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(Testimony of Harold H. Maundrell.)

time, how are you going to carry those two big boxes?

Q. Did you get a receipt for these books?

A. I don't remember whether I received a receipt the first time.

Q. Did you at any time receive a receipt? [1378]

A. I don't remember.

Q. Did any of the agents at any time question you concerning any of the items that appeared in your books, either by way of inquiry or anything of that sort?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

Mr. Gillen: May I put one more question—I am not in disobedience to your Honor's ruling?

The Court: Yes, sir.

Q. Did any agent at any time require from you any explanation of anything that appeared in any of your books?

Mr. Campbell: Objected to as incompetent.

The Court: Same ruling.

Mr. Campbell: May I suggest a recess at this time?

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.) [1379]

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December 28, 1951—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Maundrell, in your direct testimony yesterday you stated that the name of William Remmer was on one of the social security forms or the employer's forms of the Menlo units, do you recall that? A. Yes, sir.

Q. And you identified that William Remmer as the nephew of Elmer Remmer, the defendant?

A. Yes, sir.

Q. And you also stated that returns had been made for the Menlo Club originally in the name of William Remmer doing business as the Menlo Club, do you recall that testimony? A. Yes, sir.

Q. Now I will show you the prosecution's Exhibits 89, 90 and 91 and defendant's Exhibit "Y." I will further identify these for you as the 1945 return and amended return, 1946 return and amended return of the Menlo Club. I will ask you to look at these and see if it isn't a fact that the returns were made, not in the name of William Remmer, doing business as the Menlo Club, but in the name of the Menlo Club? A. Yes, sir. [1380]

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(Testimony of Harold H. Maundrell.)

Q. Now you were mistaken about that, were you not, Mr. Maundrell?

A. I was as to the—that is the income tax return of the partnership.

Q. Now, Mr. Maundrell, I am going to hand you the prosecution's Exhibit 125, which you will recall as the Menlo Club ledger, and with regard to the payments that were made to Gene Schriber on account of the purchase of the Menlo Club units, namely, the social club, the bar and the restaurant, will you tell us just how those payments were made?

A. Well, the first payment was made before I entered into the picture.

Q. That was the payment of 25 thousand dollars cash on April 30 of 1945, is that correct?

A. That's right.

Q. And at that time you were employed and had engaged yourself at the Cal-Neva in the capacity you have heretofore described, is that correct?

A. Well, not at that moment. I was in southern California when it all took place.

Q. Well, you went to Cal-Neva in May in the season, did you not?

A. No, not until the latter part of June.

Q. Then when you went up to Cal-Neva, an arrangement was made for you to also employ yourself at the Menlo Club. During the balance of that summer season, I understood you to say that [1381] you spent part of your time in Cal-Neva and only a part of your time in San Francisco at the Menlo Club, is that correct? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. Then in the month of August of 1945, you were setting up books for the Menlo Club, were you not? A. That's right.

Q. And when you commenced to set up the books for the Menlo Club, from there on what were the payments that were made to Gene Schriber on account of the purchase price of the Menlo Club and the two other units, the bar and the restaurant?

A. Well, in the first place we decided, what I wanted——

Mr. Campbell: I am going to object on the ground the answer will not be responsible.

The Court: Just listen to the question, Mr. Maundrell, and confine your answer to the matters responsive to the question.

A. May I have the question?

(Question read.)

Mr. Gillen: Let me withdraw the question and ask you this.

Q. Did you initially, when you set up the books for the Menlo Club, do anything with relation to the initial payment of 25 thousand dollars cash?

A. Well, when I originally set up the books the 25 thousand dollars cash was set up in the [1382] books.

Q. Yes, and that was reflected on the page out of the ledger which is now prosecution's Exhibit 140, isn't that correct? A. Yes, sir.

Q. And that showed there had already been made, as of date of April 30th, the payment of 25 thousand dollars cash? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. Now did you thereafter, in the month of August, do anything with relation to that 25 thousand dollars cash that had already been paid?

A. Yes, sir.

Q. And what did you do?

A. I called in Mr. Schriber and Mr. Remmer and told them that we had better make out a check for 25 thousand dollars and to just exchange it for the 25 thousand dollars in cash.

Q. In other words, you asked Mr. Schriber to give you back 25 thousand dollars in cash, which you would deposit in the bank, and issue him a check for that payment, is that correct?

A. Yes, sir.

Q. And did Mr. Schriber return the 25 thousand dollars cash?

A. He returned that to Mr. Remmer.

Q. And was that turned over to you to put in the proper account? A. Yes, sir.

Q. And did you put it in the proper account?

A. Yes, sir.

Q. And did you thereupon issue check for 25 thousand dollars? [1383] A. Yes, sir.

Q. And that check was paid out of the proper account, is that correct? A. Yes, sir.

Q. Thereafter what was the next payment that was made?

A. Next payment was made September 8th.

Q. And that was in the sum of 25 thousand dollars, was it not?

A. Made in three separate payments.

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(Testimony of Harold H. Maundrell.)

Q. Three separate checks, all dated the same day, is that correct? A. Yes, sir.

Q. One check for 15 thousand dollars, one for $8500 and one for $1500, making a total of 25 thousand dollars, is that correct? A. Yes, sir.

Q. Do you recall why it happened to be three checks instead of one check?

A. Mr. Schriber made a request that I make out the checks that way.

Q. In other words, he wanted three separate checks? A. Yes, sir.

Q. In the amounts specified, is that correct?

A. Yes, sir.

Q. Now Mr. Campbell asked you regarding a 50 thousand dollar check that had been made out on August 8th and invalidated by tearing off the signature, or something of that sort. Do [1384] you recall the circumstances under which that check was made out and then invalidated?

A. Well, originally I made out the check for 50 thousand dollars. Twenty-five thousand of that was to take care of the original 25 thousand cash that had been paid in the original——

Q. Half of that check was to be covered by the money, the 25 thousand dollars Mr. Schriber was to return to you?

A. That's right. And then the other 25 thousand was for an additional payment.

Q. That was September payment or the second payment?

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(Testimony of Harold H. Maundrell.)

A. It was for the second payment.

Q. And do you recall why or under what circumstances you caused the check to be invalidated?

A. Well, when Mr. Schriber came to the office, I told him at the time that we didn't have 50 thousand dollars in the bank and asked him to hold it and he decided at that time he didn't want the check. He said, "You had better make me out a check for 25 thousand dollars," so the check was cancelled at that time and I made a further check out for 25 thousand dollars.

Q. So you made out a check for the cash he gave you for the 25 thousand dollars?

A. And then I made out an additional 25 thousand dollar check for the second payment and at that time I asked him to hold the check.

Q. I see. [1385]

A. And then after that he decided, "Well, I will just take the one check now." The check was cancelled out for the 25 thousand dollars cash and just forget about that check and cancelled that for the time being?

Q. So the 50 thousand dollar check was cancelled and one of the 25 thousand dollar checks was cancelled? A. Yes, sir.

Q. Now on the following month, when you paid him the 25 thousand dollars in three separate checks at his request, did he tell you why he wanted the checks in those particular amounts?

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

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(Testimony of Harold H. Maundrell.)

A. He wanted the checks made in different amounts because he had some obligations, he told me, that he wanted to pay.

Q. In other words, he wanted to use the checks directly to cover obligations of his own?

A. Yes.

Q. Now when was the next payment, or the third payment, made to Mr. Schriber on the purchase price of the Menlo units?

A. February 28, 1946, 25 thousand dollars.

Q. And that was made by check? A. Yes.

Q. And when was the next payment made?

A. May 1, 1946, 25 thousand dollars.

Q. And when was the next payment after that made? [1386]

A. May 1, 1947, 25 thousand dollars.

Q. Now do you recall, Mr. Maundrell, that there was one payment that was held up for a time because Mr. Schriber was unable to furnish the Menlo bar with a liquor license?

A. Yes, sir, that's correct.

Q. And that delayed the payment. The payment was retained, wasn't turned over until that liquor license was cleared, is that correct?

A. That's the reason the payment was not made until February.

Q. Of 1946?

A. '47. No, I beg your pardon, '46.

Q. That was the third payment that was held out? A. Yes, sir.

Q. Now the amounts due on these payments had

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(Testimony of Harold H. Maundrell.)

been evidenced by promissory notes, is that correct?

Mr. Campbell: Objected to—the notes are the best evidence.

The Court: Objection overruled.

A. I believe there were notes in existence at the time.

Q. Now after you had——

Mr. Campbell: Pardon me—I ask that the answer be stricken, based upon his belief.

The Court: Oh, it may stand.

Q. Mr. Maundrell, after you had arranged for Mr. Schriber to return the 25 thousand dollars in cash, so that you could issue [1387] a check for that 25 thousand dollars to have a check record or a bank record of that first payment or down payment, you did then, did you not, set up a new page in the ledger showing the transaction? A. Yes.

Q. And in other words, the page that is now marked prosecution's Exhibit 140, which is the photostat before you there, was corrected by the page which is in prosecution's Exhibit 125 and which has been marked 125C? A. 125C.

Q. So there were two corrections on that original page, 140, is that correct, one correction being the allocation of the value of the furniture, fixtures and merchandise and the lease, which was originally set up as 100 thousand dollars for the lease and 75 thousand dollars for the furniture, fixtures and merchandise, that was corrected after the State appraisal, isn't that correct? A. Yes, sir.

Q. And then the matter of payments to Schriber

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(Testimony of Harold H. Maundrell.)

was also corrected on 125C? A. Yes, sir.

Mr. Gillen: I will ask the clerk to mark these two pages for identification.

The Clerk: Defendant's "Z."

Q. Mr. Maundrell, the exhibit 140, which is a photostatic copy [1388] the page originally made in the ledger for the Menlo Club, incorrectly reflects the transcripts thereon, while Exhibit 125, the rewritten page, correctly reflects the transactions, is that true? A. Yes, sir.

The Court: When you mention 125 do you mean 125C?

Mr. Gillen: Yes, I do, your Honor, 125C is the page that we are interested in.

Mr. Campbell: Counsel you stated I had a copy of this. I have never seen that document.

Mr. Gillen: It was supplied by your office or the Internal Revenue.

Mr. Campbell: I have never seen the document.

Mr. Gillen: If counsel will check his files, I am sure you will find it.

Q. Mr. Maundrell, I will show you defendant's Exhibit "Z" for identification. I will ask you to look at it and tell us whether or not that fully reflects the status of payments by the Remmer interest to Schriber on account of the purchase of the Menlo units?

Mr. Campbell: If the Court please, the document itself purports to be document, shows in 1949, not signed by this witness, but signed by other individuals, and purports to be a recitation of some kind

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(Testimony of Harold H. Maundrell.)

and I submit that the document of this kind is not the best evidence for any purpose. [1389]

Mr. Gillen: May it please the Court, by this very witness in direct examination Mr. Campbell used the identical procedure in establishing the matter of the purchase of a safe. He presented a bill from Herman Bros., reciting a safe had been purchased by Mr. Kyne. He asked Mr. Maundrell to look at it and if that described the safe which was at 52 Mason Street and he asked Mr. Maundrell if he recognized the signature of William Kyne and on that foundation laid, he put that exhibit before the jury and read the exhibit. The identical procedure.

The Court: Let me see this exhibit please. Objection will be sustained.

Mr. Gillen: Well, I would like to read your Honor the transcript on that ruling your Honor made and your Honor will see it is the identical procedure that was used and as a matter of fact, Mr. Maundrell in that instance was called upon——

The Court (Interceding): This ruling will stand.

Mr. Gillen: May I finish my statement to your Honor?

The Court: There is nothing before the Court.

Q. Mr. Maundrell, you look at defendant's Exhibit "Z" for identification, on the signature page, the last page, and tell us whether or not you can identify the two signatures on that page?

Mr. Campbell: Objected to as incompetent and immaterial.

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(Testimony of Harold H. Maundrell.)

The Court: Objection overruled. You may answer that question.

A. Yes, I recognize both signatures. [1390]

Q. And whose signatures are they?

A. The first signature is Gene Schriber. The second signature is Elmer Remmer.

Q. Now I will ask you to read that document and tell us whether or not that truly reflects the status of the payments on the purchase of the Menlo Club as you, of your own knowledge, know them to be?

Mr. Campbell: Objected to as incompetent and immaterial and an attempt to summarize the testimony through the use of a document to which the witness was not a party.

The Court: Objection is sustained. After reading and examining the Exhibit "Z," I would not permit it to be introduced in evidence, so I don't see any sense in going along identifying it further.

Mr. Gillen: May it please the Court, he was first permitted to answer whether or not 125C truly reflected the transaction as he knew it. Now he is being asked to identify another document evidencing the status of the transaction as he knew it.

The Court: The ruling will stand.

Mr. Gillen: All right. Then on the foundation of his having recognized the signatures of both parties, may it please the Court, I will ask that defendant's Exhibit "Z" for identification be admitted in evidence.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: We object on all the grounds heretofore [1391] stated.

The Court: Objection will be sustained.

Mr. Gillen: Then, may it please the Court, I would like to be heard on the matter under whatever conditions your Honor imposes.

The Court: We will excuse the jury.

(Jury and alternate jurors admonished and excused at 10:30.)

(Argument in the absence of the jury.)

(NB 329 P. 26-33.)

The Court: The ruling will stand.

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Maundrell, after you had assembled your data for the returns for the Menlo Club, you turned them over to Mr. Ayton to prepare the returns, is that correct? A. Yes, sir.

Q. And then they were turned back to you by Mr. Ayton for the signature of Mr. Remmer, is that true? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. I will show you the prosecution's Exhibits 89 and 91 and defendant's Exhibit "Y" and I will identify them as 89, 1945 return of the Menlo Club, 91, the amended 1946 return of the Menlo Club, defendant's Exhibit "Y" the amended 1945 [1392] return for the Menlo Club, and I will ask you to tell us whether or not Mr. Remmer's signature appears on those three returns? A. Yes, sir.

Q. Did you present those to Mr. Remmer for his signature? A. Yes, sir.

Q. Did Mr. Remmer read those returns at the time he signed them?

Mr. Campbell: Objected to as calling for the witness' conclusion.

The Court: Objection overruled; if he knows.

A. No.

Q. He did not read them? A. No, sir.

Q. Now. Mr, Maundrell, I am going to hand you the prosecution's Exhibit 125, which contains several pages. This is the ledger of the Menlo Club, which contains a number of pages, some of which have been identified by letters accompanying the No. 125, and I will ask you to turn to the capital accounts of partner's page and will you look at the account of Oscar Nelson. Do you have that before you now? A. Yes, sir.

Q. Now on the 1945 Menlo Club return, the account of Oscar Nelson, under Schedule I of that return, shows that Oscar Nelson had a 10 per cent interest in the profits and that the profits credited to his account for the year 1945 was $11,548.88.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: From what exhibit are you reading? [1393]

Mr. Gillen: This is prosecution's Exhibit 89.

Q. Will you look at that account for Oscar Nelson and tell us what your ledger sheet reflects as to credit of profits to Mr. Nelson for the year 1945?

A. Mr. Nelson in 1945 had a balance of $11,548.88.

Q. What is that page designated, 125C?

A. This page I am looking at now is 125A.

Q. Will you look at 89 and see if that is the same figure, $11,548.88? A. Yes, sir.

Q. Now, Mr. Maundrell, you have seen that figure is identical as reflected in your book, the credit of profits to Mr. Nelson for the year 1945, $11,548.88 and as appears in the schedule, Schedule I for the 1945 return of the Menlo Club. Does that figure reflect Mr. Nelson's interest or equity in the business as of that time, built up by the profits?

Mr. Campbell: Objected to as calling for his conclusion in a legal matter which is in the province of the court, under the contract.

The Court: Objection will be overruled. You may answer the question.

A. Yes, it does.

Q. In other words, that represents the equity that Mr. Nelson had acquired at that time by leaving his profits in the business, is that correct? [1394]

A. Yes, sir.

Q. And that is what he paid income tax on as partner in that business, as being a partner with

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(Testimony of Harold H. Maundrell.)

one-tenth interest in that business, $11,548.88, isn't that correct?

Mr. Campbell: Objected to as calling for his conclusion as to what Mr. Nelson paid income tax on; not the best evidence.

The Court: Isn't that merely reading from the exhibit itself?

Mr. Gillen: That's right.

Mr. Campbell: Well, Mr. Nelson's returns were not here. He is asking if that is the amount Mr. Nelson reported on his individual income tax.

Mr. Gillen: No. If counsel understands it that way, let me put it this way.

Q. That is what Mr. Nelson was charged with in the partnership return, that much profit?

Mr. Campbell: I don't object to that question.

Mr. Gillen: That is nice. Then we can get along.

Q. I will show you, Mr. Maundrell, prosecution's Exhibit 89, 1945 return.

A. May I have the question?

(Question read.)

Q. Do you understand now?

A. Mr. Nelson had in his capital account a balance in 1945 of $11,548.88, the same as reflected in the partner's shares [1395] in the return of the Menlo Club for 1945.

Q. Maybe my question isn't clear. That is what he is charged with in the income tax to pay tax on?

Mr. Campbell: I object to the question in that form. I think it is evident, if the Court please, that

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(Testimony of Harold H. Maundrell.)

the same amount that is in the books is reflected in the partnership return.

Mr. Gillen: But insofar as profits out of the partnership, he would be responsible to pay taxes on that amount?

Mr. Campbell: I object to that question, calling for conclusion of this witness.

Mr. Gillen: He may have some other income he paid income taxes on over and beyond this enterprise.

The Court: Let me have the question.

(Question read.)

The Court: You may answer the question.

A. I do not understand the question.

Mr. Gillen: I will withdraw it.

Q. Now, Mr. Maundrell, you were questioned about two checks that you issued—I took your book away from you too soon, Mr. Maundrell—with the Court's permission I will hand you this ledger again, prosecution's Exhibit 125, and reading from prosecution's Exhibit 90 in evidence, which is the 1946 return of the Menlo Club the following year; I will ask you to turn to the capital accounts of the partners, Mr. Oscar Nelson again, [1396] and reading from this return under Schedule I, it appears in this Exhibit 90 that Mr. Nelson's interest had increased to 15 per cent and that it is reflected here that he reported on the profits for the year 1946 as a partner with a 15 per cent interest in the Menlo Club in the sum of $12,524.49. Will you read what

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(Testimony of Harold H. Maundrell.)

the ledger sheet reflects was his profits as reflected on your capital account for Mr. Nelson for the year 1946? A. 1946 profit, $12,524.49.

Q. And will you look at prosecution's Exhibit 90 and tell us is that the identical amount that appears in the income tax return for the year 1946?

A. Yes, sir.

Q. Now that entry in your ledger means that Mr. Nelson, as a result of leaving his profits in the business, had acquired, as of that time, that is of the balance of the year 1946, the end of the year 1946, an equity or interest in the business to the extent of $12,524.49?

Mr. Campbell: Objected to as calling for his conclusion. He is calling for a legal conclusion which is in the provice of the Court.

The Court: Doesn't it amount to this—couldn't the question be put this way: "Did a credit of that amount remain on the books at the end of that year?"

Mr. Gillen: Yes, acquired from the profits that he had participated in? [1397]

The Court: I think it amounts to the same thing, so the objection will be overruled. He may answer the question.

Mr. Campbell: That is the latter question, the question suggested by the Court?

The Court: Of course, I can not suggest questions to counsel.

Mr. Gillen: I think the Court's suggestion is right.

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(Testimony of Harold H. Maundrell.)

The Court: Very well; you may answer the question.

A. In 1946 he had credited to his account $12,524.49. At that time he had a balance of $11,548.88, which gave him a total balance of $24,073.37.

Q. So that accumulated profits that he left in the business, they gave him that interest in the business, is that correct?

Mr. Campbell: I object to the question in that form.

Mr. Gillen: This is cross-examination.

The Court: I think it amounts to the same thing. Objection overruled.

A. Yes, sir.

Q. These partners did, from time to time, draw on their accounts to pay income taxes on the amount of their profits, isn't that so? A. Yes, sir.

Q. What is the next entry that appears after the 1946 that you have read there? What is the next entry that appears on [1398] the Oscar Nelson account?

A. Pay Collector of Internal Revenue $3,282.16, leaving a balance of $20,791.21.

Q. In other words, that means that out of the credit on the books Mr. Nelson drew enough money to pay his income tax on those profits, is that correct? A. Yes, sir.

Q. Now, Mr. Maundrell, will you read us the next entry of the Oscar Nelson account?

A. Franchise Tax Commission—that is for the

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(Testimony of Harold H. Maundrell.)

State of California—$96.13, leaving a balance of $20,695.08.

Q. That last amount was payment of the individual income tax to the State of California?

A. Yes, sir.

Q. What was the next item after that?

A. In 1947——

Q. Pardon me just a moment. That means, does it not, that Mr. Nelson also withdrew 96 odd dollars to pay his income tax to the State of California on those profits? A. Yes, sir.

Q. All right, what is the next item?

A. 1947 he collected $750, paid to the Collector of Internal Revenue, leaving a balance of $19,945.08.

Q. And that means he withdrew from his credit on the books 700 odd dollars to pay the Internal Revenue Collector, is that [1399] correct?

A. Yes.

Q. What is the next item on Mr. Nelson's sheet?

A. Paid to Collector of Internal Revenue for 1947, $1,878.24, leaving a balance of $18,066.84.

Q. All right, what is the next item?

A. He withdrew to pay the Franchise Tax Commission, State of California, $67.90, leaving a balance of $17, 998.94.

Q. All right, what is the next item?

A. In march of '47 he drew on the account $2000, leaving a balance of $15,998.94.

Q. All right, and what is the next item?

A. August 8th——

Q. This is 1947?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir. He drew to pay Collector of Internal Revenue $18.78, leaving a balance of $15,980.20.

Q. What is the next item?

A. September 1st he paid the Collector of Internal Revenue on estimated tax $1500, leaving a balance of $14,480.16

Q. What is the next?

A. September 23rd on the amended tax return he paid $40.89, leaving a balance of $14,439.27.

Q. And now will you give us the next item?

A. September he drew on the account $2,000, leaving a balance of $12,439.27. [1400]

Q. And what is the next item?

A. In November he drew $2,000, leaving a balance of $10,439.27.

Q. This is still 1947, is it? A. Yes, sir.

Q. What is the next item?

A. December he drew on the account $2,000, leaving a balance of $8,439.27.

Q. And what is the next item after that?

A. 1948 paid Collector of Internal Revenue $750, leaving a balance of $7,689.27.

Q. What is the next item?

A. That is the last item in the book.

Q. There was a credit left on the books there, was there not? A. Yes, sir.

Q. About $7600. A. $7,689.27.

Q. So that the equity, something in excess of 20 thousand dollars he built up out of the profits, he

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(Testimony of Harold H. Maundrell.)

withdrew for his own use and benefit, all but $7600, is that correct? A. Yes, sir.

Q. Now, Mr. Maundrell, you were questioned concerning two checks that were issued by you in November of 1945—November 16th, I believe was the date—for six thousand dollars to Lou Brice and Mattie Silverman. Those two checks, totalling 12 thousand dollars, represented a 12 thousand dollar investment [1401] that Mr. Remmer made in a night club in New York with Mr. Brice and Mr. Silverman, is that correct? A. Yes, sir

Q. And that night club failed, did it not?

A. Yes, sir.

Q. In how short a time? A. About 8 days.

Q. It operated about 8 days and failed?

A. Yes, sir.

Q. Did Mr. Remmer ever get back any of the proceeds of those two checks for 12 thousand dollars?

Mr. Campbell: Objected to as calling for his conclusion.

The Court: Objection sustained.

Q. Up until the time you left the association with Mr. Remmer in 1948, to your knowledge did any of that money ever come back? Did he recover any of that 12 thousand dollar investment?

Mr. Campbell: Also calling for conclusion

The Court: Same ruling.

Mr. Gillen: I am asking if he had knowledge. He is the man that handled that.

The Court: Answer that question yes or no.

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(Testimony of Harold H. Maundrell.)

Q. Do you have the question in mind?

A. Yes, sir.

Q. Some of the money did come back?

A. Yes, sir. [1402]

Q. Part of the 12 thousand dollars?

A. Yes, sir.

Q. How much did he get back out of the 12 thousand dollars?

A. I believe around eight thousand dollars.

Q. And in what form did that come?

A. That I do not know.

Q. Did it pass through your books?

A. No, sir.

Q. It didn't pass through your books?

A. No, sir.

Q. So that there was lost on that investment how much?

Mr. Campbell: Just a minute—objected to as calling for his conclusion. He knew some money came back but otherwise it would be conclusion as to whether the balance was paid.

The Court: It is just a matter of deducting 8 thousand from 12 thousand.

Mr. Campbell: Yes, but he wouldn't know whether or not the balance of the four thousand was returned.

The Court: Objection will be sustained.

Q. Do you know when that 8 thousand dollars came back and in what form?

A. No, I do not.

Q. It didn't pass through your hands?

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(Testimony of Harold H. Maundrell.)

A. No, sir.

Q. I ask you for your knowledge on the subject. Did it come [1403] back after 1948?

A. It was way before 1948.

Q. Well, do you know when it came back? Do you have any knowledge on the subject?

A. No, I don't remember at this time.

Q. You don't remember when it came back?

A. No, sir.

Q. What is your information on the subject, based on what somebody told you or what you saw yourself?

Mr. Campbell: That is objected to——

The Court: Objection sustained.

Mr. Gillen: I asked for his knowledge, your Honor. The objection was made by counsel to my initial question that I was calling for his opinion, calling for hearsay.

The Court: You may answer the question.

A. May I have the question?

(Question read.)

A. I had a conversation with both Mr. Remmer and Mr. Brice.

Q. And when was that conversation?

A. Well, the conversation with Mr. Remmer was about four or five months, I believe, after the ill-fated night club folded up in New York, at which time he told me he received back about 8 thousand dollars.

Q. And when was your conversation with Mr. Brice?

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(Testimony of Harold H. Maundrell.)

A. I had a conversation with Mr. Brice about two months ago in [1404] Honolulu.

Q. So that your information on the subject is based on what was told to you by these two men?

A. That's right.

Q. You have no personal knowledge of how much was returned, from your own knowledge?

A. No, sir.

Mr. Gillen: Well then, may it please the Court, I move the testimony be stricken as not responsive. The question was based upon his personal knowledge on the subject. When the initial question was asked, when I used the word "knowledge," counsel offered the objection I was calling for hearsay evidence and your Honor ruled that if the word, "his own personal knowledge" was included in the question, he could answer on the basis of his own personal knowledge.

The Court: Motion denied, the answer will stand.

Mr. Gillen: Not that it is based on hearsay?

The Court: Motion denied.

Q. Your knowledge then, outside of the issuance of checks for 12 thousand dollars, was based on hearsay?

Mr. Campbell: Just a moment——

The Court: Objection sustained.

Q. Now, Mr. Maundrell, in the course of your duties in keeping the books of account of the Menlo Club and various other enterprises that you have stated that you kept books for, including [1405]

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(Testimony of Harold H. Maundrell.)

some attention to Mr. Remmer's personal account, did you ever prepare a promissory note for Mr Remmer's signature? A. Yes.

Mr. Campbell: Just a minute.

The Court: The answer may go out.

Mr. Campbell: Objected to on the ground it is not within the scope of direct examination.

(Question read.)

The Court: What is your objection?

Mr. Campbell: Not within the scope of direct examination.

The Court: Objection overruled. You may answer the question.

A. Yes.

Q. And that promissory note was for the sum of 50 thousand dollars that Mr. Remmer borrowed, was it not?

Mr. Campbell: Objected to as not the best evidence, if the Court please. He says "that promissory note." He asked him first, "Did you ever prepare a note?" and then he says "that promissory note was for 50 thousand dollars." I submit the promissory note is the best evidence.

Mr. Gillen: I will withdraw the question.

Q. It is true, is it not, that you prepared a promissory note for Mr. Remmer's signature for the sum of 50 thousand dollars borrowed from a certain person? [1406]

Mr. Campbell: I make the same objection.

The Court: Objection sustained.

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: That isn't the best evidence?

The Court: I don't know how this witness can testify why Mr. Remmer wanted the note.

Mr. Gillen: I will ask this be marked for identification.

The Clerk: Defendant's A-1.

Q. Mr. Maundrell, I will show you defendant's Exhibit A-1 for identification. I will ask you to look at this and tell us if you recognize this instrument? A. Yes, sir.

Q. Whose letterhead was that?

A. My personal letterhead.

Q. And that is the letterhead you used during the time that you were managing the affairs that you have described here for the Menlo Club and other enterprises? A. Yes, sir.

Q. And at whose instance and request, if anybody's, did you make out that document?

A. At Mr. Remmer's.

Q. Who else was present when that was made out? A. Mr. Jeffres.

Q. Where is Mr. Jeffres now, if you know?

A. I understand he passed away.

Mr. Gillen: I offer this, may it please the Court, as [1407] defendant's exhibit next in order.

Mr. Campbell: Objected to as no proper foundation laid as to the time of preparation. Further, it was not prepared within the scope of events set forth in the indictment; secondly, in addition to the lack of proper foundation, that it is not within the scope of direct examination of this witness, as will

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(Testimony of Harold H. Maundrell.)

appear upon examination of the document itself.

Mr. Gillen: I will ask a couple of more questions, your Honor.

Q. Look at this document again and tell us whether or not it was made out on the date it bears?

A. Yes, it was made out September 27, 1946.

Q. And by whom was it prepared?

A. I prepared it.

Q. Did you type it yourself? A. Yes, sir.

Q. And as to the purported signature on there, whose signature is that, do you know?

A. Mr. Remmer's.

Q. Did you see him sign that?

A. Yes, sir.

Q. In whose presence?

A. In the presence of Mr. Jeffres and myself.

Q. Where was that signed?

A. At Mr. Remmer's office, 50 Mason [1408] Street.

Mr. Gillen: I offer it in evidence.

Mr. Campbell: Objected to on the grounds of immateriality and not within the scope of direct examination.

The Court: Objection overruled. It may be admitted in evidence. Exhibit A-1.

Q. Now, Mr. Maundrell, will you relate from the begining to end under what circumstances you were directed to, and did, prepare that exhibit?

Mr. Campbell: Objected to as incompetent, call-for a narrative statement.

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(Testimony of Harold H. Maundrell.)

The Court: I will sustain the objection.

Mr. Gillen: Well, I would like to be heard on that, your Honor.

The Court: Very well, I will excuse the jury. I think the question is rather indefinite and it can't be anticipated what will be expected in the way of an answer or what will come.

Mr. Campbell: I can not interpose proper objections to a question of this kind.

Mr. Gillen: All right.

Q. Mr. Maundrell, on the day that this document was made out, where were you?

A. I was in the office, 50 Mason Street.

Q. Was Mr. Remmer there?

A. Yes, sir. [1409]

Q. Was Mr. Remmer in the same room that you were in? A. Part of the time.

Q. Now were you present when Mr. Jeffres first appeared there? A. Yes, sir.

Q. And did Mr. Jeffres bring anything with him? A. Yes, sir.

Q. What did he bring?

A. He brought a package with some money in it.

Q. What was the appearance of the package?

A. Wrapped up in a newspaper.

Q. What, if anything, did he do or say about the package with the money in it when he arrived?

A. He told me he had a package for Mr. Remmer.

Q. What did you do?

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(Testimony of Harold H. Maundrell.)

A. I told him Mr. Remmer was in his own office, so he went back to Mr. Remmer's office.

Q. What happened next?

A. About—I don't remember the time, 10 or 15 minutes later, Mr. Remmer came out of his office and asked me to come into his office, which I did.

Q. Who was present in the office when you went in? A. Mr. Remmer and Mr. Jeffres.

Q. What was said then?

A. Mr. Remmer asked me to make out a note to Mr. Jeffres for 50 thousand dollars. [1410]

Q. What, if anything was said then by any one?

A. Well, I think at the time I asked him whether he wanted an installment note or just a straight note. Mr. Jeffres said, "Just a little simple note so I have something to show for this."

Q. Mr. Jeffres said, just a little simple note so he would have something to show for it?

A. Yes.

Q. And as a result of that, did you make out that note? A. Yes, sir.

Q. You took your own stationery and went out to your typewriter and typed up that note, is that correct? A. Yes, sir.

Q. You brought it back in and saw Mr. Remmer sign it? A. Yes, sir.

Q. Did you see what Mr. Remmer did with the note? Did he give it to Mr. Jeffres?

A. He gave the note to Mr. Jeffres.

Q. In your presence? A. Yes, sir.

Mr. Gillen: At this time, may it please the

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(Testimony of Harold H. Maundrell.)

Court, I desire to read this exhibit to the jury. This is a letter size sheet, on the top of which appears in printing, "Property Management, 50 Mason Street, San Francisco, California." (Reads Exhibit A-1.) And then a signature line and on the signature line in pen and ink the signature Elmer F. Remmer. [1411]

(Jury and alternate jurors admonished and noon recess taken at 11:45.)

December 28, 1951, 1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MAUNDRELL

resumed the witness stand on further

Cross-Examination

By Mr. Gillen:

Mr. Gillen: During the noon recess, in order to shorten the balance of the cross-examination, which will be very brief, we asked Mr. Maundrell if he would personally total up the figures that Mr. Campbell had him read of the monthly gross totals of the Menlo Club. We have just discovered that we gave Mr. Maundrell one wrong figure which throws him out $400. We would like to correct that.

Q. Mr. Maundrell, at the noon recess, and in the

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(Testimony of Harold H. Maundrell.)

interest of time, you were requested, were you not, by defense counsel if you would take the figures that Mr. Campbell had you read in direct examination from your records of the monthly totals of the Menlo Club reported income, do you recall that?

A. Yes, sir.

Q. And there was one figure given to you for the month of May, 1946, I believe total figures of January 2nd to and including December, 1946—what figure were you given? A. $26,545.35. [1412]

Q. I think the correct figure is $26,945.35. Will you, Mr. Maundrell, add $400 to the $26,545.35 and tell us what your total is? A. $412,543.80.

Q. Now, Mr. Maundrell, having made that correction, I will ask you, you recall, do you not, that Mr. Campbell, in his direct examination, asked you to examine Exhibit 126, prosecution's Exhibit 126, which purported to show the monthly totals of the Menlo Club, total receipts and returns, do you recall that? A. Yes, sir.

Q. Do you recall that Mr. Campbell had you read from your records the totals for January through and including the month of December of 1946, do you recall that? A. Yes, sir.

Q. Now those totals that you read to Mr. Campbell, did they represent the gross totals or the net totals after the payment of salaries and expenses, and so on? A. They were the gross totals.

Q. Without the deduction of salaries or other expenses, is that correct? A. Yes, sir.

Q. Now I am going to place in your hands, in

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(Testimony of Harold H. Maundrell.)

case you wish to refer to it, prosecution's Exhibit 126 in evidence, and I am going to ask you to compare, if you wish, the monthly gross totals against the monthly gross totals that you have—— [1413]

Mr. Campbell: If you state they are the same figures you supplied, I have no objection.

Q. Now, Mr. Maundrell, what was the grand gross total shown for the 12 months of 1946, according to the addition which you made at the noon hour from the monthly figures?

A. $412,543.80.

Q. Now I am going to show you prosecution's Exhibit 90 in evidence, and that I will identify as the 1946 return of the Menlo Club, and I am going to ask you to look at item 1, where it is described as gross income, and tell us what is the grand gross total of the income of the Menlo Club as reported on that 1946 return? It is the first item at the top of the page. A. $412,543.80.

Q. Now will you read your total from the figures that were given to you again? A $412,543.80.

Q. Looking at that return, will you tell us what that return shows as deductions for salaries and other expenses paid out of that gross of 412 thousand odd dollars?

A. It shows under cost of goods sold, that is scratched out and under No. 2(a) promotion expenses, $3,263.00; under (b) playing cards $22,037.53, making a total of those two lines, $25,300.53, leaving a gross profit of $387,243.27. Now the next line is income from Tiny's Waffle Shop for the year

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(Testimony of Harold H. Maundrell.)

showed deficit of $18,661.42. Under No. 8, rents, which was the rental [1414] of the cigar stand, $1200, $100 a month for rent of the cigar stand in the entrance to the Menlo Club. That left a balance of $369,781.85. Next is salaries, $227,008.52; rent, $7800; repairs, $782.47; taxes, $7,545.68; depreciation, $200.00; other deductions authorized by law, $33,248.61.

Q. Those are all the deductions out of that gross amount, is that correct? A. Yes, sir.

Q. Now Mr. Campbell didn't ask you to state what the net income was. Will you state what the return shows to be the net income after those deductions from that 400 thousand odd dollar figure?

Mr. Campbell: I object to the first statement of counsel and ask that be stricken, as to what I did or did not ask.

The Court: That may be stricken.

A. Line 26, on the ordinary net income, $93,196.57.

Q. Now, Mr. Maundrell, the last figure that you read, $93,196.57, that represented the total net income for the entire partnership in the Menlo Social Club, Tiny's Waffle Shop and the Menlo Bar, is that correct?

A. According to this return, yes, sir.

Mr. Gillen: I think that concludes the cross-examination.

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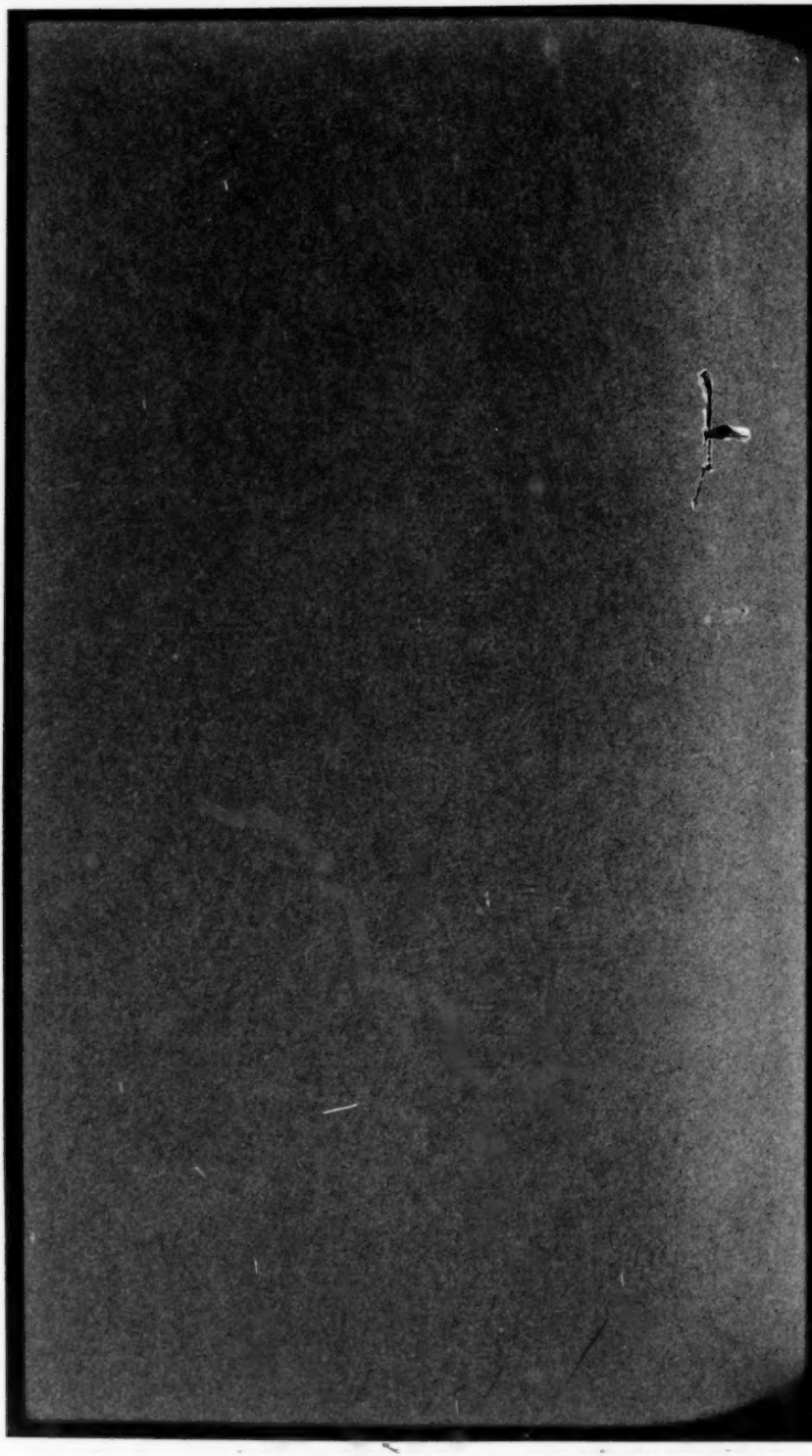

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Nine Volumes

Volume V
(Pages 1849 to 2300)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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(Testimony of Harold H. Maundrell.)

Redirect Examination

By Mr. Campbell:

Q. Mr. Maundrell, I am going to refer to defendant's Exhibit [1415] A-1, the purported promissory note dated September 27, 1946, in amount of 50 thousand dollars to Robert L. Jeffres and signed Elmer F. Remmer, concerning which you testified on cross-examination. Now, Mr. Maundrell, did you type up this note on the date that it bears, September 27, 1946? A. Yes, sir.

Q. There is no doubt in your mind as to that?

A. No, sir.

Q. Now do you recall what time of day these various matters took place?

A. It was in the afternoon, early afternoon.

Q. Do you recall approximately what time?

A. It might have been around noon or around one o'clock.

Q. Had you known Mr. Jeffres prior to that time? A. Yes, sir.

Q. How long a time had you known him?

A. About five years, I believe.

Q. And where had you known him?

A. I met him for the first time at Cal-Neva Lodge.

Q. Was he associated or connected with Cal-Neva Lodge? A. An office manager there.

Q. And was he office manager there at all times that you were employed there? A. No, sir.

Q. Over what period of time was he office manager, do you know? [1416]

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(Testimony of Harold H. Maundrell.)

A. I think he was there two years while I was there.

Q. Do you know on September 27, 1946, what his occupation was?

A. I believe he owned the Tuxedo Bar.

Q. Is that a bar located in what is known as the Ambassador Hotel in San Francisco?

A. Yes, sir.

Q. Do you know the nature of his interest, whether employed or partnership?

A. No, I don't know. It was a partnership, I believe.

Q. Do you know how long he had been in there?

A. No, sir.

Q. Do you know who supplied him with the money with which to purchase the partnership in that bar? A. No, sir.

Q. On this occasion of September 27, 1946, I believe you stated that Mr. Jeffres, Robert L. Jeffres, came into the office carrying a bundle wrapped in a newspaper? A. Yes, sir.

Q. Did you at any time see what was contained in that bundle? A. Yes, sir.

Q. When was that?

A. That same day in Mr. Remmer's office.

Q. And was that during the time that Mr. Jeffries, Mr. Remmer and yourself were present?

A. Yes, sir. [1417]

Q. Was the bundle opened in your presence at that time?

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(Testimony of Harold H. Maundrell.)

A. No, it had been opened and there was money on Mr. Remmer's desk.

Q. Did you count the money? A. No, sir.

Q. Do you know how much money was there?

A. No, sir.

Q. Did you observe the denominations of the bills? A. No, I did not.

Q. Did you see the money after that occasion?

A. No, sir.

Q. Did you, yourself, have anything to do with the handling of the money? A. No, sir.

Q. Did you make any entries in your books with regard to that money? A. No, sir.

Q. Do you know the source of that money, other than the fact that you saw Mr. Jeffers come there with a package on that day? A. No, sir.

Q. Do you know, of your own knowledge, whether or not Mr. Jeffers was the owner of that money? A. No, sir.

Q. I believe you stated that you yourself typed up this note, defendant's A-1, is that [1418]correct? A. Yes, sir.

Q. Was this note signed in your presence?

A. Yes, sir.

Q. What was done with the note?

Q. Gave it to Mr. Jeffers.

Q. Did you see him again on that day?

A. After this period?

Q. After it was given to Mr. Jeffers?

A. No, sir.

Q. When was the next time you saw the note?

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(Testimony of Harold H. Maundrell.)

A. When it was presented to me today in court.

Q. In the meanwhile, I will ask you whether or not you had seen a photostatic copy of the note?

A. Yes, sir.

Q. And when did you see that?

A. During this last week.

Q. Do you recall when?

A. It might have been last Tuesday or Wednesday—not Tuesday—it might have been before Christmas.

Q. And where did you see that?

A. I think it was Mr. Avakian showed it to me.

Q. Was that the first time you had seen the note, or photostatic copy of it, since the date of September 27, 1946? A. Yes, sir.

Q. During the last week did you see the photostatic copy on [1419] more than one occasion?

A. No, just the once, I believe.

Q. Where was it shown to you?

A. I think I saw it in Mr.—I am not sure whether in Mr. Avakian's room—I believe it was—at the hotel.

Q. Now were you ever present at any time when this money was wrapped? A. No, sir.

Q. Do you know when the money was wrapped, if it was? A. No, sir.

Q. Do you know whether or not it was wrapped that same day? A. No, sir.

Q. You have no knowledge on that subject?

A. No knowledge at all.

Q. Do you have any knowledge to what purpose

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(Testimony of Harold H. Maundrell.)

the money was placed, if it was placed to any purpose, by Mr. Remmer?

A. I have no knowledge at all.

Q. During the period of your employment, either at Cal-Neva or with the Menlo Club, did you see Mr. Jeffers on many occasions? A. Yes, sir.

Q. And how often would you see him?

A. Well, I might see him two or three times a week.

Q. During the entire period?

A. Well, the time of my employment at Cal-Neva Lodge, while [1420] he was there, I saw him every day.

Q. I mean subsequently, when you became associated with the Menlo Club? A. No.

Q. How often; did you see him often?

A. Oh, maybe several times a week, he would drop in to 110 Eddy.

Q. On the occasions when you saw him, will you state whether or not he was in company with Mr. Remmer?

A. No, sir. I have seen him in company with Mr. Remmer, but not every time I would meet him.

Q. Do you recall how large this package was that you saw in Mr. Jeffers' possession?

A. Well, a fairly large size package, I can't say at this time.

Q. Well, your best recollection as to the size?

A. Well, I imagine it was about, it might have been four or five inches thick, I don't remember.

Q. I don't know whether I asked you or not, did you observe the denomination of bills?

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: You did ask him and he said he didn't.

A. I didn't.

Q. Now I believe you stated to Mr. Gillen that this note is drawn up on stationery which you had printed; is that correct? A. Yes, sir.

Q. Where did you have that stationery printed?

A. I don't remember at this time. [1421]

Q. Do you recall when you had it printed?

A. Yes, on or about maybe September or October of 1945.

Q. 1945? A. Yes, sir.

Q. Isn't it a fact that you had more than one order of this stationery printed?

Mr. Gillen: Of course, may it please the Court, I am going to object to the form of the last question. It is a cross-examination question and not redirect—isn't it a fact—he is cross-examining his own witness throughout this redirect examination.

The Court: Try to avoid leading as much as you can.

Mr. Campbell: Yes, your Honor.

Q. Did you have more than one order of this stationery printed up?

A. I may have, I don't remember at this time.

Q. I ask you did you have an order of this stationery, that is, bearing the heading, "Property Management," printed up subsequent to September 27, 1946? A. Yes, sir.

Q. Do you recall when you had that printed up?

A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. Is the name Lauber Printing Company familiar to you? A. I don't remember at this time.

Q. Now directing your attention to government's Exhibit 125, [1422] the ledger of the Menlo Club, 1947, Mr. Gillen asked you to turn to certain accounts which he denominated "Capital Accounts," do you recall that? A. Yes, sir.

Q. And will you turn to the same accounts. Are you referring to the accounts which have been marked plaintiff's 125A and 125B?

A. Yes, sir.

Q. Are you referring to any additional accounts there? A. Yes, sir.

Q. To what additional accounts are you referring?

A. Well, there are three pages in this book.

Q. Which are headed in what manner? What is the top heading? A. Partner's Account.

Q. And those were also accounts to which you referred when Mr. Gillen was asking you as to what was shown by the capital account of the various partners?

Mr. Gillen: Objected to as assuming something not in evidence. I did not ask him about any other accounts but just an example of one account.

The Court: Let us get the question.

(Question read.)

Mr. Gillen: The only account we referred to was Mr. Maundrell's account and Mr. Nelson's account, to merely get [1423] examples of how the accounts were carried through.

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(Testimony of Harold H. Maundrell.)

The Court: I take it that the accounts which he is now examining would be one or the other of these two.

Mr. Campbell: I will reframe the question.

Q. When Mr. Gillen was asking you in regard to Mr. Nelson's capital account, are those the pages to which you referred? A. Yes, sir.

Q. Now, Mr. Gillen directed your attention on Exhibit 91 to Schedule I of the partner's shares of income and credit, calling your attention, I believe under that schedule to Oscar F. Nelson, 15 per cent, $8,238.06, is that correct? A. Yes, sir.

Q. And you stated, I believe, that that was shown on this capital account in the book?

Mr. Avakian: What is that exhibit?

Mr. Campbell: Amended 1946 return of the Menlo Club.

Mr. Avakian: I think the record will show that we asked about Exhibit 90.

Mr. Campbell: Very well.

Q. I will show you Exhibit 90, which is the original 1946 return, and your attention was directed under Schedule I to Oscar F. Nelson, 15 per cent, $12,524.49? A. Yes, sir.

Q. And you stated, I believe, that that same amount was shown in Mr. Nelson's capital account as being his distributive share? [1424]

A. Yes, sir.

Q. Now let me also call your attention to that exhibit to the balance sheet, Schedule H under the heading "Partners' Capital Accounts, Oscar F. Nel-

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(Testimony of Harold H. Maundrell.)

son," under the small letter "c" beginning of taxable year, $1580, end of taxable year, $2340. You observe those figures? A. Yes, sir.

Q. Now will you show me where in the books such a capital account is set up reflecting that as being the capital investment by Mr. Nelson as of the beginning and end of the taxable year 1946, in the Menlo Club?

A. That was handled by Mr. Ayton. He would have that in his work sheets.

Q. Do you have anything in your records relative to that? A. No, sir.

Q. Now, Mr. Maundrell, with reference to these accounts which are before you, are they in fact capital accounts or drawing accounts?

Mr. Gillen: I submit the records speak for themselves. The exhibit was introduced by the government. This is calling for an interpretation.

The Court: Objection will be overruled. You may answer the question.

A. Capital accounts.

Q. Well then can you state—you stated, I believe that you [1425] supplied the information that went into the making of plaintiff's Exhibit 90—how the capital account of Oscar F. Nelson figure of $2340, was arrived at?

A. That I don't know. That was done by Mr. Ayton, the auditor.

Q. And is there anything in your records which you maintained which would reflect this figure?

A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. Now directing your attention again to plaintiff's Exhibit 90, and to the capital account of the partners, I direct your attention that in the balance sheet for partner's capital accounts at the beginning of the year there is listed Masse Ditto, $1580, but no amount at the end of the year and for Wm. C. Fricker at the beginning of the year $1580, but no amount at the end of the year. Do you have anything in your records there that would indicate the manner of the disposal or writing off of the capital account of those two individuals during 1946?

Mr. Gillen: Objected to as improper redirect examination. It is immaterial so far as the evidence going in but counsel is reviving his direct examination. Nothing was asked in cross-examination about any partner's accounts except Mr. Maundrell's own account and Mr. Nelson's, merely to demonstrate how the accounts were carried over and the same figures reflected in income tax returns. It is improper redirect and we object on this ground.

The Court: It seems to me it is. [1426]

Mr. Campbell: I might state this, your Honor, I disagree with counsel. The matter of the capital accounts and the manner of their keeping and withdrawals was gone into by Mr. Gillen on cross-examination. It is true that he used two of them as illustrative, as he said. Then he went on and asked this witness if it was not a fact that he, this witness, supplied to Mr. Ayton all of the figures which were used to make up the returns and that subsequently Mr. Ayton would return these partnership returns

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(Testimony of Harold H. Maundrell.)

to him, so that he could secure the signature. Now I think on the basis of that, we are entitled to show that the figures set forth on the returns in certain respects are not reflected in the books. I think the subject was opened up to the extent that we were permitted to do so, and if the Court feels that this is not proper redirect examination, I will ask permission, for this purpose, of reopening the direct examination.

The Court: You may ask those questions on direct.

Mr. Gillen: May I offer this objection. Counsel refers to accounts as purported accounts. These exhibits are exhibits that the prosecution put in as their own exhibits and they relied on them and they are bound by them.

The Court: Well, the word "purported" will be stricken.

Mr. Campbell: I object to counsel's statement.

The Court: The jury have been instructed three or four times, and I will do it again, get back to the [1427] fundamental things. You will decide this case only upon the evidence that you hear from this witness stand, the testimony of the witnesses and the exhibits, and remarks of the Court, remarks of counsel, arguments of counsel, are not evidence, any exchanges between the different counsel and the Court and counsel are not to be regarded by you or to influence you in any respect. Just remember you are to decide the case entirely upon the evidence.

Mr. Gillen: May I say this, your Honor, I do not

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(Testimony of Harold H. Maundrell.)

know what counsel had to complain about. I merely gave the reason for my objection and the Court ruled upon it.

The Court: Well, I think we will have no trouble about that.

Mr. Gillen: Now we understand Mr. Campbell is being permitted to reopen his direct examination?

The Court: Yes.

Mr. Campbell: I will indicate when I am going back to redirect. This is a direct examination question.

(Last question read.)

A. No, I do not.

Q. Do you know how that figure was arrived at?

A. No, sir.

Q. After the year 1945 were either Mr. Ditto or Mr. Fricker connected with the operation of the Club? [1428] A. No, sir.

Q. Now there is shown, is there not, on the books of account that you have there, a credit to their accounts for profits in 1945? A. Yes, sir.

Q. And were those profits, to your knowledge, ever paid to them? A. Not to them.

Q. Had they been paid to them up to the time you terminated your employment?

A. Not to my knowledge.

Mr. Campbell: Now I will resume redirect examination.

Q. Now with regard to Oscar Nelson, Mr. Gillen asked you to read certain entries made in his ac-

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(Testimony of Harold H. Maundrell.)

count, where various sums were drawn payable to the Collector of Internal Revenue and to the State franchise tax commission, and in addition certain sums of two thousand dollars which were shown as withdrawn by Oscar Nelson, do you recall that?

A. Yes, sir.

Q. You have that sheet before you?

A. Yes, sir.

Q. Now with relation to the amounts paid to the Collector of Internal Revenue and State Franchise Commission, were they withdrawn in cash or by check? A. Most of those were by check.

Q. And to whom were the checks payable in case of amounts withdrawn [1429] for the purpose of the Collector of Internal Revenue and State Franchise Tax Commission?

A. I believe they were drawn directly to the Collector of Internal Revenue.

Q. And to the State Franchise Tax Commission?

A. I believe so.

Q. Well, do you recall upon what account those were drawn?

A. Yes, sir, on the Crocker National Bank, I believe.

Q. That would be the account that you maintained, is that correct? A. Yes, sir.

Q. Now what is the first check number of checks so drawn? A. 1946, June 13th.

Q. No, the check number, does it show there?

A. Check No. 108.

Q. And the date again? A. June 13th.

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(Testimony of Harold H. Maundrell.)

Q. 1946? A. Yes, sir.

Q. I have here the check stubs for the period June 11, 1946, to September 28, 1946, do you find the stub there or do you have additional check books which were used simultaneously?

A. It must have been in another check book.

Q. Do you recall whether these check books which have been shown to you were all the check books which you had? You do not [1430] find the stub there? A. No, sir.

Q. It is, however, I take it, your recollection that that was drawn directly to the collector?

A. I believe it was.

Q. What is the next check drawn to the collector for which you show a number?

A. August 8, 3358.

Q. That was of what date?

A. August 8th.

Q. Of what year? A. 1947.

Q. That period is beyond the period for which we have the check stub. Now in regard to the several withdrawals of two thousand dollars, what do the books indicate as to the manner in which that was paid to Mr. Nelson?

A. It was drawn cash.

Q. Now will you examine the records and state whether or not, from any cash fund there was shown a corresponding charge for the withdrawal of two thousand dollars?

A. No, I have no account of that.

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(Testimony of Harold H. Maundrell.)

Q. What was the source of the money, the two thousand dollars? What paid it?

A. It was taken out of the Menlo Club receipts.

Q. Well now what counter-entry was made with respect to paying [1431] him the two thouand dollars?

Q. I do not believe there was any outside the fact it was entered on this book against his account as having withdrawn from those receipts.

Q. Was there any record made of depletion of the cash fund by two thousand dollars?

A. That I do not know.

Q. Did you know at that time, or at any time, how much was in the cash fund? A. No, sir.

Q. You had no record of that?

A. No, sir.

Q. Do you know whether or not Mr. Nelson delivered these sums of two thousand dollars to Mr. Remmer?

Mr. Gillen: We offer the objection, may it please the Court, that it is leading and suggestive. It is improper redirect examination and I assign it as misconduct to ask such question.

Mr. Campbell: Well, I will withdraw the question.

Mr. Gillen: It is purely to prejudice the minds of the jury and throw some suspicious suggestions in their mind.

The Court: Counsel has withdrawn the question.

Q. Do you know what use Mr. Nelson made of that money? A. No, sir.

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(Testimony of Harold H. Maundrell.)

Q. In regard to the amounts charged against Mr. Nelson's account, [1432] did you yourself pay him that money? A. No, sir.

Q. What was the source of the information which you placed in your records there?

A. Given to me by Mr. Remmer and Mr. Nelson both.

Q. Now you were asked on cross-examination relative to making of certain tax returns in the name of William Remmer, a nephew, and I think you were shown certain partnership returns of the Menlo Club and you stated that you did not make any income tax returns for that name. Did you make any income tax return in the name of William Remmer?

A. Federal old-age pension returns, I believe.

Q. And to what agencies were those returns made?

A. The federal government and also to the state.

Q. And in what name were they made?

A. I am under the impression it was under William Remmer, doing business as——

Mr. Gillen: I do not think this is proper redirect. We are not interested in Mr. William Remmer, the nephew's personal returns. All I did in that connection, your Honor, was to correct the impression Mr. Maundrell had that the returns were made in the name of William Remmer doing business as the Menlo Club. I showed him prosecution's exhibits, asking him if it corrected the impression

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(Testimony of Harold H. Maundrell.)

in his mind. He was mistaken. It has no part in the issue of this case. [1433]

Mr. Campbell: I think the matter will be straightened out. I will ask to have marked for identification file of what purports to be copies of social security and old-age pension returns and I will ask that this file be given a number for identification.

The Clerk: No. 142.

Mr. Gillen: May it please the Court, we have no objection to the contents of these as evidence, but do offer the objection, first of all it is improper redirect examination; secondly, it is incompetent, irrelevant and immaterial, which does not touch the issues of income tax here. We think it is cluttering up the record with immaterial data. If your Honor will look at it, you will agree with us.

Mr. Campbell: I didn't intend to offer it into evidence but to refresh the witness' recollection.

The Court: There was a question before the Court on which objection was made a little while ago. It seems to me you are going beyond the scope of cross-examination.

Mr. Campbell: No, on direct examination this witness testified that he, in the course of his duties, prepared certain tax returns in relation to the Menlo Club under the name of William Remmer, the nephew, and testified further that William Remmer had nothing to do with the operation of the business. On cross-examination counsel brought out that that did not apply [1434] to the income tax

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(Testimony of Harold H. Maundrell.)

returns and left the matter there, with apparently the inference, and asked the witness if he had not been mistaken in his testimony as to preparing the tax returns. Now I intend to refresh the witness' recollection.

The Court: You may proceed. Objection will be overruled.

Q. Refreshing your recollection, if it does, I show you plaintiff's Exhibit 142 for identification and ask you to examine it and then state whether or not it refreshes your recollection as to whether or not you prepared certain tax returns for the Menlo Club in the name of William Remmer and if so, the type of return which was prepared under that name?

Mr. Gillen: Now, may it please the Court, that does not help the situation at all. Mr. Maundrell testified that the income tax returns, federal income tax returns he recollected were made out William Remmer doing business as the Menlo Club. I showed him those income tax returns on cross-examination, which were prosecution's exhibits, and which showed that they were not such and I merely corrected that mis-impression he had. He admitted he was mistaken about that. This is something else. This has to do with social security and other things. We do not think it is material. It isn't doing anything to the case we have here except cluttering up the record.

The Court: He may answer the question.

A. May I have the question?

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(Testimony of Harold H. Maundrell.)

(Question read.) [1435]

A. Yes, sir.

Q. Will you state the type of returns which was prepared under the name of William Remmer, doing business as the Menlo Club?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, also assuming something not in evidence.

The Court: He may answer the question.

A. Employers tax return for the federal government and for the State of California and contribution return, which is known as unemployment insurance.

Q. Under what name were they prepared by you?

A. William Remmer, doing business as Tiny's Waffle Shop, Menlo Bar and Menlo Club.

Q. And were those prepared by you in the course of the performance of the duties which you have described? A. Yes, sir.

Q. I am going to direct your attention to government's Exhibit 90—I think you have that before you, have you not?—income tax, partnership return of income of the Menlo Club for 1946—and directing your attention to the schedule set up for the Tiny's Restaurant and bar and for the Menlo Club, and calling your attention to the expense item of the social security tax, amount $980.16, and unemployment tax employer, $2,646.50, on this return and ask you whether or not the employers and con-

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(Testimony of Harold H. Maundrell.)

tribution and social security tax, as set up in the returns prepared by you under the name of William Remmer, doing business [1436] as Tiny's Waffle Shop, Menlo Bar and Menlo Club, were taken as deductions upon the partnership return of the Menlo Club?

Mr. Gillen: We will stipulate that it was.

Mr. Campbell: Very well, so stipulated.

Q. Now, Mr. Maundrell, you stated on cross-examination that before you began your active employment with the Menlo Club they had a bank account; do you recall that? A. Yes, sir.

Q. Where was that bank account located?

A. Bank of America.

Q. At what branch?

A. Day and Night Branch.

Q. In whose name was that account?

A. I think in the name of Muriel Bourque.

Q. Who was Muriel Bourque?

A. She was a secretary.

Q. For whom?

A. Well, secretary for the Menlo Bar and the Menlo Club and Tiny's Waffle Shop.

Q. Now at the time you commenced that employment, were you given any records in regard to that bank account? A. Yes, sir.

Q. Do you know where those records are?

Mr. Gillen: I don't think this is proper redirect unless counsel is going to ask the Court to permit him to go onto [1437] direct again. We asked nothing about any early bank accounts.

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(Testimony of Harold H. Maundrell.)

The Court: I don't recall.

Mr. Campbell: Yes, counsel asked the specific question whether or not there was any specific bank account when he commenced.

Mr. Gillen: No, I challenge counsel to find any reference to any bank account other than the Crocker Bank.

Mr. Campbell: May I ask the witness his recollection?

The Court: No, we will have the record searched.

Mr. Campbell: Very well.

The Court: Is it at the beginning of cross-examination or when?

Mr. Campbell: According to my notes, it will be close to the beginning of the cross-examination, and I will examine it during the recess. Now may I have defendant's Exhibit "X"?

Q. Showing you defendant's Exhibit "X," which is carbon copy of letter dated March 12, 1947, addressed to Pat Mooney, 800 South Center Street, Reno, I believe you testified, in response to Mr. Gillen's question, that you dictated that letter, signed the original and mailed it to Mr. Mooney at that address; is that correct? A. Yes, sir.

Q. Do you know what that address is on there?

Mr. Gillen: I submit the letter speaks for itself what the address is. [1438]

A. No.

Mr. Campbell: I will reframe my question.

The Court: The answer may go out.

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(Testimony of Harold H. Maundrell.)

Q. Do you know whether or not that is the residence or office of Mr. Mooney, or was at that time?

A. No, I do not.

Q. I direct your attention to the fact that the address is 800 South Center Street; are you familiar with those premises? A. No, I am not.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial.

The Court: He already answered he didn't know, Mr. Gillen.

Q. Now directing your attention to the contents of the letter itself, you say: "The total payment is $175,000, of which $100,000 has been paid down. Up until this time no credit of any kind to cover the capital investment has been entered on the books." Was that the fact as of March 12, 1947?

A. I don't remember.

Q. Well, will you examine the records of the Menlo Club which I show you, plaintiff's Exhibit 125—and may I have 126—I also show you plaintiff's Exhibit 126.

A. May I have the question, please?

(Question read.)

A. Well, all the capital investment is entered on the books. [1439]

Q. And was it entered as of March 12, 1947, of the date of that letter?

A. Yes, sir; I would say yes.

Q. I call your attention to plaintiff's No. 140, photostat, of furniture, fixtures and building, under

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(Testimony of Harold H. Maundrell.)

date of April 30, 1945, that purports to set up the capital account in that record, does it not?

A. Yes, sir.

Q. And when was it, Mr. Maundrell, that you set up that page for which you hold photostatic copy?

Mr. Gillen: The page speaks for itself.

The Court: When it was set up—I don't believe you understood the question, Mr. Gillen.

Mr. Gillen: I believe so. I believe the page will show for itself.

Mr. Campbell: I asked him when he entered this.

The Court: He may answer the question.

A. I don't remember when I entered them.

Q. What is your best recollection?

A. I imagine it was done on or about the 8th of August.

Q. What year? A. Of 1945.

Q. Now as I recall your testimony on cross-examination, you stated on August 8th a check for 25 thousand dollars was issued, was cashed and the cash restored to Mr. Remmer; is that [1440] correct, in regard to the Schriber transaction?

A. I didn't see the actual cash restored to Mr. Remmer.

Q. What was done with the cash?

A. It wasn't on August 8th that I received that cash. It was a little bit later because at the time I remember speaking to Mr. Schriber and asking him to hold the check up if he would and let me know

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(Testimony of Harold H. Maundrell.)

when he wanted to cash it and I would have the money in the bank at that time.

Q. I am referring to the transaction whereby you stated on cross-examination that in order to obtain some written record of the first 25 thousand dollars, a 25 thousand dollar check was issued; do you recall that? A. Yes.

Q. What were the circumstances there as you related them, Mr. Maundrell?

A. It seems that previous to my employment, Mr. Remmer had given Mr. Schriber 25 thousand dollars cash.

Q. Yes?

A. I had spoken to both Mr. Schriber and Mr. Remmer about the fact that it would be a whole lot better if we issued a check for the sum, so it would be reflected in the books, the books of the partnership. At the time I gave the check to Mr. Schriber I asked him at that time if he would hold it because I didn't have the 25 thousand dollars at that time. I would have to deposit in the bank to take care of the check and Mr. Schriber told [1441] me, "That is all right, I will let you know when I want to deposit it in the bank," and at that time I made a deposit to cover the check.

Q. And is that check No. 1242 to which you have referred, dated August 8, 1945? A. Yes, sir.

Q. Now isn't it a fact, Mr. Maundrell, that you entered that on the records which you noted as additional payment of 25 thousand dollars?

Mr. Gillen: What record is he referring to now?

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: Exhibit 140.

Mr. Gillen: Objected to as asked and answered and explained not once, but several times, in direct examination and on cross-examination, and not only by this witness but by two other witnesses.

The Court: You may answer the question.

A. No, it was not an additional payment.

Q. Now I ask you to examine this record, the first entry shows April 30, Gene Schriber, a debit of 75 thousand dollars for building and equipment and credit for payment of 25 thousand dollars, leaving a balance due of 50 thousand dollars; is that correct?

Mr. Gillen: What is that, 140?

Mr. Campbell: 140.

Mr. Gillen: May it please the Court, this witness has [1442] already testified that 140 was corrected by rewriting of the page which is now known as 125C, prosecution's Exhibit 125C, and he explained that very fully. There were two corrections made, if your Honor will remember, one correction as to the allocation of purchase price as against lease and furniture and fixtures, after the State of California had made its appraisal, and the other one the correction to show that a check had been given instead of 25 thousand dollars that had been given in cash. In other words, had taken back the 25 thousand dollars cash and replaced it with a check for 25 thousand dollars and that he corrected that in 125C, and 140, which was still retained by Mr. Maundrell, was the incorrect and inaccurate reflection of the

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(Testimony of Harold H. Maundrell.)

transaction and that was corrected by 125C. Now counsel, after that explanation, is trying to use that again. He has already said this is incorrect.

The Court: The witness may answer, and if he has any explanation he would like to make, he may make it.

A. May I have the question again?

Mr. Campbell: I will reframe the question.

Q. I call your attention simply to the first item here of April 30, showing credit of 25 thousand dollars, further credit of August 8, No. 1242, 25 thousand dollars, next three items September 8, 1945, giving three check numbers with total of 25 thousand dollars, and the final item February 28, 1946, a payment to Gene Schriber of 25 thousand dollars. Now, Mr. Maundrell, [1443] I believe you testified all of the entries there were made by you, were they not? A. Yes, sir.

Q. So that this record was maintained by you up until February 28, 1946, the date of the last entry, was it not? A. Yes, sir.

Q. Now when was it that you made what has been referred to as the corrected sheet, 125C, in which the two changes to which Mr. Gillen referred, were made?

Mr. Gillen: I am going to offer for the record, may it please the Court, the objection that this has all been asked and answered and they are both prosecution's exhibits. 125C was offered by the prosecution and 140. It has been explained by Mr. Maundrell as to why the pages were rewritten, first

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(Testimony of Harold H. Maundrell.)

of all because an appraisal different from the figure he had down had been given him by Mr. Schriber as Mr. Schriber's valuation, had been made by the State of California and tax was paid on that appraisal, and that is why he changed that to meet the appraisal made.

The Court: Objection will be overruled. He may answer the question.

A. I don't remember the exact date.

Q. Well, does the fact that the last entry made by you on government's Exhibit 140 is dated February, 1946, does that refresh your recollection as to whether or not plaintiff's 125C [1444] was made subsequent to some date in February of 1946?

A. Yes, it could have been.

Q. You say it could have been. Were you keeping two records simultaneously? A. No, sir.

Q. What is your best recollection?

A. It was made after that.

Q. Now you stated, I believe, in response to Mr. Gillen's question, that Mr. Ezralow was the first agent who called upon you; is that correct?

A. Yes, sir.

Q. And do you recall when he first made his appearance? A. No, sir.

Q. Do you recall that his investigation was commenced prior to your writing up 125C?

Mr. Gillen: Objected to as leading and suggestive and not proper redirect examination.

The Court: It may be leading.

Mr. Campbell: Well, I will reframe the question.

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(Testimony of Harold H. Maundrell.)

Q. Do you recall when Mr. Ezralow started his investigation with relation to the time that 125C, the corrected ledger sheet, was set up?

A. No, I do not.

Mr. Gillen: Objected to as calling for the witness' opinion and conclusion. [1445]

The Court: It is already answered. The answer may stand.

Q. Do you recall ever having seen that corrected sheet prior to your appearance here?

A. Yes, I do.

Q. When did you see it?

A. I saw it in the office.

Q. When?

A. I don't know when, but sometime during my employment there.

Q. What is your best recollection?

Mr. Gillen: What is this referring to now?

Mr. Campbell: 125C.

Mr. Gillen Well, your Honor——

The Court: There is nothing before the Court.

Mr. Gillen: Well, I am going to offer an objection to this. It is a very strange examination. He puts in records through witnesses and then tries to destroy his own records. It is not proper redirect examination.

Mr. Campbell: I ask the remark be stricken.

The Court: There is nothing before the Court. The remark will be stricken from the record.

Q. In response to counsel's question you stated

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(Testimony of Harold H. Maundrell.)

about two months after you were there the State tax men came in; is that correct?

A. No, it was later than that. [1446]

Q. Do you recall when they came in?

A. No, I don't. I don't recall exactly the date they came in.

Q. As I recall your testimony, you said it was about two months after——

Mr. Gillen: Objected to as leading and suggestive and cross-examining his own witness.

Mr. Campbell: I am trying to get his testimony straightened out.

Mr. Gillen: I know what he is trying to do and it is not permissible.

The Court: Try to avoid leading questions.

Q. What is your present recollection as to how soon it was after you commenced your employment that the State sales tax men, as you call them, came in there? A. Sometime in '45.

Q. In 1945. Can you state when it was in relation to the time when the 1945 partnership return of the Menlo Club was filed, before or after?

A. It might have been after. I don't quite remember now, but it could have been in 1945.

Q. When was it in relation to the time the '46 partnership return of the Menlo Club was filed?

A. It was way before that time.

Q. Now calling your attention to 125C, the corrected ledger sheet, your attention was directed to the change in capital [1447] set-up of the acquisition of the lease, equipment and inventory; do you recall that? A. Yes, sir.

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(Testimony of Harold H. Maundrell.)

Q. So that where on plaintiff's Exhibit 140 it had been divided 100 thousand dollars as cost of lease and 75 thousand dollars as cost of equipment and inventory, the new figures utilized were some 31 thousand odd dollars for inventory and equipment? A. Yes, sir.

Q. And the balance as being the cost of the lease. Now do you recall upon what basis, which of those two bases, the 1946 return was filed?

Mr. Gillen: That return would be the best evidence.

Mr. Campbell: Yes I will show it to him.

Q. Calling your attention to Exhibit 90, partnership return of the Menlo Club. It might take a few minutes to examine this. May I suggest a recess?

(Jury and alternate jurors admonished and recess taken at 2:30.)

2:40 P.M.

(Defendant present with counsel.)

(Jury and alternate jurors' presence stipulated.)

MR. MAUNDRELL

resumes the witness stand on further

Redirect Examination

By Mr. Campbell:

(Last question read.)

Q. I am referring to bases set forth in 140 of

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(Testimony of Harold H. Maundrell.)

100 thousand [1448] dollars for the lease and 75 thousand dollars for the inventory or basis as set forth in 125C of 31 thousand dollars for the inventory and equipment and the balance for the lease.

A. Well, on this return it was on 125C. It was not on that, it was on the photostat; it was on the other.

Q. Now you were examining 91, which is the amended return—90, which is the original return—I apparently handed you the wrong exhibit. I beg your pardon. Will you examine that?

A. Well, the 1946 was made out previous to 125C.

Q. And the amended return was made out after 125C, is that correct, or used the same basis?

A. Well, has the same basis as 125C, yes.

Q. Calling your attention to the amended return and to the statement attached, which you testified in response to Mr. Gillen's question was drawn up by Mr. Haughey, Mr. Remmer's attorney, with your assistance, do you recall that? That is on the amended 1946 return, which is plaintiff's 91, and the statement, the long written statement which is made a part of that return?

Mr. Gillen: That wasn't drawn up with the assistance of Mr. Haughey and I never said so. My question was, wasn't it a fact that Mr. Maundrell had prepared——

Mr. Campbell: I will reframe the question.

Q. Who actually wrote that statement?

A. I actually wrote it. [1449]

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(Testimony of Harold H. Maundrell.)

Q. Did you have any assistance in writing it?

A. Previous to writing it, I got all my information from Mr. Mooney.

Q. And you wrote that yourself?

A. Yes, I wrote it with the assistance of Mr. Ayton. I asked Mr. Ayton what he suggested and I wrote it.

Q. I call your attention to the fact that stated here the term of the lease is five years.

A. Yes, sir.

Q. Now what was the term of the lease?

A. Well, at that time I thought the term of the lease was five years, but they had an option for five additional years.

Q. Had you examined the lease at that time?

A. No, I hadn't seen the lease.

Q. And when you did examine it, you found it to be for ten years?

A. Well, I didn't find that until later. I was under the impression all the time it was a five-year lease with option for 5 years.

Q. Now directing your attention to government's Exhibit 89, return of 1945, which I believe you testified, in response to counsel's question, that you gathered the figures and gave to Mr. Ayton to prepare the return and then he returned it to you; is that correct?

A. The figures for Tiny's Waffle Shop were prepared by Mr. Shaw. [1450]

Q. Yes.

A. Those for Tiny's Waffle Shop and Bar.

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(Testimony of Harold H. Maundrell.)

Q. Yes.

A. Those figures I turned over to Mr. Ayton.

Q. How about the Menlo Club?

A. The Menlo Club, I gave Mr. Ayton the pay roll and utilities and rent and all the bills that I received from the Menlo Club.

Q. I call your attention to Item 9, promotion expense, $286,837.75. What was the source of that figure?

Mr. Gillen: I was going to suggest to your Honor that this sounds to me like reopening direct examination rather than redirect. I think it is improper redirect and I will object to it on that ground.

Mr. Campbell: Counsel inquired to the source of the figures, also brought out this man had collected figures and turned them over to Mr. Ayton or to the other accountant for preparation of return.

Mr. Gillen: I withdraw my objection.

A. The Menlo Club in 1945, as I stated before, all the poker sheets had been lost, and taking the matter up with Mr. Ayton, he had been the auditor for the Menlo Club the previous years, he finally came to the conclusion that there was only one thing to do and that was to submit to the government the returns for 8 months during the previous year and make the same return to the government for 1945. [1451]

Q. Is that the source of this promotional expense?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir. Mr. Ayton handled all income tax returns.

Q. From your knowledge of the operation of the Menlo Club, was any such sum spent during 1945 for promotion?

Mr. Gillen: Objected to as improper redirect examination.

The Court: Objection overruled. He may answer the question.

A. Yes, sir.

Q. There was? A. Yes, sir.

Q. And in what manner was it spent?

A. The practice that was used previously by Mr. Ayton and the people who owned the Menlo Club, they called promotion the difference between the money that was given to players and the balance that was finally concluded after the returns were made. In other words, a man was staked to $100 to play a game and he brought back $80, there would have been a loss, and that is where those promotion expenses came in.

Q. Are you referring to the house men, that is, employees who were given money to sit in a game?

Mr. Gillen: This was answered in direct examination. He said some men were employees and some not, and some men required seven persons to play before they would enter a game.

The Court: Objection overruled. Answer the question. [1452]

A. I am referring to any house man that happened to play and the outside men who also played.

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(Testimony of Harold H. Maundrell.)

Q. You say outside men, they had no connection with the set-up? A. That's right.

Q. Was there some term used to apply to those individuals?

Mr. Gillen: That is objected to as incompetent, irrelevant and immaterial, what term is used. Not proper redirect.

The Court: Objection sustained.

Q. I believe you stated that similar agreements, in response to Mr. Gillen's question, similar partnership agreements to that which you produced here as between yourself and Mr. Remmer, relating to that 10 per cent interest, were also entered into by the other individuals?

A. There was an agreement given to every one of the partners.

Q. And will you state, were those all written agreements, do you know? A. Yes, sir.

Q. You saw them? A. Yes, sir.

Q. Were they all drawn at one time, if you know? A. Yes, sir.

Q. Now will you state whether or not more than one agreement was given to any of the individuals?

Mr. Gillen: Do you mean more than one copy of the agreement? [1453]

Mr. Campbell: No, separate, different agreements.

A. I don't know.

Mr. Gillen: We will stipulate in one instance——

The Court: The witness said he didn't know.

Q. Now directing your attention to the fact there

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(Testimony of Harold H. Maundrell.)

has been shown in the returns for 1945 and 1946 of the Menlo Club, the interest of Mr. Nelson, according to the returns, an increase from 10 per cent to 15 per cent, the interest of Mr. Remmer an increase from 40 to 55 per cent, the interests of Mr. Ditto and Mr. Fricker of 10 per cent, were new agreements drawn with respect to those changing interests?

Mr. Avakian: Objected to as contrary to the evidence because the witness testified the written agreements were in November, 1946, which was after the date these other partners dropped out. The evidence shows that.

(Question read.)

The Court: Is that contrary to the evidence introduced here?

Mr. Campbell: The two contracts which have been introduced here, those of this gentleman and Mr. Kyne, are dated in 1946, but are retroactive to 1945, April or May of 1945. Now the returns of the Menlo Club in 1945 purport to show interests in Remmer of 40 per cent, Kyne of 10 per cent, and so on down the line, Ditto and Fricker and Nelson for 10 per cent each. In 1946 return filed for that year showed the partnership [1454] interest to be Remmer 55 per cent, Kyne 15 per cent, Nelson 15 per cent, an increase of 5 per cent.

The Court: What is the objection?

Mr. Avakian: The testimony has been that these written agreements were drawn in November

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(Testimony of Harold H. Maundrell.)

of 1946, Mr. Maundrell testified they were all drawn at the same time, and November, 1946, is after the time that Mr. Fricker and Mr. Ditto dropped out.

The Court: Is it after the time the 1946 return was filed?

Mr. Avakian: It is after the time 1945 was filed.

The Court: Is it after the time the 1946 return was filed?

Mr. Avakian: No, prior to the time 1946 was returned.

The Court: Objection overruled.

Mr. Avakian: I would like to explain further. I do not think your Honor got my point.

The Court: Yes.

Mr. Avakian: The point is, this is the purpose of the question, first, find out whether there were new partnership agreements drawn.

The Court: I do not think any of us now know what the question is.

Mr. Campbell: I will have to reframe the question.

Q. You were asked, Mr. Maundrell, if partnership agreements were drawn as to all partners. Directing your attention to the [1455] 1945 return, which lists the partners as Remmer 40 per cent, Kyne 15 per cent, Ditto 10 per cent, Nelson 10 per cent, Maundrell 10 per cent, Fricker 10 per cent and Turner 5 per cent, now were partnership agreements drawn as to all those individuals?

A. Yes, sir.

Q. And that included Ditto and Fricker?

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(Testimony of Harold H. Maundrell.)

A. Yes, sir.

Q. And were they likewise drawn in November of 1946? A. Yes, sir.

Q. When had they terminated their relationship with the Menlo Club? A. At the end of '45.

Q. Now the 1945 return shows Oscar Nelson as having a 10 per cent interest. Was an agreement drawn with Mr. Nelson as to that 10 per cent interest? A. Yes, sir.

Q. Now the 1946 return shows that he had a 15 per cent interest. Was a new agreement drawn?

A. Not to my knowledge.

Q. After the end of 1945 were any further amounts accrued in the account set up on the records for Mr. Fricker and Mr. Ditto?

A. No, sir.

Q. Now you stated, I believe, that with respect to the bank roll at the Menlo Club, that a portion of that was made up of [1456] markers or IOUs, as shown at the right-hand lower corner of the page, poker sheets; is that correct? A. Yes.

Q. Did you ever yourself verify the amount of cash on hand in the bank roll?

Mr. Gillen: That has been asked and answered at least seven times.

The Court: That has already been answered.

Mr. Campbell: Except on cross-examination, your Honor, it was brought out for the first time the assertion of the witness——

The Court: You may answer the question.

Mr. Gillen: Now, may it please the Court, that

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(Testimony of Harold H. Maundrell.)

is not the truth. Mr. Kyne testified that markers were considered the same as cash and Mr. Kyne was the government's witness.

Mr. Campbell: I am referring to this witness' testimony.

The Court: Objection is overruled. Answer the question.

A. May I have the question?

(Question read.)

A. No, sir.

Mr. Campbell: At this time I am going to ask to have marked for identification three sheets bearing date January 13, 1946, headed "Poker Sheets," as one exhibit.

The Clerk: 143.

Q. From what source, Mr. Maundrell, did you receive your [1457] information that markers were counted as part of the cash on hand or bank roll?

A. Right at the beginning. Mr. Fricker was the man that acquainted me with the whole operation of the club.

Q. Did you at any time have any personal observation with regard to the amount of cash that was actually there or the treatment of the markers as a part of or as not a part of the bank roll?

A. I did not.

Q. I am going to call your attention to plaintiff's Exhibit 143 for identification and ask you if you recognize those sheets?

A. They are similar to the poker sheets we used.

Q. Now will you compare the entries thereon

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(Testimony of Harold H. Maundrell.)

with the entries made by you in your records from the poker sheets for that day, for the purpose of ascertaining if the employees listed were employees on that date and if the amounts set forth on those poker sheets were utilized by you in keeping the books and records of the Menlo Club?

Mr. Avakian: We object to the use of these documents in any manner unless they are first received in evidence, and we object further to the prosecution's use of them at this time on the usual grounds that we have made to all of these records, which were taken by the government upon the assurance that they would return them but which was not kept.

Mr. Campbell: I am going to object to that statement, [1458] if the Court please.

The Court: That will be stricken from the record.

Mr. Avakian: The evidence from this witness shows——

The Court (Interceding): There is no evidence to that effect.

Mr. Avakian: Yes, there is. This witness and Mr. Kyne both testified that records were turned over to the agents——

The Court (Interceding): The remark will be stricken.

Mr. Avakian: I believe I am correct in my statement.

The Court: You have heard my ruling.

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(Testimony of Harold H. Maundrell.)

Mr. Avagian: Yes, I heard your ruling, naturally.

The Court: Very well.

Mr. Avakian: But I wish to have an objection to the use of these.

The Court: The usual objection made before?

Mr. Avakian: Yes, and an additional objection.

The Court: All right.

Mr. Avakian: No proper foundation has been laid for the use of these sheets because there is no showing of the authenticity of them. If your Honor will look at the sheets, there is nothing on the sheets to show to what business they related. This witness has testified simply they are similar. The record will show that these sheets were produced not by the witness, but rather by the government from their own files and we object to the use of any such document unless and until the government [1459] produces witnesses who obtained these documents to show how and where they obtained and to testify that these are the very ones they did obtain, because in the absence of that we have no way of knowing whether these are the actual sheets or copies.

The Court: Objection overruled.

Q. Do you still have the question in mind?

(Question read.)

A. As to the amounts of the records that were kept by me, this is a sheet of 11-3-46, No. 1 shows the tables took in $421.50, which is correct.

Q. The same on both records which you have before you?

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: I object——

Mr. Campbell: That may go out.

The Court: I do not think the contents of this should be allowed to go in the record. It will be stricken.

Q. Just make a comparison to yourself without stating, so you can answer the main question yes or not.

(Question read.)

Mr. Gillen: Of course, your Honor, that certainly is by indirection and subterfuge getting before the jury the contents of a document before it is introduced.

The Court: I think it is a means of laying the foundation.

Mr. Gillen: I do not think he can do it that way unless this gentleman has some knowledge of those being authentic [1460] sheets.

The Court: I think he could.

Mr. Gillen: Well, if you want to let it go in, what is in the document.

The Court: Oh, I don't want anything like that. The question has two departments. Break that question down, first as to employees, then as to figures.

Mr. Gillen: Of course, you see there is nothing to indicate whether any names are employees, or if employees, of what place. What we are complaining about, this man has to conclude a lot of things before he can answer that.

The Court: We will see what happens.

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(Testimony of Harold H. Maundrell.)

Q. I am handing you Exhibit 124A, which has previously been identified as the payroll record of the Menlo Club, is that correct? A. Yes, sir.

Q. Now, I ask you to examine plaintiff's Exhibit 143 for identification and for the purpose of ascertaining if the persons set forth on 143 for identification as employees were on the date shown on 143 for identification employees of the Menlo Club and receiving the amounts as set forth on 143 for identification?

Mr. Gillen: We ask again for your Honor to look at 143 and your Honor will see there is nothing there that satisfies anybody in showing him as an employee. That is an assumption. [1461]

The Court: I don't understand the question in that light. You may proceed.

A. I recognize——

The Court (Interceding): Don't state the contents. Just answer the question. I wish that the question could be broken down in two parts, first as to the persons and secondly as to the figures, then we could get answers yes or no.

Q. I will ask you first if the figures shown on 143 for identification, under the headings, "Amount Loaned," "Return" and "Amount," are the same figures that were used by you in the records of the Menlo Club, Exhibit 126, for the date of January 13, 1946?

Mr. Gillen: Objected to, the document speaks for itself, is the best evidence of what it contains,

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(Testimony of Harold H. Maundrell.)

and also it is a leading question on the contents of a document not yet admitted in evidence.

The Court: Objection overruled. You may answer the question. A. Yes, sir.

Q. Now, do you recognize whether or not on Exhibit 143 for identification, whether there appear to be the names of employees of the Menlo Club and if so, if the records heretofore introduced in evidence as pay roll records of the Menlo Club, being government's Exhibit 124A, indicate that those persons were [1462] employed upon that date?

Mr. Gillen: I am going to offer the objection——

The Court: Objection to that question will be sustained.

Q. Will you examine Exhibit 124A and state whether or not on January 13, 1946, there was employed a man by the name of Byrne, and if so, what was his rate of compensation?

The Court: What exhibit are you referring to? Did you ask this witness to examine Exhibit 143?

Mr. Campbell: I asked him to examine this, yes, sir, and to also examine a record which is here in evidence and see if the same information is contained on both this and the record which he took and which he previously testified he obtained from the poker sheets which are here in evidence, as to certain dates.

The Court: I wonder if we couldn't have the question framed to show just names without showing any implication as to whether they are employees or not?

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(Testimony of Harold H. Maundrell.)

Mr. Gillen: There is a very simple way of laying foundation——

The Court (Interceding): We don't need any further remarks.

Mr. Gillen: I would like your Honor to listen to the grounds of my objection.

The Court: I don't want to listen to you.

Q. Let me ask you this—referring to 143 for identification [1463] and to the names appearing in the upper right-hand corner, and using, if necessary, Exhibit 124A, pay roll record, which is in evidence, to refresh your recollection, if necessary, I will ask you whether or not the individuals set forth there on this exhibit for identification were employees of the Menlo Club on that date?

Mr. Gillen: I am going to offer an objection, may it please the Court, if your Honor will look at 143 and see there are last names used. There happens in this very courtroom to be two men named Gillen, a man I never met before, the crier, and here is a bunch of last names and nicknames and how can this man say they are the same names as appeared as employees? I object to the question as leading and suggestive, calling for opinion and conclusion of the witness, getting before the jury matters in a document not admitted by your Honor into evidence, improper redirect examination, incompetent, irelevant and immaterial.

The Court: Objection overruled. You may answer the questions.

A. Yes, I recognize some of these names.

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(Testimony of Harold H. Maundrell.)

Q. As being employees on that date?

A. Yes, sir.

Q. Will you state whether or not this is the type of sheet from which you made up the books and records of the Menlo Club as to income and as to wages? [1464]

Mr. Gillen: What is he referring to now, this type of sheet?

Mr. Campbell: 143 for identification.

Mr. Gillen: I object as having been asked and answered. He said they were similar to the poker sheets.

The Court: Objection overruled.

A. The wages were not taken off that sheet. The wages were taken off Exhibit 124A.

Q. From what source was 142A written up?

A. It was written by the secretary of the Menlo Club.

Q. And do you know from what source she obtained those figures?

A. She received those from the cashiers every day.

Q. I believe you previously stated the poker sheets were kept by the cashiers?

A. Yes, sir.

Mr. Campbell: I offer this in evidence as Exhibit 143.

Mr. Gillen: To which we object, no proper foundation laid and we haven't any opportunity to examine the person who obtained those sheets. They

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(Testimony of Harold H. Maundrell.)

were obtained undoubtedly by some government agent who is probably present here in court.

The Court: Objection overruled. The exhibit may be admitted in evidence.

Q. Calling your attention to plaintiff's Exhibit 143, bank roll of ten thousand dollars, did you observe that figure? A. Yes, sir. [1465]

Q. I call your attention, what are these items in the lower right-hand corner, if you know?

A. Markers.

Q. I call your attention to the fact that the total amount of markers as shown thereon is $10,400. I further call your attention to, under the advances, as I believe you have identified them, there is amount of $480. Do you observe those figures?

A. Yes, sir.

Q. Now, do those figures refresh your recollection as to whether or not the markers were considered or taken as part of the bank roll?

A. Yes, sir.

Mr. Gillen: I am going to offer the objection counsel is cross-examining his own witness and it is an attempt to impeach, through this prosecution witness, Mr. Kyne, who related the meaning of markers and names of the markers and differences in figures on the poker sheets, namely, that it might mean a man had picked up a marker and that might have changed the figure on the markers, and that they were treated as cash and treated as part of the general bank roll.

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(Testimony of Harold H. Maundrell.)

The Court: Objection will be overruled. He may answer the question.

Q. That is your recollection?

A. Yes, sir. [1466]

Q. Will you state your recollection as to whether they were a part of the bank roll?

A. I have always been under the impression they were.

Q. That day then there would be a minus bank roll, is that correct?

A. Yes, sir. That is in the morning only.

Q. That is at the start of the day's business?

A. Yes, sir.

Q. Before any profits were realized for that day?

A. Yes, sir.

Mr. Avakian: Now, your Honor, may we have an opportunity to make an objection to that question?

The Court: No, we will let it stand.

Mr. Avakian: We move to strike the answer.

The Court: Motion denied.

Q. Now, Mr. Maundrell, at the time that Mr. Nelson increased his interest from 10 to 15 per cent and Mr. Remmer increased his interest from 40 to 55 per cent, was any amount paid by both or either of them, if you know, for that increased percentage?

Mr. Gillen: Objected to as not proper redirect examination.

The Court: I think that objection is good.

Mr. Gillen: Nothing was gone into——

The Court: I think that objection is good, not proper [1467] redirect.

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(Testimony of Harold H. Maundrell.)

Mr. Campbell: Then for the purpose of that question, I ask permission to ask on direct examination.

Mr. Gillen: May I respectfully suggest counsel should not be given seven or eight to reopen. He should conduct his direct and be through with it and I respectfully submit we object to his being accorded seven or eight opportunities.

The Court: He may ask the question on direct examination.

Direct Examination

(Last question read.)

A. Not to my knowledge.

Mr. Campbell: That's all. You may cross-examine.

Recross-Examination

By Mr. Gillen:

Q. Mr. Maundrell, did you ever see an agreement, wherein Mr. Ditto acknowledged—the agreement was signed by Mr. Ditto and Mr. Remmer—Mr. Ditto acknowledged that he received from his interest at the time he withdrew from the partnership of the Menlo Club 14 thousand odd dollars?

Mr. Campbell: Objected to as not the best evidence.

The Court: Objection overruled. Answer the question.

A. Yes, sir.

Q. Now, with regard to Mr. Nelson's with-

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(Testimony of Harold H. Maundrell.)

drawals of two thousand dollars at various times, not including the money that he withdrew to pay income tax, either to the federal government [1468] or to the State of California, there was an entry made deducting his withdrawal from his credit there in your book, was there not, in the ledger?

A. Yes, sir.

Q. And that in effect was his marker or IOU that was deducted from whatever credit he had on the books, isn't that true?

Mr. Campbell: I object to the question in that form.

The Court: He may answer the question.

Q. Isn't that so?

A. Well, that was a direct payment to Mr. Nelson against his capital account.

Q. And that was the record of Mr. Nelson's credits or his debits, wasn't it? A. Yes, sir.

Q. Now, with regard to Mr. William Remmer, the nephew of Mr. Elmer Remmer, isn't it a fact that Mr. Elmer Remmer originally planned on placing his nephew, William Remmer, in charge of the Menlo Bar and Tiny's Waffle Shop?

Mr. Campbell: Objected to as calling for his conclusion as to what Mr. Remmer may or may not have had in mind.

The Court: He may answer if he knows.

A. Yes, sir.

Q. That was the explanation that you were attempting to make the other day to Mr. Campbell, was it not, in your direct examination? [1469]

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(Testimony of Harold H. Maundrell.)

A. Well, I started in and was stopped.

Q. Now it is true, is it not, that in contemplation of that Mr. William Remmer's name was put up as the employer's name in the various security, withholding and contribution taxes, isn't that so?

A. Yes, sir.

Q. It is within your knowledge, is it not, and a fact, that Mr. William Remmer decided not to quit his place of employment where he was and enter into this enterprise, isn't that true?

Mr. Campbell: Objected to as incompetent.

Mr. Gillen: I am asking him if it isn't a fact. If he doesn't know, he can answer he doesn't know.

The Court: Objection will be sustained.

Q. Well, do you know whether or not Mr. William Remmer remained at his place of employment and did not go into the business?

A. He did not go into the business. He stayed on the job where he was working.

Q. Now it is true, is it not, that as a result of having originally put his name as employer the first year, you had to make the return in his name as employer, isn't that so?

Mr. Campbell: Objected to as calling for a legal conclusion.

The Court: He may answer the question.

A. The employer's number was requested in his form and as long [1470] as the number had been issued to us in his name, I left his name right on the return.

Q. However, Mr. William Remmer never ap-

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(Testimony of Harold H. Maundrell.)

peared as a partner or an employer or owner in any of the income tax returns that have been introduced here by the prosecution, isn't that true?

A. Yes, sir.

Q. All the partners were set forth in those tax returns and Mr. William Remmer was not mentioned in those tax returns, isn't that true?

A. Yes, sir.

Q. Now referring again to the prosecution's Exhibits 140 and 125C, the fact is, isn't it, Mr. Maundrell, that after the State of California sales tax man had made an appraisal of the furniture and fixtures and merchandise of the Menlo units and had placed their appraisal figure, that that was your reason for making one correction from the original sheet, Exhibit 140, to the sheet 125C, isn't that true? A. Yes, sir.

Q. And also the other correction that we went into this morning, with regard to the amount of money paid for the Menlo Club originally a cash payment, which was later substituted by a check payment, was the other correction, isn't that true?

Mr. Campbell: Objected to—that has been asked and answered several times.

The Court: Objection overruled. [1471]

Q. Isn't that true? A. Yes, sir.

Q. And the initial payment for that 25 thousand dollars and the check was the one single 25 thousand dollar payment, isn't that true?

A. Right.

Q. And it was not two payments of 25 thousand

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(Testimony of Harold H. Maundrell.)

dollars apiece, one by cash and one by check, isn't that true?

A. Well, they were made; one was withdrawn.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. In response to counsel's questions, you said you had seen some kind of agreement between Mr. Remmer and Mr. Ditto? A. Yes, sir.

Q. When did you see that? A. Last night.

Q. Where did you see that?

A. Mr. Gillen's apartment.

Q. Had you ever seen it prior to that time?

A. No, sir.

Q. Did you ever have any knowledge with reference to it prior to that time? A. No, sir.

Q. Do you know, of your own knowledge, whether any 14 thousand dollars was paid to Mr. Ditto? [1472] A. No, sir.

Q. Did you ever talk to Mr. Ditto about any such agreement? A. No, sir.

Mr. Campbell: I think that is all.

The Court: Any further questions?

Mr. Gillen: That's all.

The Court: Any reason why this witness can not be permanently excused at this time?

Mr. Campbell: Subject to recall if necessary.

The Court: You are satisfied to have him return to his home?

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Mr. Campbell: Yes.

Mr. Gillen: We are satisfied.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 3:35 p.m. until Wednesday, January 2, 1952.) [1473]

January 2, 1952, 10:00 A.M.

(Defendant present with counsel. Mr. Lohse absent.)

(Presence of the Jury and alternate jurors stipulated.)

WILLIAM J. GRAHAM

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your full name?

A. William J. Graham.

Q. Where do you reside?

A. 524 California Avenue, Reno.

Q. What is your business or occupation?

A. Hotel business and club business.

Q. In Reno, Nevada? A. In Reno, yes.

Q. Are you acquainted with the defendant in this case, Elmer Remmer? A. Very well.

Q. How long have you known Mr. Remmer?

A. Since 1912.

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(Testimony of William J. Graham.)

Q. Have you at any time been associated with Mr. Remmer in any business enterprise?

A. Yes, Cal-Neva Lodge.

Q. When did you first become associated with him in connection with Cal-Neva Lodge? [1474]

A. '24—'26.

Q. And for the purpose of the record, Cal-Neva Lodge is located at the State line on California and Nevada at Lake Tahoe, is that correct?

A. That is right.

Q. And as I understand a small portion of the building is on the California side and the balance is on the Nevada side? A. That's right.

Q. What year was it, did you say, you became associated in that enterprise?

A. I think around '24. I believe it was '24 or '26, we bought it.

Q. When you say we bought it, to whom are you referring?

A. Well, when we first bought it, it was the old Cal-Neva. I forget the man's name, from Australia. He built it and I think it was around '26.

Q. I was asking you when you say "we bought," to whom do you refer?

A. Myself and Mr. McKay and Mr. Hall and we went to the bank and borrowed the money from the bank and put Mr. Remmer in as equal partner.

Q. As I understand your answer, you and Mr. Hall and Mr. McKay went to the bank and borrowed the money and you say you put it in Mr. Remmer as equal partner? A. Yes. [1475]

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(Testimony of William J. Graham.)

Q. Did Mr. Remmer contribute any money or capital toward the acquisition of the club?

A. No, sir.

Q. Was all of the money that was utilized for that purpose borrowed from the bank?

A. Yes. It was paid off to the bank, all the indebtedness.

Q. Was the business subsequently incorporated under a corporation known as the Cal-Neva, Inc.?

A. That's right.

Q. And at this time do you recall approximately when it was that the business was incorporated?

A. No, right off I couldn't tell you. I would have to look at the records. Mr. Woodburn has those records.

Q. Was it in 1930 as you recall?

A. I think it was incorporated before that.

Q. Incorporated shortly after you acquired it?

A. I think so, yes.

Q. How were shares issued, if you recall, that is to say, were they in equal amounts as among four individuals?

A. Yes. I think the stock was kept in Mr. Woodburn's office.

Q. As to shares issued of the corporation, were they issued in the name of each of the four individuals equally? A. Yes, that's right.

Q. Is Mr. Hall still alive?

A. No, Mr. Hall died. [1476]

Q. Do you recall approximately when Mr. Hall died? A. I can't say the year.

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(Testimony of William J. Graham.)

Q. Well, within a year or two do you recall?

A. Mr. Hall is dead about ten years.

Q. Now at the time of Mr. Hall's death, what, if anything, was done in relation to the stock standing in his name?

A. Well, we bought his stock from his wife.

Q. When you say "we"?

A. The corporation bought it.

Q. That is Cal-Neva, Inc., purchased the stock from his wife, is that correct?

A. Yes, that's right.

Q. Now I will ask you whether or not you and Mr. McKay at some subsequent time sold your stock in Cal-Neva, Inc.?

A. At any time—did you say up until when?

Q. Well, at any time? A. Sold it in 1946.

Q. To whom did you and Mr. McKay sell your stock? A. Sold to Mr. Remmer.

Q. So that I take it all the stock was then in Mr. Remmer's name, is that correct?

A. He didn't have the stock. The stock was in Mr. Woodburn's office. They hold the stock until it was paid and we still have the stock.

Q. Mr. Woodburn held it as escrow? [1477]

A. Still has it as escrow until the place is paid off.

Q. All outstanding stock was then sold to Mr. Remmer through this escrow, is that right?

A. Yes.

Q. During the time and up until the time that you and Mr. McKay sold your interest in Cal-Neva,

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(Testimony of William J. Graham.)

through this escrow to Mr. Remmer, who was in active management of Cal-Neva Lodge?

A. Mr. Remmer.

Q. Did you or Mr. McKay take any active part in the management?

A. Yes, we used to go up and stay around in the summer time, but Mr. Remmer ran the business all the time.

Q. Now it is a fact, is it not, Mr. Graham, that you and Mr. McKay were away from the State for a period of time prior to the sale of the stock?

A. Yes, sir.

Q. And what period of time was that?

A. 1939 to 1945.

Q. During that period of time did you or Mr. McKay take any part whatsoever in the management of Cal-Neva?

A. No. We were away, we couldn't take part in it.

Q. And then it was after your return that you sold this stock? A. Yes.

Q. I am going to have this document which is headed "Memorandum and Receipt" marked for identification as 144 for identification. I show you government's Exhibit 144 for identification and ask [1478] you if you recognize the three signatures appended thereto? A. Yes.

Q. Whose signatures are they?

A. One is mine, one is Mr. McKay's and one Mr. Remmer's.

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(Testimony of William J. Graham.)

Q. And I will ask you whether or not this document had to do with the sale of yours and Mr. McKay's stock to Mr. Remmer?

Mr. Gillen: Objected to, the document speaks for itself.

The Court: Objection sustained.

Mr. Campbell: I was laying the foundation. I will offer it in evidence, 144.

Mr. Gillen: I think, may it please the Court, we will have to offer the objection that there is no foundation laid to show that this document was ever delivered to the parties involved and I think that foundation should be laid.

Mr. Campbell: The signatures of the three parties.

The Court: Can you go a little farther with it, Mr. Campbell?

Mr. Campbell: Well, I had asked this question, to which the objection was sustained.

The Court: Can you meet this suggestion of counsel?

Mr. Campbell: Yes, your Honor.

Q. Were you present at the time the three signatures were affixed here? A. Yes.

Q. And you you recall where this document was signed? [1479]

A. In Mr. Thatcher's office, Mr. Thatcher's room.

Q. You have referred to an escrow being held in Mr. Woodburn's office with relation to the sale

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(Testimony of William J. Graham.)

of stock to Mr. Remmer; was this the document which was drawn in connection with that escrow?

Mr. Gillen: Same objection—what happened to the document when it was prepared——

The Court: Objection overruled.

(Question read.)

Mr. Gillen: We offer the same objection, that the document itself is the best evidence of what it was.

(Question read.)

The Court: Objection overruled. Answer the question.

A. The stock and receipt was kept and they still have it.

Q. Was it drawn in connection with the sale of the stock?

A. Yes, it was drawn for the sale of the place.

Mr. Campbell: I offer it in evidence.

A. They still have it.

Mr. Gillen: Our objection is still no foundation laid to show what was done with the document. Like a deed, a deed can be signed—whether it is ever delivered or not is another matter.

The Court: Objection overruled. The exhibit will be admitted in evidence, 144 admitted.

Mr. Campbell: At this time I wish to read this document:

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(Testimony of William J. Graham.)

(Reads.)

"Memorandum and Receipt

"J. C McMay is the owner [1480] of 6,000 shares of the capital stock of Cal-Neva, Inc. W. J. Graham is the owner of 5,000 shares of the capital stock of Cal-Neva, Inc.

"Elmer Remmer is the owner of 6,000 shares of Cal-Neva, Inc., and

"J. C. McKay, W. J. Graham and Elmer Remmer are also the joint owners, one-third each, of 6,000 shares of the capital stock of The Cal-Neva, Inc., which last-mentioned shares cost $28,125.00.

"J. C. McKay and W. J. Graham have this day sold to Elmer Remmer the stock that they separately own and have also this day sold to Elmer Remmer their two-thirds interest in 6,000 shares of stock of Cal-Neva., Inc., held jointly by McKay, Graham and Remmer.

"Mr. Remmer has this day paid to J. C. McKay and W. J. Graham, to be shared equally by themselves, $466,666.66, the receipt whereof is hereby acknowledged.

"Dated this 10th day of July, 1946.

"J. C. McKAY,

"W. J. GRAHAM.

"OK

"Elmer Remmer."

Now, Mr. Graham, at the time of the acquisition of this document dated the 10th day of July, 1946, was

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(Testimony of William J. Graham.)

there in fact paid to you and Mr. McKay the sum of $466,666.66? [1481] A. No, sir.

Q. Was any money at all paid to you on that occasion or up to that time in connection with the sale of that stock? A. No.

Q. Did you subsequently and during the year 1946 receive any sums of money on account of the sale of that stock?

A. Yes, the first payment was in September, we received 100 thousand dollars, fifty for myself and fifty for Mr. McKay. That was the first payment.

Mr. Campbell: I am going to ask a photostatic copies of two checks be given 145 for identification.

Q. Do you recall the date in September that you received those payments, Mr. Graham?

A. September 24th it says here. I think it was around September 24th.

Q. Now, during the year 1946 did you or Mr. McKay receive any further payments in connection with the sale of that stock?

A. No, that was all that year. We received——

Q. No, we must confine it to that year.

A. Oh.

Mr. Gillen: The defense will stipulate that this photostat may go in evidence.

The Court: Will you accept the stipulation?

Mr. Campbell: Yes, I accept.

The Court: Exhibit 145 will be admitted in evidence. [1482]

Q. Mr. Graham, I show you government's Exhibit 145, photostat of two checks, both dated Sep-

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(Testimony of William J. Graham.)

tember 24, 1946, each in amount of 50 thousand dollars, one payable to William C. Graham and one to James C. McKay, bearing signature Cal-Neva Lodge by James B. Jeffers, and bearing respective endorsements William J. Graham and James C. McKay, and ask you if those were checks received by you in respect to the 100 thousand dollars paid to yourself and Mr. McKay in September, 1946? A. Yes, that is correct.

Q. Calling your attention again to plaintiff's Exhibit 144, "Memorandum and Receipt," wherein it is alleged the sum of $466,666.66, does that represent the sale price of yours and Mr. McKay's stock to Mr. Remmer? A. Yes.

Q. And after the payment of the 100 thousand dollars, what amount remained due as of December 31, 1946 from Mr. Remmer to you and Mr. McKay?

A. Just take 100 thousand off and that is what remained due us.

Q. That would be $366,666.66, is that correct?

A. Yes.

Q. Calling your attention to plaintiff's Exhibit 145, the two checks bearing the signature of James B. Jeffers, are you acquainted with James B. Jeffers? A. Yes.

Q. Do you know what his connection, if any, was with Cal-Neva [1483] Lodge at the time these checks were issued?

A. Well, he was supposed to be manager around there with Mr. Remmer, bookkeeper or manager.

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(Testimony of William J. Graham.)

Q. Had he been there, if you know, prior to the time you sold out to Mr. Remmer?

A. Yes, he worked there four years.

Q. Now during the period of time that you and Mr. McKay remained interested in Cal-Neva Lodge, were any profits or dividends distributed?

A. Just one dividend. That was in '34, I think.

Q. In 1934? A. Yes.

Q. And aside from that year were any profits distributed?

A. If we made anything in the place we built more cabins and put it in the property.

Q. But so far as distribution of profits to the partners? A. Yes, that's right.

Q. I believe you stated during that period of time the bank loan was paid off, was it not?

A. Oh, yes.

Q. And improvements made on the property?

A. That's right.

Q. Now, during the period of time that you were there and aside from the year 1934, when a dividend was distributed, was any salary or compensation paid to Mr. Remmer? [1484]

A. No.

Q. Incidentally, what period of the year was the Cal-Neva Lodge open during the period that you and Mr. McKay were interested in it?

A. End of June—the 15th of June until September; sometimes the 30th of June.

Q. Did you at any time, up to and including the

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(Testimony of William J. Graham.)

period of December, 1946, have any other business interests with Mr. Remmer? A. No.

Q. Are you acquainted with former revenue agent A. V. Barcy? A. Yes.

Q. Do you recall an occasion upon which Mr. Brady made examination of Cal-Neva, Inc., as well as some other unrelated enterprises in which you were interested? A. Yes, I do.

Q. Do you recall in what year that was?

A. I can't tell you the year off-hand.

Q. Well, do you recall whether or not that was prior to your leaving the State for the period of time you have referred to?

A. Oh, yes; that was before that.

Q. And you left when? A. '39.

Q. The latter or early part?

A. The latter—October.

Q. Do you recall when it was in relation to that time? [1485] A. Right around '34.

Q. What were the circumstances surrounding the sale of yours and Mr. McKay's interest to Mr. Remmer?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, what the circumstances were. I don't know what bearing it would have on the issues in this matter.

The Court: I think it is a rather broad question, Mr. Campbell.

Mr. Campbell: Very well, I will withdraw it.

Q. Now, I will ask you, Mr. Graham, whether or not, during the years 1944-1946 inclusive, you

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(Testimony of William J. Graham.)

had occasion to loan Mr. Remmer personally any money? A. 1946, yes.

Q. And in what month was that?

A. February.

Q. And what was the amount involved?

A. Ten thousand.

Q. And how was that given, by your personal check? A. Yes, that's right.

Q. And will you state whether or not that amount was still outstanding as of the end of 1946? Did he still owe you?

A. He still owed me, didn't pay it until, I think in 1947.

Q. So he still owed that money at the end of 1946? A. Yes.

Q. Did you loan him any other money in 1946? [1486]

A. Yes, he phoned me from San Francisco and he said, "I have my income tax to pay," he said, "Will you loan me seven thousand dollars? I will send an attorney over to pick up the money," so I gave him a check for seven thousand.

Q. Did he say when he would pay it back?

A. He said he would pay it back in a week or so, so he came up in ten days and paid that money.

Q. So that was not outstanding in 1946?

A. No.

Q. Did he owe you any other money in 1946?

A. He owed me ten thousand.

Q. That is all?

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(Testimony of William J. Graham.)

A. Outside the money he owes for the corporation.

Q. You are referring to the purchase of the stock? A. Yes.

Q. But he owed you no other personal loans?

A. No, I don't remember that he owed me other than that ten thousand he owed.

Q. Did he owe you any personal loans at the end of '45?

A. No. '45, I didn't get home until October, 1945. I was away all them years.

Q. Now, during the period of time that you and Mr. McKay were interested in Cal-Neva up to the time that you sold your interests to Mr. Remmer who, if any one, supervised the keeping of the records at Cal-Neva? [1487]

A. The records were kept by Mr. Semenza.

Q. That is Mr. Lawrence Semenza of Reno?

A. Yes, the auditor.

Q. Were they kept by him from the inception, from the beginning of Cal-Neva Lodge?

A. Yes, I am sure they were.

Q. He has, has he not, been accountant for Mr. McKay and yourself for a number of years?

A. Yes, he has been our accountant for a number of years?

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Graham, just a couple of questions. The Exhibit 144, which sets forth the transaction of you

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(Testimony of William J. Graham.)

and Mr. McKay selling to Mr. Remmer your interests, that was prepared in Mr. Thatcher's office?

A. The office of Woodburn and Thatcher. Mr. Thatcher is the one who prepared it.

Q. Although it recited that that day, as I understand your testimony, you and Mr. McKay sold to Mr. Remmer for $466,666.66 and that he had paid you, that wasn't actually the fact at that time?

A. Oh, no; he didn't pay any. He was to pay us that money. That is why Mr. Thatcher drew that up.

Q. In the year 1946 then, as I understand it, the only payment that you and Mr. McKay received were those reflected by these [1488] photostat checks in Exhibit 145, which would be 50 thousand dollars check to each of you, is that correct?

A. That is correct.

Q. And that was the check of Cal-Neva Lodge, was it not, or Cal-Neva corporation, drawn on the Nevada bank; is that correct?

A. Cal-Neva Lodge, that's right.

Q. And the check was signed by Mr. James B. Jeffers? A. Yes, sir.

Q. So it was out of Cal-Neva account of the Main Office of the First National Bank of Nevada, is that correct? A. That is correct.

Q. And then, as I recall, you received no other payments that year? A. No.

Q. As a matter of fact, Mr. Graham, this total of 100 thousand dollars of these two checks that were paid, 50 thousand to you and 50 thousand to

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(Testimony of William J. Graham.)

Mr. McKay, in 1946 was borrowed by Mr. Remmer out of Cal-Neva?

A. I don't know where he got it.

Q. All you know it came from Cal-Neva bank account?

A. Cal-Neva, but I don't know where he got it. When we sold out to Mr. Remmer there was seventy-five thousand in the corporation.

Mr. Gillen: I think that is all.

Mr. Campbell: That is all.

(Witness excused.) [1489]

Mr. Campbell: At this time I wish to have marked for identification what purports to be a general ledger of Cal-Neva, Inc., 146 for identification, and a volume purporting to be pay roll records of Cal-Neva, Inc., as 146A for identification. These two records, which were produced pursuant to subpoena for the corporation records will be offered in evidence.

Mr. Gillen: Well, may we examine them first of all?

The Court: Yes, you may, certainly.

Mr. Gillen: May it please the Court, we have no objection to the admission of these two exhibits, once they have been properly identified and proper foundation laid, but merely having them marked and offering them now, without having a witness identify them and without being able to cross-examine as to the contents, we think counsel should lay the foundation.

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Mr. Campbell: Now, if the Court please, these were produced pursuant to subpoena which was served on Mr. Semenza and were produced at that time by counsel, who stated they were making no objection as to the production of these corporate records. They were delivered to the clerk and just now taken from the clerk's custody. In view of those circumstances, I hardly see that the objection is proper.

Mr. Gillen: The subpoena does not authenticate records. They may be the wrong records and we would like a witness on the witness stand who might explain the contents and details concerning them and we can have an opportunity to cross-examine. [1490] If they are merely put in and read, we are bereft of any opportunity to cross-examine.

The Court: I think the objection is well taken.

Mr. Campbell: In view of the circumstances of the production?

The Court: Yes.

Mr. Campbell: Very well, your Honor.

RODRICK PERKINS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Rodrick Perkins.

Q. Where do you live?

A. 1024 Plumas Street, Reno, Nevada.

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(Testimony of Rodrick Perkins.)

Q. What is your business or occupation?

A. I am a bookkeeper for the Bank Club.

Q. In Reno, Nevada? A. Yes, sir.

Q. And who are the owners of the Bank Club?

A. Who were?

Q. Who are?

A. The owners of the Bank Club are Bank Club of Reno, a corporation.

Q. And during the years up to and including the end of 1945 who were the owners? [1491]

A. The owners were Mr. Graham, Mr. McKay, and Mr. Sullivan. He was known as Sullivan. His legal name was Scarlett, but he was known as J. B. Sullivan throughout Reno and in the Bank Club.

Q. And he is now deceased, is he not?

A. Yes, sir.

Q. How long have you been bookkeeper for the Bank Club, Mr. Perkins? A. Since 1940.

Q. Now, Mr. Perkins, in the course of your duties as bookkeeper for the Bank Club, did there come to your attention a transaction whereby certain cases of Gallagher & Burton whiskey, which were stored at the Nevada Transfer and Warehouse Company's warehouse, were acquired by the Bank Club? A. Yes, sir.

Q. You were asked to produce the records with relation to that transaction. Have you done so?

A. They are right here.

Q. You have produced what you refer to as an

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(Testimony of Rodrick Perkins.)

invoice, a check and certain ledger records with relation thereto, is that correct?

A. That's correct.

Mr. Campbell: I will ask to have document entitled "Invoice" marked 147 for identification. I ask that the check be marked 147A for identification.

Q. With regard to this ledger sheet, will you point out to me, [1492] without a statement of any kind, Mr. Perkins, the items to which reference was made? (Witness indicates.)

A. Here is the check record. The general ledger sheet—it is included in that figure there.

Mr. Campbell: I will ask to have the ledger sheets marked 147B for identification. Do you have copies?

A. I do not have them here. I have them, but don't have them here.

(Short recess taken at 10:55. Jury and alternate jurors admonished.)

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. PERKINS

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Gillen: If the Court please, the defense is willing to stipulate that the three last exhibits offered by counsel may be admitted in evidence and also we are willing to stipulate that the original documents may be supplanted by copies.

The Court: Will counsel accept the stipulation?

Mr. Campbell: Well, I hadn't intended to offer the ledger sheet.

Mr. Gillen: Well, whatever he wants to offer.

The Court: You offer 147A? [1493]

Mr. Campbell: 147 and 147A.

The Court: I understand there is no objection. They will be admitted in evidence.

Mr. Campbell: I will read Exhibit 147. Typewritten document headed in typewriter, "Elmer Remmer Cal-Neva Lodge, Crystal Bay, Nevada. License 11757, November 22, 1946. Sold to Bank Club 239 No. Center Street, Reno, Nevada, 900 cases Gallagher & Burton $33.31—$29,979. (Now stored at Nevada Transfer Warehouse Company.)" Signed, written signature, "Elmer Remmer." Ex-

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(Testimony of Rodrick Perkins.)

hibit 147A is a check account of "Bank Bar, 239 No. Center Street, Reno, Nevada, First National Bank, dated July 30, 1947, pay to the order of Elmer Remmer $29,979." Signed "Bank Bar by Rodrick Perkins," bearing the pen written endorsement, "Elmer Remmer" and the stamp endorsement of the Bank Club of Reno.

Mr. Avakian: May we inquire whether all of Exhibit 147 was read? Is there a paid designation?

Mr. Campbell: I beg your pardon. There is also on 147 a notation, partially in pen and ink and partially by a date stamp, "Paid July 30-1947 check No. 3813," which is the date and check number as shown on Exhibit 147A.

You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Perkins, the document which is 147, plaintiff's exhibit in evidence, is the document that recited the sale of 900 cases of Gallagher & Burton whiskey for the total sum of $29,979, that [1494] was merely relating the transaction, was it?

A. It is an invoice.

Q. Now, the check, which is plaintiff's exhibit 147A, was issued by you on account of the Bank Club at the time? A. That's right.

Q. Now, the endorsement on the back of 147A indicates that the check, which was made to Elmer Remmer as payee by yourself, as payer, for the Bank Bar, was endorsed by Elmer Remmer?

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(Testimony of Rodrick Perkins.)

A. Yes, it was.

Q. And then there is below Elmer Remmer's ink endorsement, your bank stamp endorsement of the Bank Club of Reno, is that correct?

A. That is correct.

Q. And that would indicate that Mr. Remmer endorsed this check and turned it back to the Bank Club, which endorsed it again?

A. The Bank Club cashed the check for Mr. Remmer.

Q. Now, do you personally recall the transaction itself? A. Yes, sir.

Q. It is a fact, is it not, that when the check was issued by you to Mr. Remmer, he endorsed it, turned it back to you, and you cashed it, is that correct? A. Yes.

Q. And it is true, is it not, that you retained out in the sum of 23 thousand odd dollars to cover an indebtedness to the Bank Club from Robert Jeffers? [1495] A. That is correct.

Q. And Robert Jeffers had become obligated to the Bank Club in that amount and Mr. Remmer paid 23 thousand dollars out of this 29 thousand dollar check? A. Yes, sir.

Q. And it had been brought to your attention, had it not, by Mr. Robert Jeffers that Mr. Remmer owed Mr. Jeffers some money and Mr. Remmer would pick up Mr. Jeffer's obligation?

Mr. Campbell: Objected to as hearsay.

The Court: Objection sustained.

Q. Can you relate under what circumstances

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(Testimony of Rodrick Perkins.)

Mr. Remmer agreed to pay Mr. Jeffer's obligation, or under what circumstances did you happen to collect Mr. Jeffer's obligation from Mr. Remmer?

Mr. Campbell: Same objection—by indirect sought to be the same answer that could not be obtained by direct.

The Court: Same ruling.

Mr. Gillen: Of course, your Honor, the man handled the transaction. He must have some personal knowledge how he happened to collect one man's obligation from another. Here is the man, who is a witness on the stand, who issued the check and had it endorsed by the payee and then had taken back the check and deducted therefrom the sum of 23 thousand dollars. I have in mind, your Honor, he has some personal knowledge on the matter.

The Court: The ruling will stand. [1496]

Mr. Gillen: I don't know how else to get at it, your Honor. That's all.

Mr. Campbell: That's all.

(Witness excused.)

Mr. Gillen: May I ask this witness—I am sorry—to just resume the stand for a moment?

The Court: Yes.

Q. Mr. Perkins, you were acquainted with the fact that Mr. Robert Jeffers is now dead?

A. Yes, sir.

Mr. Gillen: That's all, thank you.

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WILLIAM K. WOODBURN

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. William K. Woodburn.

Q. Where do you reside?

A. 835 Arlington.

Q. In the City of Reno? A. Yes.

Q. What is your business or occupation?

A. Attorney at law.

Q. What is the name of your firm, Mr. Woodburn?

A. At present Woodburn Foreman and Woodburn.

Q. And what was formerly the name of your firm, during particularly [1497] the period 1944 to 1946? A. Thatcher and Woodburn.

Q. Are you acquainted with William Graham and James McKay? A. Yes.

Q. And are you acquainted with the defendant here, Elmer Remmer? A. Yes.

Q. In your capacity as an attorney, have you previously represented each of the three individuals whom I have named?

A. Yes, for many years.

Q. And I will ask you whether or not, in your capacity as an attorney, you also represented the corporation known as Cal-Neva, Inc.?

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(Testimony of William K. Woodburn.)

A. That is correct.

Q. As a matter of fact, you or members of your firm incorporated that business?

A. I believe that is correct. That is a matter outside my knowledge.

Q. You, however, did represent Cal-Neva, Inc.?

A. That is correct.

Q. And did you or did you not during the year 1946? A. Yes.

Q. Now, during the year 1946 were you present at various negotiations relating to the sale of the interests of Graham and McKay in Cal-Neva, Inc., to the defendant, Elmer Remmer?

A. No, sir. [1498]

Q. Did you, in connection with any such transaction, draw any papers?

A. No, sir. I might explain, Mr. Campbell, my law partner, Mr. George B. Thatcher, drew all the papers in connection with the sale of Cal-Neva, Inc., in connection with the sale of the stock.

Q. Mr. George Thatcher is now deceased?

A. He died about three months after this transaction took place.

Q. And with respect to the papers which he drew, was he at that time your partner in the company? A. That is correct.

Q. And after his death did you yourself personally look after the transactions?

A. Well, there really wasn't anything to look after, Mr. Campbell.

Q. Was there an escrow set up in your office, if you know? A. Yes.

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(Testimony of William K. Woodburn.)

Q. And are you still holding that escrow?

A. Correct.

Q. You were asked to produce here such records as you may have with respect to that escrow, have you done so? A. Yes, sir.

Q. Will you produce those at this time, Mr. Woodburn?

A. I might say at this time, Mr. Campbell, before I produce these record, that these records were given to me by reason of [1499] my relationship as attorney and client for both Mr. Remmer and McKay and Mr. Graham. I believe Mr. Graham has waived any objection he might have to my so testifying, but as yet I have not received waiver of Mr. Remmer.

Q. Might I ask you one question? I believe you stated in connection with these papers you were acting as an escrow agent for all parties?

A. We represented all parties.

Q. And you are holding the escrow at this time?

A. That is correct.

Mr. Campbell: I submit, your Honor, it is not a matter of confidence.

Mr. Gillen: I am sure Mr. Remmer will waive any privilege.

Mr. Campbell: I do not believe it is a matter of privilege.

Mr. Gillen: Well, if it is.

The Court: It does not seem to be. He is merely an escrow agent.

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(Testimony of William K. Woodburn.)

Mr. Gillen: However, we will waive any privilege that might attach.

Q. You have produced a document, Mr. Woodburn, entitled "Memorandum and Receipt."

A. That is correct.

Q. I am going to show you what has already been introduced as plaintiff's Exhibit 144 and ask you if that is a duplicate original [1500] of the document which you hold in your escrow?

A. It would appear to be.

Q. I will ask you whether or not there were any other memoranda or contracts setting forth the purported terms of the transaction?

A. None I know of, Mr. Campbell.

Q. That is the only document which so sets forth? A. That is correct.

Q. What else are you holding in that escrow?

A. The stock that was issued to Mr. Remmer.

Q. You have in your hand what purports to be stock certificates held by you in the escrow?

A. That is correct.

Mr. Campbell: Possibly we can avoid putting these in evidence.

Mr. Gillen: The defense would have no objection to Mr. Woodburn testifying verbally from these exhibits.

Mr. Campbell: That is what I was going to ask.

Q. You have stated that you hold certain stock certificates in the escrow and you have produced here what purport to be some eleven stock certificates of Cal-Neva, Inc. Mr. Woodburn, do you

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(Testimony of William K. Woodburn.)

know that those purport to represent all of the capital stock outstanding of Cal-Neva, Inc.?

A. I believe that is correct, Mr. Campbell.

Q. And in whose name are those stock certificates made? [1501]

A. Well, one for six thousand in Elmer Remmer and ten for 1800 in Elmer Remmer.

Q. And they all stand in the name of Elmer Remmer? A. That is correct.

Q. By whom are they signed?

A. Well, the first one for six thousand is signed by H. O. Hall as secretary and Mr. McKay as president. The others——

Q. What is the date of that certificate?

A. June 30, 1929.

Q. Now, the others are signed by whom?

A. Digressing a moment—1929 was the date Mr. Remmer and Mr. McKay and Mr. Graham and Mr. Hall acquired Cal-Neva. The others are all signed by Rodrick Perkins, assistant secretary, and Elmer Remmer as president.

Q. What date do the 10 certificates of 1800 bear? A. July 10, 1946.

Q. Now, Mr. Woodburn, do you have any written instructions with reference to the escrow as to what disposition is to be made of those certificates?

A. No. Mr. Thatcher's secretary, who is still with the firm, told me that Mr. Thatcher gave her this receipt and the stock and said, "Put this in the safe until I give you further instructions."

Q. And you, yourself, received no instructions with reference to that escrow? [1502]

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(Testimony of William K. Woodburn.)

A. None at all.

Q. From anyone? A. No, sir.

Q. Has money passed through you with relation to that escrow, passed through your hands?

A. Well, not exactly, not with that escrow. Now, when Mr. Remmer subsequently sold Cal-Neva, or sold the assets of the corporation, to its present owners, we did collect some money, some money that was disbursed in our office.

Q. Will you state whether or not that money was collected through your office on account of the 466 thousand dollars? A. Yes.

Q. As set forth in that receipt and memorandum? A. If you wish, I can tell you exactly.

Q. Yes, will you do so?

A. There was an original balance due to Mr. McKay and Mr. Graham of $233,333.33.

Q. That would be one-half of the price set forth in the memorandum?

A. That's right. Now, in 1946 Cal-Neva paid directly to each of them 50 thousand dollars. On March 2, 1949, 50 thousand dollars was paid to Mr. McKay and Mr. Graham through the First National Bank through the Trust Department.

Q. Is that 50 thousand each?

A. That's correct. The Trust Department at the bank was the [1503] escrow agent handling the deal between Mr. Remmer and Mr. Adler, the present owner.

Q. As I take it then, Mr. Woodburn, from a subsequent sale of the property——

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(Testimony of William K. Woodburn.)

A. That is correct.

Q. ——through an escrow set up for the purpose of effecting that sale and monies were paid by that escrow over to you or directly to Graham and McKay in relation to those transactions?

A. That is correct.

Q. So that, I take it, according to your records of the purchase price of $466,666.66 there had been paid by the end of 1946 a sum of 100 thousand dollars, is that correct?

A. Not according to my records because that payment didn't go through our office, but I believe I got that information from Mr. Semenza.

Q. And if that information was accurate, there would still be outstanding as of December 31, 1946, from Remmer to Graham and McKay the sum of $366,666.66? A. That is correct.

Q. Now, as attorney for Cal-Neva, Inc., do you know who kept the records of that corporation?

A. Well, I think that the manager, Mr. Jeffers, kept some, and my best recollection is Mr. Semenza used to audit their records, but I am not positive of it at all.

Q. Have you ever examined the records of the corporation yourself? [1504]

A. Well, what records, for instance, do you mean, the books?

Q. Yes, the books. Have you even seen them?

A. No.

Q. Do you know in whose custody they were kept? A. No.

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(Testimony of William K. Woodburn.)

Q. Do you know in what city they were kept? That is, maintained, the books themselves?

A. I couldn't tell you.

Mr. Campbell: That's all. You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Woodburn, I believe you stated that following the sale of the Cal-Neva assets by Mr. Remmer to the Adler group, your office disbused certain funds out of the proceeds of that sale to Mr. Graham and Mr. McKay on behalf of Mr. Remmer?

A. That is right.

Q. Out of the proceeds of that money did you also disburse, on behalf of Mr. Remmer, the sum of 25 thousand dollars to one Mr. Scarlett, also known as Sullivan? A. That is correct.

Q. Who was Mr. Scarlett?

A. Mr. Scarlett was one of the former partners in the Bank Club.

Q. Partner of Graham and McKay?

A. That is right. [1505]

Q. He was also known as Mr. Sullivan?

A. That is right.

Q. Did you have any records showing when you disbursed that money to Mr. Sullivan on behalf of Mr. Remmer?

A. I do not have any direct record of it. I do know it was some time after the sale by Mr. Remmer to Mr. Adler.

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(Testimony of William K. Woodburn.)

Q. And that sale was in 1949?

A. Well, the escrow was set up, I believe, in January, 1949.

Q. Was that in the amount of 25 thousand dollars? A. That is right.

Q. Did that represent a repayment to Mr. Scarlett of that sum, in repayment of loan from Mr. Scarlett to Mr. Remmer at some earlier date?

A. That's right.

Mr. Campbell: If he knows.

The Court: Do you know?

A. Yes, I know. I know Mr. Sullivan was very, very happy to get the money.

Q. Do you know whether Mr. Sullivan had loaned that money to Mr. Remmer prior to December 31, 1946? A. No, I do not.

Redirect Examination

By Mr. Campbell:

Q. In that connection, Mr. Woodburn—incidentally, what was the sale price of Cal-Neva to Mr. Adler?

A. I couldn't tell you offhand. [1516]

Q. Do you recall it was the sum of 800 thousand dollars?

A. I didn't handle that deal, Mr. Campbell. I believe either my father or John Thatcher handled it.

Q. Now, with regard to this 25 thousand dollars that was paid to Mr. Scarlett, sometimes known as Mr. Sullivan, he had, had he not, prior to his death,

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(Testimony of William K. Woodburn.)

been a partner in the Bank Club with Mr. Graham and Mr. McKay? A. That's right.

Q. Did you see any note in connection with that transaction? A. No.

Q. Do you know yourself when the loan was made? A. No.

Q. If it was a loan?

A. No. I remember Mr. Sullivan saying to both my father and myself that Remmer owed him 25 thousand dollars.

Q. Now, do you know whether or not the 25 thousand dollars referred to had been money borrowed by Mr. Remmer, or borrowed by someone else whose obligation Mr. Remmer had guaranteed?

A. I do not have any knowledge.

Q. I think you stated you did not know the date of the obligation? A. That is correct.

Q. Were you holding any security, either by note or any other form, in respect to the 25 thousand dollars?

A. I don't recall, Mr. Campbell, I don't think we did, though. [1507] I know I asked my father about that and he couldn't recall whether we had a note or not.

Mr. Campbell: I think that is all.

Recross-Examination

By Mr. Avakian:

Q. You said Mr. Sullivan told both you and your father that Mr. Remmer owed him 25 thousand dollars? A. That is right.

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(Testimony of William K. Woodburn.)

Q. Did he tell you that on more than one occasion?

A. Oh, yes, he was rather concerned about it and when this sale by Mr. Remmer to Mr. Adler came up, he asked us to be sure and see he was looked after.

Q. Do you recall the date of any occasions on which he told you Mr. Remmer owned that money?

A. Well, it would be subsequent to the sale.

Q. In other words, the sale had been set up and he wanted to make sure that you collected it for him? A. That's right.

Mr. Avakian: That is all.

(Witness excused.)

MR. PERKINS

recalled on further

Direct Examination

By Mr. Campbell:

Q. Mr. Perkins, you were acquainted, were you not, with Mr. Scarlett, known as Mr. Sullivan?

A. Yes, sir.

Q. He was one of the partners of the Bank [1508] Club? A. Yes, sir.

Q. Do you recall an occasion upon which you handled a loan for Mr. Sullivan when Mr. Remmer was present? A. No, sir.

Q. Mr. Perkins, do you recall an occasion when you handled money with respect to a loan made by Mr. Sullivan?

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(Testimony of Rodrick Perkins.)

Mr. Gillen: Objected to as asked and answered, leading and suggestive.

The Court: Objection overruled. Answer the question.

(Question read.)

A. That is a pretty broad question.

Q. Well——

A. We handle a lot of money down there over many periods of years.

Q. Did you at any time, in behalf of Mr. Sullivan, or Mr. Scarlett, handle a loan transaction from Mr. Sullivan to one O'Brien in San Francisco?

A. I do not recall. Mr. Sullivan handled most of the loans himself of that nature.

Q. Referring to this 25 thousand dollar repayment made to Mr. Scarlett, do you have any knowledge of the original transaction?

A. No, I heard that——

Q. No, not hearsay—but you yourself?

A. I don't have any direct knowledge, no sir.

Q. Did you keep any books or records for Mr. Sullivan? [1509]

A. I occasionally kept track of his interest receipts from bonds and dividend payments, occasionally.

Q. But other than that, did you keep any records for him? A. No, sir.

Mr. Campbell: I think that is all.

The Court: Any further questions, gentlemen?

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Mr. Gillen: No further questions.

(Witness excused.)

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

January 2, 1952—1:00 p.m.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

ALBERT FREDERICK FRITCHETT

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Albert Frederick Fritchett.

Q. Where do you reside?

A. Ambassador Hotel, San Francisco, California.

Q. What is your business or occupation?

A. At the present time I am unemployed.

Q. What was your former business or occupation?

A. I worked for Mr. Remmer, also worked at the race tracks. [1510]

Q. Over what period of time did you work for Mr. Remmer?

A. From 1941 to 1945 and a few days in 1946.

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(Testimony of Albert Frederick Fritchett.)

Q. With what business or businesses of Mr. Remmer were you connected during that period of time?

A. B & R Smoke Shoppe.

Q. That was located at 50 Mason Street in the City of San Francisco? A. That is correct.

Q. And during that period was that your sole employment? A. Yes, sir.

Q. Will you state the basis upon which you were employed, that is to say, by salary, commission or in what manner? A. By salary.

Q. And what was that salary?

A. It varied. I think I started in around sixty a week and at the end I was getting a hundred.

Q. Now, for a portion of that period of time were you in charge of the business of the B & R Smoke Shoppe?

A. I kept the financial end of it.

Q. Did you manage the financial end of it?

A. Yes, sir.

Q. What period of time was that?

A. During 1945.

Q. Was that after William Kyne went into the service? A. Yes, sir. [1511]

Q. Did you continue in that capacity until Mr. Kyne returned from the service? A. No, sir.

Q. Do you recall approximately when it was that you left in 1946?

A. I left about the end of '45 and I was back there for a few days the end of March or middle of March.

Q. How long did you remain at that time?

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(Testimony of Albert Frederick Fritchett.)

A. Oh, about a week.

Q. When you left in March, was the business still operating? A. No, sir.

Q. And that was March of '46?

A. That's correct.

Q. And will you state whether or not up until the first time you left at the end of 1945 the business operated continuously?

A. No, sir. It was a few months in 1945.

Q. Do you recall what months those were?

A. No, I do not. It was the end of '45.

Q. Was that at a period when the race tracks were closed down? A. Yes, sir.

Q. But aside from that, during the time that the race tracks operated from 1941 to the end of 1945, was the business continuously in operation?

A. Yes, sir.

Q. Now, prior to the time of Mr Kyne's entry into the service, [1512] what was the nature of the duties that you performed for the B & R Smoke Shoppe?

A. I used to figure the winning books.

Q. By figuring the winning books, do you refer to the figuring out the amount that should be paid to the holder of a ticket? A. Yes, sir.

Q. During that period of time, did you, yourself, handle the cash which came in?

A. I used to have to balance the room at the end of the day and I used to put the bank roll in in the morning.

Q. When you say you helped to balance the

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(Testimony of Albert Frederick Fritchett.)

cash count at the end of the day, do you refer to the operation of amount of cash on hand as checked against the wagers, less the pay-outs? A. Yes.

Q. Did those pay-outs include running expenses, as well as payment of wages?

A. Now what I used to do.

Q. You had nothing to do with that at that time? A. No, sir.

Q. Now, what did you have to do with the bank roll in the morning?

A. I used to go down to the bank and get the sack with the money in it for the cashier.

Q. Who was the cashier at that time?

A. Well, we had a couple of them at different times. Employees, [1513] one of them might be a ticket man and he would probably move up to cashier. Sometimes I would do the cashing also.

Q. By cashier, you refer to other employees who took in and paid out the money during the course of the day, is that correct?

A. Yes, sir.

Q. For example, when a person would place a bet, I take it it would be written out and money paid to the cashier or to the ticket rather?

A. That is right.

Q. Who, in turn, would turn it over to the cashier, is that correct? A. That is right.

Q. And I take it on each race, as the results and odds became known, it would be figured on the

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(Testimony of Albert Frederick Fritchett.)

winning ticket, the amount to be paid, is that correct? A. That is correct.

Q. And the cashier would then make such return as the fortunate winners called for?

A. That is correct.

Q. When you got the money at the beginning of the day—that is during the period when Mr. Kyne was still there—from what source did you receive it, what bank?

A. The sack would be made up at the end of the day with the bank roll and it used to be around five hundred and a couple of [1514] hundred or so in small bills.

Q. What bank was that kept in?

A. Day and Night Branch of the Bank of America, 1 Powell Street.

Q. Was it kept there in safety deposit boxes or banking account? A. In a deposit box.

Q. Do you recall the number of that safety deposit box? A. No, I don't.

Q. In whose name was that safety deposit box?

A. Myself and Willie Kyne.

Mr. Campbell: I would like to have these two photostats marked for identification, 148 for identification.

Q. I show you Exhibit 148 for identification, consisting of photostatic copies of two cards, and I draw your attention to the signatures appearing on those photostatic copies, and ask you if you recognize those?

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(Testimony of Albert Frederick Fritchett.)

A. Yes, sir, that is my signature and Mr. Kyne's.

Q. Now, I will ask you to examine that and state whether or not that refreshes your recollection as to the number of the safety deposit box to which you had access? A. Yes, 39813.

Q. And I will ask you whether or not that refreshes your recollection as to when that box was opened? I draw your attention—— [1515]

A. February 24, 1943.

Mr. Campbell: This will be offered in evidence as Exhibit 148.

The Court: 148 admitted in evidence.

Q. Now, during the period of time that you were employed there and prior to the entry of Mr. Kyne into the armed forces, did you maintain or were you an authorized signator on any bank account with reference to the operation of the B & R Smoke Shoppe? A. No, sir.

Q. Now, after Mr. Kyne entered the services and after you took over the running of the financial affairs, as you have stated, was a bank account opened in connection with the B & R Smoke Shoppe, of which you were an authorized signator?

A. Yes, sir.

Q. I show you plaintiff's Exhibit 24 in evidence, bank account in the name of E. F. Remmer or A. F. Fritchett, and drawing your attention specifically to the signature card, and also to the ledger sheets and ask you if that is the bank account to which you refer? A. Yes, sir.

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(Testimony of Albert Frederick Fritchett.)

Q. And during the period of time that this bank account was operated, will you state who made the deposits? A. I used to.

Q. And will you state the source of the money which was [1516] deposited into this account?

A. I would take it from money that I had on hand.

Q. At the B & R Smoke Shoppe?

A. Yes, sir.

Q. Were you given any instructions by anyone as to what money should be placed in that account, what amount? A. None at all.

Q. Now, with regard to any checks drawn on this account, who drew those checks? A. I did.

Q. Do you know whether or not Mr. Remmer drew any of the checks?

A. I believe he did, yes, sir.

Q. Did you at any time keep any of your personal funds in this account? A. No, sir.

Q. Do you know of your own knowledge whether or not Mr. Remmer deposited any monies in this account other than monies arising from the B & R Smoke Shoppe?

A. I don't remember. I don't believe so.

Q. What is your answer?

A. I do not remember.

Q. Now, in addition to the box at 1 Powell Street, the Day and Night Branch of the Bank of America, during the time that you were in charge of the B & R Smoke Shoppe, did you also have access [1517] to any other lock box?

A. To the safe at 52 Mason Street.

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(Testimony of Albert Frederick Fritchett.)

Q. Will you state whether or not there was assigned to you in that safe at 52 Mason Street a box? A. Yes, sir.

Q. Was that a lock box? A. Yes, sir.

Q. How was it opened, that is to say, by key or combination or both? A. By key.

Q. Who, if you know, in addition to yourself, had a key to that box? A. I had both.

Q. You had the only two keys?

A. Yes, sir.

Q. For what purpose was that box used?

A. To keep my cash in from the business.

Q. Over what period of time would a particular deposit be kept in there, that is to say, at the close of the day's business, when you were putting money in, how long would that money remain there, as a matter of practice?

A. It would be there all the time different amounts, and it was mostly in checks.

Q. When you say checks, you are referring to checks of customers? [1518] A. That's right.

Q. How would they subsequently be cashed?

A. I used to give them to Mr. Maundrell.

Q. During the next business day, is that correct? A. That's right.

Q. Cash that was taken during the day's business, what was done with that?

A. Put that in the box.

Q. Was that subsequently deposited in the bank? A. No, it was kept in the box.

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(Testimony of Albert Frederick Fritchett.)

Q. So that money deposited in the bank just represented checks, is that correct?

A. When I needed more money, I would put cash in.

Q. Then, do I understand your testimony to be that this bank account only carried whatever funds you needed to draw against, is that correct?

A. That account was opened *with* Mr. Kyne went into the army. There was no business in the place. That was opened and I was put in charge of it in order to pay the rent, phone bills, and the utilities.

Q. And you would deposit sufficient money in this account to cover those items, is that correct?

A. That is right.

Q. But so far as any other money coming in, the checks would [1519] be given to Mr. Maundrell and the cash retained in the safe, is that correct?

A. Yes, sir.

Q. Will you state whether or not from time to time the money that was retained in the safe at 52 Mason Street, if you turned that over to anyone or passed that over to anyone? A. No, sir.

Q. During the period of your employment there were there any accounting times, any accounting period? A. No.

Q. So far as you know? A. No.

Q. Now, during the period of time in 1945 when you took charge and this bank account was opened —appears to be, according to this exhibit, February 17, 1945, referring to plaintiff's Exhibit 24— did you maintain any books or records of account

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(Testimony of Albert Frederick Fritchett.)

showing the amount of money received and paid out in connection with the B & R Smoke Shoppe?

A. Yes, sir.

Q. And were those daily records?

A. Daily records, yes, sir, then they would go into monthly records.

Q. And in what form were they kept?

A. Just on sheets of paper.

Q. Individual sheets of paper for each day, is that correct? [1520] A. Yes, sir.

Q. And you say the monthly records, what form was that, also sheet of paper?

A. Just one sheet of paper.

Q. What would be done with the daily record at the time you made the monthly record?

A. They would be destroyed.

Q. Now, so far as monthly record which was taken from your daily records, what was done with them? A. I kept them in my desk.

Q. Where? A. 52 Mason Street.

Q. When was the last time you saw that record?

A. December, 1945.

Q. At the time you left? A. Yes, sir.

Q. And you have not seen that since that time?

A. No, sir.

Q. I show you Exhibit 111B, which is labeled "Standard Daily Journal 1945," and which was previously identified with Mr. Kyne, who made but one entry in this book, and ask you if you recognize this as one of the books maintained by the B & R Smoke Shoppe?

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(Testimony of Albert Frederick Fritchett.)

Mr. Gillen: By him.

Mr. Campbell: I will ask him first if he recognizes it. [1521] A. I never saw this before.

Q. During the period of time that you were in charge there, did you keep a record in any similar volume to this? A. No, sir.

Q. Calling your attention to plaintiff's Exhibit 111A, which is marked on the outside, "Daily Reminder 1943," I will ask you if you ever saw that record before?

Mr. Gillen: We offer the objection as asked and answered. This witness described during the period he was in charge how he kept his accounts. These are accounts of Mr. Kyne, as I recall; also this is year 1943, which is prior to the starting point in the indictment.

The Court: Objection will be overruled.

A. I may have seen this before.

Q. Now, during the time you were in charge did you keep any record in a book similar to this?

A. No, sir.

Q. Or did you keep any record of entries of a similar nature to entries shown in this book?

A. No, just on the sheets of paper.

Q. Now, with respect to the records which you kept, you say daily and then on monthly recapitulations, at which time you stated you destroyed the daily sheets, were any formal books kept, do you know? A. Not by me. [1522]

Mr. Gillen: Just a moment. I offer the objection it has been asked and answered, how he kept

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(Testimony of Albert Frederick Fritchett.)

his records. This "formal" books, of course, is characterization by counsel, but I do not think it is proper characterization. This is his witness on direct examination.

(Question read.)

The Court: You may answer the question.

A. No.

Q. Now, with respect to the checks which you delivered to Mr.——

Mr. Gillen (Interrupting): Pardon me, I am going to ask leave of the Court to strike out the word "formal" in connection with books. That is merely characterization of counsel. A book can be just a volume in a covering and accurately kept, or on a piece of paper. I think the word "formal" of his own witness is improper characterization and should be stricken.

The Court: Motion denied.

Q. Now, with regard to the checks which you say you delivered to Mr. Maundrell, did you keep any record of those checks? A. No, sir.

Q. Did you keep any record in any form as to those checks? A. No, sir.

Q. With regard to the cash which was kept in the safe, did you keep any record of any count from day to day or month to month as to the amount of cash on hand? [1523]

A. Well, I kept the sheet and the cash would balance with what was either won or lost and what was there.

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(Testimony of Albert Frederick Fritchett.)

Q. Was that carried on to the monthly sheets at the time you destroyed the daily sheets?

A. Yes, sir.

Q. Now, at the time you left the business at the end of 1945, do you recall the amount of cash on hand? A. No, I do not.

Q. What is your best recollection?

A. I think it was around five thousand dollars cash.

Q. Do you recall whether or not there were also on hand at that time any accounts receivable?

A. Yes, sir.

Q. What was the amount?

Mr. Gillen: I think the records would be the best evidence of what those amounts were. No foundation laid to show that those were not available to the prosecution.

Mr. Campbell: He stated the last time he saw the records.

The Court: Objection overruled.

A. I don't recall what it was?

Q. What is your best recollection?

A. I believe around 15 thousand outstanding.

Q. At the time you left there at the end of 1945, were there, to your knowledge, any outstanding obligation? [1524]

A. You mean money that the place owed?

Q. Yes. A. None.

Q. Now, calling your attention again to the bank account which you recognized of the B & R Smoke Shoppe, plaintiff's Exhibit 24, and the signature card on which I believe you identified the signature

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(Testimony of Albert Frederick Fritchett.)

of Mr. Elmer F. Remmer? A. Yes, sir.

Q. I call your attention to the information set forth on the card, "business liquor warehouse 52 Mason Street, joint business, parts introduction W. E. Kyne, address A. F. Fritchett, 56 Mason Stree, San Francisco," to what firm is the reference, if you know, about liquor warehouse, 52 Mason Street.

A. That is where the liquor was stored, 52 Mason Street.

Q. As I understand your testimony, the premises of the B & R Smoke Shoppe were at 50 Mason Street, is that correct? A. Yes.

Q. 52 Mason, I take it were adjoining premises?

A. Yes.

Q. What liquor was stored there?

A. I had nothing to do with the liquor, but there was a lot of liquor in there, cases, stored.

Q. You say you had nothing to do with that operation? A. No.

Q. Over what period of time did you observe that liquor stored [1525] there?

A. I think when I first went in, around 1943.

Q. Was the liquor still stored there when you left at the end of 1945?

A. Yes, sir, there was some there.

Q. Did you observe at any time the quantity or amount of liquor stored there?

A. Several hundred cases.

Q. Did you at any time participate in an inventory of that liquor?

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(Testimony of Albert Frederick Fritchett.)

A. I helped Mr. Kyne take inventory at the time.

Q. Do you recall on what dates?

A. No, sir.

Q. Prior to Mr. Kyne's going to the service or after his return?

A. No, before he went into the service.

Q. Did you at any time during 1944 assist in taking an inventory of that liquor?

A. It is possible I did.

Q. What is your best recollection?

A. I couldn't say.

Q. Do you recall at that time the quantity of liquor which was stored there at the time of the last inventory that you took?

A. No, sir. [1526]

Q. Now, I observe, with regard to this signature card, that the address is listed A. F. Fritchett, 56 Mason Street, San Francisco? A. Yes, sir.

Q. What was located on 56 Mason Street premises?

A. 56 Mason Street is the Crystal Hotel, which is immediately over 50 and 52.

Q. Did you reside at 56 Mason Street?

A. Yes, sir.

Q. I call your attention further to the signature card after the notation "business" in typing appears, "Liquor warehouse, 52 Mason Street, joint business partners." Will you state to what that refers?

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(Testimony of Albert Frederick Fritchett.)

A. That is the first time I ever knew I was a partner to this minutes.

Q. Now, Mr. Fritchett, did you at any time assist in preparing a 1945 partnership return for the B & R Smoke Shoppe? A. No, sir.

Q. Did you have anything to do with any return that was put in? A. No, sir.

Q. Do you know whether or not a 1945 partnership return for the B & R Smoke Shoppe was prepared? A. I do not.

Q. Now, there has been some testimony here regarding the [1527] acceptance of lay-off bets from others in the bookmaking business. Did you have anything to do with that end of the business?

A. No, sir.

Q. During the period of time that you were managing the B & R Smoke Shoppe was any such business conducted? A. Yes.

Q. And did you handle it during that period of time?

A. Just mailing away of the checks, cashing of the checks and the receipt.

Q. Who handled that business during the time that you were manager?

A. Mr. Lando and Mr. Remmer.

Q. Now with regard to those bets, do you know whether they were carried by the B & R Smoke Shoppe or if they were passed on to others?

A. I do not know.

Q. During the course of your employment, did it ever come to your attention any instances in

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(Testimony of Albert Frederick Fritchett.)

which bets were received from other bookmakers and passed on to third persons?

A. Well, I knew they used to do that.

Q. To whom were they passed on?

A. Oh——

Mr. Gillen: Just a moment. I think we are getting to a matter upon which your Honor has passed upon at an earlier [1528] witness. We offer the objection it is incompetent, irrelevant and immaterial and offer the further objection that your Honor has already indicated by rulings the immateriality of persons to whom bets were passed.

The Court: I don't see that the answer to that question would be material. If you want to argue the matter, I would like to hear from you.

Mr. Campbell: I think it is material, your Honor.

The Court: We will excuse the jury then.

(Jury and alternate jurors admonished and excused at 1:40 p.m.)

(In the absence of the jury.)

Mr. Gillen: We will locate the transcript in which similar rulings have been made.

The Court: I have in mind that ruling to which you refer.

Mr. Campbell: If the Court please, I think it is material to the matter of profits derived from the B & R Smoke Shoppe as to the amount of business which consisted of what counsel has referred to as so-called courtesy bets, compared to business which

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(Testimony of Albert Frederick Fritchett.)

was accepted as a regular business. Now, for example, the first page here of Exhibit 116F relating to 1943, that, as an example, shows that during 1943 there were purchased nearly half a million dollars of cashier's checks, which were largely sent to other bookmakers, without designating the names—the names are denominated here, but the [1529] testimony of Mr. Kyne was that with the exception of those made to the Collector of Internal Revenue and I think two or three others he pointed out, the rest were made to those in the bookmaking business. Now I think it is material to ascertain as far as possible how much of that 428 thousand dollars, for example, shown in those cashier checks represented business of the B & R Smoke Shoppe which they were handling as a part of their business, as compared to what has been termed courtesy handling, and that is the purpose of this question.

The Court: I think this covers the same situation we had quite a while ago. I do not believe it would be proper to allow the names of notorious people to go to the jury unless it was impossible to get the evidence before the jury without disclosing these names.

Mr. Campbell: Well, of course—pardon me——

The Court: You see the thought I have.

Mr. Campbell: Yes, I do, your Honor.

The Court: That these names are names of such characters as might possibly—although I doubt it would prejudice the members of this jury—but I

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(Testimony of Albert Frederick Fritchett.)

think the Court should guard against any possibility of that kind.

Mr. Campbell: I think that was counsel's characterization rather than my characterization.

The Court: I think we can safely say that he came pretty [1530]

Mr. Campbell: Yes, I think that is true. However, of course, these individuals were business associates——

The Court: Can we get this evidence that you desire before this jury without disclosing these names to the jury?

Mr. Campbell: Well, I can attempt to have him identify on here by mark of some kind, I presume, yes, which represented so-called courtesy bets which he knew about.

The Court: If it was impossible to achieve your point here without disclosing these names, that would be another thing, but if you can do it without disclosing these names to the jury, I think in the interest of justice we should try to avoid disclosing these names.

Mr. Campbell: I will attempt to approach it from that method.

The Court: That is what you have in mind, Mr. Gillen?

Mr. Gillen: Yes, and further, may it please the Court—of course, here we have a witness whom it becomes obvious to us, by reason of what we know from other testimony, was only in charge in the absence of Mr. Kyne for a period of perhaps seven

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(Testimony of Albert Frederick Fritchett.)

months. In 1945, the first five months there were no races at all, so for a period of about seven months. Now he testified he had nothing to do with that end of the business except he sent off the checks and I doubt that particular [1531] information could be obtained by this witness. Furthermore, this whole field was probed by counsel with Mr. Lando and Mr. Kyne, as your Honor will recall, particularly with Mr. Kyne. Mr. Kyne gave a very comprehensive description of how matters were handled, and it was explained how they were handled and what were courtesy and why courtesies were extended, so I think that it is here in the record, if your Honor cares to glance at it.

The Court: Well, go along and see what the questions of this witness develops, but I am interested in this matter that we discussed here. I do not see any reason why names should go before the jury of people the mention of whose names might possibly be prejudicial to the defendant. I do not see any reason why those names should go before the jury. Of course, if this—if this evidence which you desire to introduce here, if it is admissible otherwise and can't be shown without disclosing names, we just can't help that. That is all.

Mr. Campbell: I will proceed along that line, your Honor.

The Court: Very well. We will call in the jury.

(Jury returned into court at 1:50.)

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MR. FRITCHETT

resumes the stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Fritchett, directing your attention to plaintiff's [1532] Exhibit 116, which purports to be a summary of cashier's checks purchased through the Bank of America, Day and Night Branch, I will ask you first to examine this list——

Mr. Gillen: I wonder if we might have counsel show it to us. It is my recollection Mr. Kyne said they were checks he had purchased.

The Court: Yes.

Mr. Campbell: Some were purchased by him.

Mr. Gillen: I just want to see. I would like your Honor to look at the exhibit. There is no 1945 in this list.

The Court: The exhibit has been admitted in evidence.

Mr. Gillen: That is true, but this witness, if I followed the testimony, and I have taken careful notes, is being questioned now as to what he did in 1945 in connection with purchase of cashier's checks. There are no 1945 checks reflected here.

Mr. Campbell: I have not propounded the question yet.

Mr. Gillen: Let us hear the question before the jury was excused. The question was as to what date did Mr. Pritchett in 1945, when he was——

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(Testimony of Albert Frederick Fritchett.)

Mr. Campbell: I am about to ask another question at this time.

The Court: Yes, proceed.

Q. I am going to show you plaintiff's Exhibit 116, which purports to set forth cashier's checks purchased through the Day and Night Branch of the Bank of America, on the dates indicated, purchased [1533] by the persons whose names are indicated, payable to the payees as indicated and the amounts as indicated, and ask you if you will examine this list and state whether or not, from your association with the business, for the date of your employment in the business, if you are able to distinguish the money which was handled by those checks simply as courtesy and not as regular business of the B & R Smoke Shoppe?

Mr. Gillen: I offer the further objection it should be confined to the period involved in the indictment. Anything before 1944 would be incompetent, irrelevant and immaterial and if it is subsequent to the time that Mr. Fritchett left the place of employment would be incompetent, irrelevant and immaterial, calling for his opinion and conclusion.

The Court: Well, I take it that—if he can answer the question he may do so, because it would indicate to me his answer is from knowledge he gained during the course of his employment.

Mr. Campbell: This calls for yes or no answer.

Mr. Gillen: Prior to 1944 would not be material.

The Court: How about the starting point? I

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(Testimony of Albert Frederick Fritchett.)

have heard something about a starting point.

Mr. Gillen: The starting point is 1944. The first day of the year 1944, and the finishing point of the indictment is the last day of the year 1946.

The Court: Objection overruled. [1534]

A. I don't know.

The Court: Do we have stipulation of counsel that the jury and alternate jurors were present at all times?

All Counsel: So stipulated.

Q. Mr. Fritchett, do you recognize the names of the payees as set forth here? That should be answered yes or not.

Mr. Gillen: I offer the objection we are not concerned with matters that occurred before the time of the indictment. We are called upon to face charges set forth in the indictment, as your Honor has stated, and that is all. Now this is an exhibit, I forget how many years it goes back, back to '42 or '43, and as to those matters, we offer the objection it is incompetent, irrelevant and immaterial and outside the realm of this case, the boundary of the indictment.

The Court: Objection overruled. Answer the question.

A. Yes, I recognize it.

Q. Now, do you know, Mr. Fritchett, during the time of your employment, cashier's checks were being received from these persons whose names are listed here as payees?

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(Testimony of Albert Frederick Fritchett.)

A. I can only answer for 1945, because previous to that I had nothing to do with that.

Q. You knew nothing about that prior to 1945?

A. No, sir.

Q. During 1945, what was the situation?

A. We received checks, yes, sir.

Q. Who would receive those? [1535]

A. I would.

Q. What would you do with them?

A. Give them to Mr. Maundrell.

Q. Did you keep any record of those checks?

A. No, sir.

Q. Did you have any record at this time, or did you maintain any record as to what that money represented by way of payments or otherwise?

A. No, sir.

Q. During the period of time that you were in charge there, how often would cashier's checks be received?

Mr. Gillen: That is in 1945?

Mr. Campbell: When he was in charge.

A. Well, due to the condition of the business.

Q. Well, was it a daily matter of what?

A. Well, some of them would be a week, some by a few days, some probably about 2 weeks.

Q. You say some would be by a few days or week or month, are you referring to different individuals?

A. Well, the same account would carry on sometimes until it got to be five thousand dollars or so.

Q. And then there would be a cashier's check paid out or received, is that correct?

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(Testimony of Albert Frederick Fritchett.)

A. That is correct. [1536]

Q. Who kept the record of those accounts?

A. I did.

Q. And was that a part of your daily and monthly recapitulation? A. Yes.

Q. Well, then, did I understand you—or possibly we are talking at cross purposes here—you stated that you kept no record of the bank and cashier's checks?

A. I kept records of the amount of money that was owed.

Q. And when you referred to the 15 thousand dollars accounts receivable at the end of 1945, are you referring to such accounts represented by payments from time to time by cashier's checks?

A. They could be money that was owed, that was delinquent.

Q. Now, do you recall at this time what the volume of the business was during the period of time that you were manager and handling these affairs as to amounts received from out-of-town bookmakers and amounts paid out to out-of-town bookmakers?

A. No, it would show in the records with the checks that I bought and sent away.

Q. Now, as to the incoming checks, do you know where they were deposited and in what account?

A. No, sir.

Q. You simply turned them over to Mr. Maundrell? A. That's right. [1537]

Mr. Campbell: You may cross-examine.

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(Testimony of Albert Frederick Fritchett.)

Cross-Examination

By Mr. Gillen:

Q. Mr. Fritchett, in the year 1945, Mr. Kyne went into the service on February 14th, if I recall his testimony, is that about your recollection of it?

A. It was in February, I don't remember the date.

Q. And for the first five months of 1945, there were no races? A. That's correct.

Q. So that, as a matter of fact, you were in charge of this business yourself only for a period of about seven months, is that correct?

A. That's right.

Q. And this 15 thousand dollars that you mentioned here as accounts receivable, I take it that that included markers or IOU's, is that correct?

A. That is right.

Q. And when you left the business in December of 1945, Mr. Slater was the auditor or accountant who took care of the books and so on. Did you turn over your accounts to him?

A. I don't recall; I believe I did.

Q. Then as I understand, during the year 1946, you just went back to work there for about a week?

A. Correct.

Q. Do you recall what time of year that was?

A. About the middle of March. [1538]

Q. About a week and then you left the place again? A. That's right.

Q. Mr. Fritchett, during the period of time that

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(Testimony of Albert Frederick Fritchett.)

you were in charge in the B & R Smoke Shoppe in the year 1945, there having been no racing for the first five months, there was no business for that period of time, was there? A. No.

Q. And is it your recollection that the B & R Smoke Shoppe for that year operated at a loss?

A. I believe it did.

Q. Mr. Fritchett, calling your attention to prosecution's Exhibit 148, you will recall that this is the signature card and application for opening of safe deposit box, and this refers to the box that was opened in the name of William Kyne and A. F. Fritchett, Box No. 39813, Day and Night Branch of the Bank of America, who was it that opened this box, you or Mr. Kyne, do you recall?

A. You mean took out the box?

Q. Gave the information and took out the box, do you know?

A. I think we were both there together.

Q. Were you ever a partner in the B & R Smoke Shoppe? A. No, sir.

Q. Were you ever a partner in any liquor warehouse at 52 Mason Street?

A. I was strictly salary. [1539]

Q. And that salary, you say, commenced when you first went to work in 1941, around sixty dollars?

A. That is right.

Q. And ultimately you were raised up to one hundred a week? A. Yes, sir.

Q. Did you ever see any of the B & R partnership income tax returns? A. No, sir.

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(Testimony of Albert Frederick Fritchett.)

Q. So far as you know, you were never shown, as a partner, anything of those returns, is that correct? A. No, sir.

Q. Mr. Fritchett, with the permission of the Court, I will show you these prosecution's Exhibits 77, 78, and 79, which are the partnership returns for the B & R Smoke Shoppe partnership for the years 1943, 1944 and 1946, and if you look on the reverse side, which is called Schedule I, you will see set forth there the members of the partnership. I will ask you if your name appears on that schedule?

Mr. Campbell: If counsel so states, I will stipulate it does not appear. The witness says he has never seen it before.

The Court: The witness may answer.

A. I don't see it.

Q. There are three partners mentioned in that schedule, Mr. Remmer, Mr. Kyne, and Mr. Lando, is that correct? A. That is correct. [1540]

Q. Now, those daily accounts that you kept on separate sheets of paper and then recapitulated them into a monthly account at the end of each month, are those the records that you believe you turned over to Mr. Slater when you left in December, 1945?

A. The monthly accounts up to the 12 months of the year.

Q. The daily accounts you destroyed at the end of each month when you made up the monthly account?

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(Testimony of Albert Frederick Fritchett.)

A. They had names on them and they were destroyed.

Q. And to the best of your knowledge and recollection at this time did your daily sheets reflect truly the business that was done by the B & R Smoke Shoppe and did the monthly accounts truly reflect a recapitulation of the daily accounts?

Mr. Campbell: Objected to, the books are the best evidence. The witness has testified he is not familiar with certain of the aspects of the business.

The Court: He may answer the question.

A. To the best of my knowledge, they were true and correct.

Mr. Gillen: That's all.

Redirect Examination

By Mr. Campbell:

Q. Counsel asked you whether or not the 1945 operation of the B & R Smoke Shoppe was at a profit or loss, and you stated you believed it to be operated at a loss. Do you know that to be a fact?

A. No, I don't. [1541]

Q. Do you know what the records show as to whether it was a profit or loss?

A. My records show a profit but if the delinquent accounts were not collected, it would show a loss.

Q. Now, you referred to the fact as to destruction of the daily sheets and you said they had names on them and were destroyed; to what do you refer?

A. Each daily sheet, like Joe Brusso a thousand,

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(Testimony of Albert Frederick Fritchett.)

and Charlie Jones, five hundred; I kept them for a while and then I was told to destroy them and destroy the evidence of the names.

Q. Who gave you those instructions?

A. Mr. Remmer.

Q. When you then destroyed those and set up your monthly sheet, your monthly sheet did not reflect who owed you and whom you owed money to by name?

A. The monthly sheet I refer to would be just how much was won or lost for the month.

Q. And wouldn't show who owed you or who you owed money to?

A. No, that would be carried on the daily sheet.

Q. The sheet after you destroyed it?

A. Yes, after it was all paid off, that would be destroyed.

Q. So no permanent records were ever kept to show who you owed money to at any given time——

Mr. Gillen: Objected to as assuming something already in evidence. He already testified to 15 thousand dollars in markers. [1542] Certainly they were kept. Leading and suggestive and not proper redirect.

The Court: Read the question.

(Question read.)

Q. No permanent records were kept showing from day to day who owed you money and who you owed money to?

Mr. Gillen: Objected to as leading and sugges-

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(Testimony of Albert Frederick Fritchett.)

tive and not proper redirect examination. It has been asked and answered and explained.

The Court: Objection overruled. Answer the question.

(Question read.)

Mr. Gillen: I object to the word "permanent." It is characterization of counsel.

The Court: He may answer the question.

A. After the money was paid I didn't see any reason to keep any.

Q. Did you keep any? A. No.

Q. Those were the sheets that were destroyed, is that correct? A. Yes.

Mr. Gillen: Objected to as leading and suggestive, asked and answered. This is his witness. He is cross-examining his own witness. He stated he kept a daily record and at the end of the month made a recapitulation and when he left there, there were 15 thousand dollars markers.

The Court: You may answer the question. [1543]

A. Yes.

Mr. Campbell: That's all.

Recross-Examination

By Mr. Gillen:

Q. Mr. Fritchett, do I understand that daily you kept a record of the money taken in and the money paid out, is that correct? A. Yes.

Q. And also who you owed money to and who owed money to you, is that correct? A. Yes.

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(Testimony of Albert Frederick Fritchett.)

Q. And then in the case of markers the records were kept? A. Yes, sir.

Q. And when the end of the month was reached, you made a recapitulation of the total month's business, did you not? A. Yes.

Q. And if somebody owed money on markers as long as a month, that marker was kept until paid?

A. That is true.

Q. And when you left there were 15 thousand dollars in markers unpaid? A. Correct.

Q. And if those markers had not been paid, the B & R would have had a loss in 1945?

A. Yes, sir.

Q. And you don't know whether they were paid any part or not? A. I don't know. [1544]

Q. And you don't know, therefore, whether the B & R Smoke Shoppe made or lost money in 1945—it all depended on whether the markers were paid?

A. I don't know.

Mr. Gillen: That's all.

Redirect Examination

By Mr. Campbell:

Q. Just what did your monthly recapitulation show?

Mr. Gillen: Objected to as asked and answered.

The Court: He may answer the question.

A. What did it consist of?

Q. Yes, did it consist of more than one figure?

A. How much was won and how much was lost and how much was still owed.

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(Testimony of Albert Frederick Fritchett.)

Q. Did your monthly recapitulation, was that more than one sheet or one sheet?

A. Just on one sheet.

Q. And showing the winning, loss, and how much was owed, is that correct? A. Yes.

Q. Was the amount which you owed in one figure or more than one figure?

A. The amount which we owed?

Q. Yes.

A. It would be in more than one.

Q. And the amount owed to you? [1545]

A. Would be more than one figures.

Q. The names of those that owed you, were they on that monthly recapitulation sheet?

A. Yes.

Q. And the names that you owed, were on that sheet, is that correct? A. Yes.

Mr. Campbell: That's all.

Mr. Gillen: That's all.

(Witness excused.)

MR. BERT BUSTERNA

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Bert Busterna.

Q. Are you sometimes known as Bert the Barber? A. Yes, sir.

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(Testimony of Bert Busterna.)

Q. That was your occupation at one time?

A. Yes, sir.

Q. Where do you reside, Mr. Busterna?

A. 50 Laguna.

Q. In the City of San Francisco?

A. City of San Francisco, yes.

Q. What is your business or occupation.

A. I have a cigar store. [1546]

Q. Are you acquainted with Elmer Remmer, the defendant? A. Yes, sir.

Q. How long have you known him?

A. Oh, 14 or 15 years.

Q. Have you at any time been associated with him in the conduct of business?

A. Just one place.

Q. What was the name of that place?

A. 186 Club.

Q. And that is located at 186 Eddy Street, in San Francisco? A. Yes, sir.

Q. There was, I believe, also on the same premises a concern known as the Day-Night Cigar Store?

A. In front, yes.

Q. Did you have any connection with that?

A. No, sir.

Q. Of any kind? A. No, sir.

Q. Now, when did you first become associated in the 186 Club? A. It was the year of 1943.

Q. Do you recall approximately what part of that year? A. I don't remember.

Q. Well, now, in what manner did you become associated with the 186 Club?

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(Testimony of Bert Busterna.)

A. Well, I heard that the place was for sale and I went over [1547] to him and asked him if he would like——

Q. You went over to whom?

A. Mr. Remmer.

Q. All right, proceed.

A. And I told him about it and he said, "Well, I will look into it," so about a week later he bought it and put me in charge of it.

Q. As manager? A. As manager, yes.

Q. What was the business of the 186 Club?

A. Well, it was a card room.

Q. And it operated, did it, on the back of the premises in which the Day-Night Cigar Store was located? A. That's right.

Q. Now, how long did you remain there as manager of the 186 Club?

A. Well, from that time until 1947.

Q. And you continuously managed over that period? A. Yes, sir.

Q. Now, did you at any time invest any money or pay any money to any one in connection with the acquiring of the 186 Club?

A. You mean, did I invest any money to buy the place?

Q. Yes. A. No, sir.

Q. Who, if you know, put up the money for that property? [1548]

A. Well, it was the only one that talked to me, was Mr. Remmer.

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(Testimony of Bert Busterna.)

Q. Do you know how much was paid for that club? A. No, I do not know, sir.

Q. Now, will you state wether or not in the operation of the club if a bank roll was used?

A. Yes, sir.

Q. Who put up the bank roll?

A. Well, Mr. Kyne put up the bank roll.

Q. Do you know whether or not it was Mr. Kyne's money? A. That I couldn't say.

Q. How much was the amount of it?

A. I couldn't give the correct figure because I don't remember.

Q. You don't recall at this time?

A. No, sir.

Q. Let me show you exhibit here in evidence, Mr. Busterna, plaintiff's Exhibits 110 to 110F inclusive, which have heretofore been identified as poker sheets from the 186 Club, and ask you if you are familiar with sheets of this character used in connection with that business? A. Yes, sir.

Q. Were such sheets kept daily in connection with the operation of the business?

A. Well, as far as those sheets is concerned, I recognize them all right, but I don't know how they kept them because I don't know much about the office work and I had some people [1549] working in there who kept the sheets themselves.

Q. Were such sheets kept by the employees?

A. Yes, sir.

Q. Were they employees operating under your direction as manager? A. Yes, sir.

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(Testimony of Bert Busterna.)

Q. Who kept the poker sheets? Who were those individuals, what were they known as?

A. They were kept in the office.

Q. By office, do you refer to a room in the building on the premises?

A. In the office in the club room.

Q. Well, were the people who kept these also known as cashiers? A. Cashiers, yes.

Mr. Gillen: Objected to as leading and suggestive, leading his own witness.

The Court: The answer may stand.

Q. Now, I observe that there are several sheets apparently for each day. Can you state how that came about, Mr. Busterna? A. What, sir?

Q. There are several sheets for each day.

A. Yes, sir.

Q. How does that come about?

A. I don't know; I couldn't say.

Q. How many hours a day was the club [1550] open. A. Twenty-four hours a day.

Q. Did the employees work in shifts?

Mr. Gillen: May it please the Court, this sounds like a waste of time. It has been established in the record there were three eight-hour shifts. I think that has all been established in the record, just wasting time going over that again. We will stipulate there were three shifts of work and the place was open 24 hours a day.

The Court: Objection overruled. You may answer the question.

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(Testimony of Bert Busterna.)

(Question read.)

A. Yes, sir.

Q. Now isn't it a fact, Mr. Busterna, that different sheets were kept for each shift?

Mr. Gillen: Objected to. He is cross-examining his own witness. The question is a cross-examination question—isn't it a fact, and setting forth the facts.

The Court: Objection overruled. Answer the question.

A. I don't know anything about the office, whatever they did, sir. They kept the sheets themselves. I didn't know anything about it.

Q. Who directed what should be put down on the sheets? Who gave instructions to the employees in that regard? A. Themselves.

Q. Did you give them any instructions as to keeping of these [1551] sheets? A. No, sir.

Q. Who did instruct them?

A. Themselves. They got along together and thought that was the best way to keep them.

Q. Who are they?

A. The office; boys that worked in the office.

Q. What were done with the sheets at the end of each day?

A. They were put away in the drawer.

Q. Then was happened to them?

A. Well, somebody come and picked them up the next day or something.

Q. Who picked them up the next day?

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(Testimony of Bert Busterna.)

A. Well, there was Mr. Slater to start with, he was one of them. Mr. Kyne picked them up a few times.

Q. Yes?

A. Then certain times, or times I got around earlier, I made them up myself.

Q. You made them up? A. Yes.

Q. What do you mean?

A. Well, figured them out.

Q. Figured what out, Mr. Busterna?

A. Figured to see how they stood, how much money we made or whether we made any or [1552] not.

Q. Then what would you do with the sheets?

A. Turned them over to 50 Mason Street.

Q. Were any books or records kept on the premises at 186 Club?

A. I don't know, sir. I think there was only the sheets kept.

Q. Well, you say they were delivered over to 50 Mason Street? A. Yes, sir.

Q. Was that done daily?

A. Well, sometimes daily; sometimes every two or three days or a week.

Q. What was done with the money that was taken in?

A. Well, when there was any money it was brought up to 50 Mason Street and when there wasn't any, it was still brought up there.

Q. What?

A. When there was money in the sheets, it was

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(Testimony of Bert Busterna.)

taken out and put here and sent over to 50 Mason Street.

Q. Where was it put over there?

A. Just left it on top of the table, or if somebody was in charge, Mr. Maundrell or Mr. Slater, or someone, Mr. Kyne. Someone was there all the time.

Q. Was that office open 24 hours a day, too?

A. No, that was in the afternoon.

Q. It was left on top of the table?

A. Well, when there was a man there to receive it, then we gave it to him. [1553]

Q. During the time you were manager there, did you receive any salary?

A. I got twenty-five a day.

Q. Did you receive any other amounts of money?

A. Yes, sir; I got five thousand dollars a year for three years.

Q. For what three years did you get that five thousand? A. 1943, '44 and '45.

Q. What did that represent? What did you get that for? A. Well, 25 per cent.

Q. You were supposed to have 25 per cent?

A. Yes, sir.

Q. Who told you that? A. Mr. Remmer.

Q. Did you have a written agreement regarding that? A. No, sir.

Q. Were you familiar with the fact that a corporation was formed?

A. No, I never heard anything about it.

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The Court: We will take our recess now.

(Jury and alternate jurors admonished and 15-minute recess taken.)

2:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BUSTERNA

resumes the witness stand on further [1554]

Direct Examination

By Mr. Campbell:

(Last question and answer read.)

Mr. Gillen: We offer the objection it is assuming something not in evidence and misinterpretation of the evidence in the case.

The Court: Well, it has already been answered.

Mr. Gillen: What is it?

The Court: The question was answered.

Mr. Gillen: I know, but the question doesn't contain the facts.

The Court: It has already been cancelled.

Mr. Gillen: The way the question was asked, it would indicate——

The Court (Interceding): Well, Mr. Gillen, there is nothing before the Court.

Mr. Gillen: All right, if you want the record to be in error, leave it.

The Court: I don't want the record to be in

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(Testimony of Bert Busterna.)

error. Did you say if I want to leave the record in error?

Mr. Gillen: No, I said if we want the record to be in error. I was trying to explain something I thought was misleading.

The Court: It may stand.

Q. Mr. Busterna, I am going to show you plaintiff's Exhibit 87, stated to be corporation income and declared value excess profits tax returns for the fiscal year July 1, 1943, to [1555] June 30, 1947, for the 186 Club, and drawing your attention to the signature appearing immediately before the provision "President," I will ask you if you recognize that signature? A. Yes, sir.

Mr. Gillen: What year is that for?

Mr. Campbell: Fiscal year ending June 30, 1946.

Q. Whose signature is that? Is that your signature? A. Yes, sir.

Q. Now did you prepare this return, Mr. Busterna?

A. Well, I can't tell you this because I don't know anything about the keeping or anything about the profits or tax or anything else there; I just don't know.

Q. Who, if anyone, presented that to you for your signature?

A. I think this was presented to me by Mr. Kyne.

Q. Did you read it at the time?

A. No, sir; I did not read it at the time.

Q. Do you, yourself, know whether or not the

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(Testimony of Bert Busterna.)

figures set forth thereon, as relative to income and profit, are correct?

A. That I couldn't tell you, sir; I don't know.

Q. I call your attention to the other document, which is a part of this Exhibit 87, which is entitled "Tentative Return Corporation Excess Profits Tax Return Fiscal Year Beginning July 1, 1943, and Ending June 30, 1944," and ask you if that is your signature there as president?

A. That is my signature. [1556]

Q. Who, if anyone, presented this to you for your signature?

A. I think that was also Mr. Kyne.

Q. Do you know whether or not the figures set forth thereon are true and correct?

A. I don't know, sir; I couldn't tell you.

Q. Now when you signed this as president, to what did you refer? A. Sir?

Q. When you signed that as president, to what did you refer?

Mr. Gillen: Object to that, it speaks for itself, may it please the Court, we object to it on that ground.

The Court: Objection overruled.

A. I don't know. I just signed it. It was presented to me and that's all, I signed it.

Q. I am going to show you plaintiff's Exhibit 88A, the corporation income and declared value excess profits tax return of the 186 Club fiscal year beginning July 1, 1944, and ending June 30, 1945; directing your attention to the signature thereon,

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(Testimony of Bert Busterna.)

Bert Busterna, president, and ask you if that is your signature?

A. Yes, sir; that is my signature.

Q. And I draw your attention to the printed word, hand-printed, "President"; did you print that on there, immediately appearing under your signature? A. No, sir; that is not me. [1557]

Q. You did not put that on there?

A. No, sir.

Q. Are you familiar with the figures set forth in this return and the schedule set forth in this return? A. No, sir; I am not.

Q. Do you know whether or not the figures set forth herein and the information set forth herein are true and accurate?

A. I couldn't tell you, sir.

Q. This is noted as signed the 15th day of February, 1945. Do you recall who, if anyone, presented this to you for your signature?

A. That would only be one man to me, Mr. Kyne, that's all.

Q. I direct your attention to the fact that there has been testimony that Mr. Kyne was at that time in the service.

A. Well, I couldn't say; either he or Mr. Slater, that is the only two ever presented me this kind of papers.

Q. I am going to direct your attention to defendant's Exhibit A, which purports to be the Articles of Incorporation of the 186 Club, as certified to by the Secretary of State of the State of Cali-

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(Testimony of Bert Busterna.)

fornia, and ask you if you have ever seen the Articles of Incorporation of which this purports to be a certified photostatic copy?

A. Is this a charter? We have a charter, it looks like this.

Q. Will you examine it?

A. I couldn't recall having seen. [1558]

Q. You couldn't recall having seen the document set forth on the 2nd and third pages following the certificate? A. No, sir.

Q. Did you ever attend any directors' or officers' meetings of the 186 Club?

A. No, sir; we had none.

Q. Do you know whether or not any minute books were kept of the 186 Club?

A. That I couldn't tell you, sir.

Q. Do I understand you that you were to have a 25 per cent interest in the 186 Club?

A. Yes, sir.

Q. Who else, if anyone, had an interest in that club?

Mr. Gillen: I think the record would be the best evidence, the books and records of the club.

The Court: He may answer the question.

A. Well, all I know, supposed to be five or six of them.

Q. Who were they?

Mr. Gillen: Objected to. The record would be the best evidence.

The Court: Objection overruled. You may answer the question.

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(Testimony of Bert Busterna.)

A. Well, there was Lando for instance, one of them.

Q. Who? A. Mr. Lando. [1559]

Q. Yes? A. Supposed to be Mr. Kyne.

Q. Yes? A. Supposed to be Mr. White.

Q. Mr. White?

A. Well, Mr. Dutch White; I don't know his name.

Q. Are you referring to Attilio Casselini?

A. Casselini, that's right. There was another one, Niels—he is dead now.

Q. Nelus?

A. Nelus and Kopstick. They are all supposed to have a part of the club.

Q. Do you know what interest they had?

A. I can't tell you.

Q. Do you know whether or not Mr. Remmer had an interest?

A. Yes, sir; he was supposed to have an interest also.

Q. Do you know what his interest was?

A. I couldn't tell you, sir.

Q. You say in addition to your daily wage or salary of $25, also in each of the years 1943, 1944 and 1945 you received the amount of five thousand dollars? A. Yes, sir.

Q. Who paid you that money?

A. Mr. Remmer gave it to me.

Q. And what did that money represent? [1560]

A. My 25 per cent.

Q. Of the profits? A. Of the profits.

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(Testimony of Bert Busterna.)

Mr. Gillen: Of course, I think that is calling for his opinion and conclusion.

The Court: The answer may stand.

Q. In what form was the money given to you?

A. It was given to me in cash.

Q. By cash, do you refer to currency?

A. Yes, sir.

Q. Was it given to you at any particular time of each of the years?

A. The end of the year, along about this time, maybe around about Christmas week.

Q. In other words, at the end of the year or beginning of the following year; is that correct?

A. Yes, sir.

Q. I call your attention to the fact that the returns which you signed, which show the 186 Club to be on a fiscal year basis ending June 30th each year. Were you ever paid any of those sums around about June 30th of any of the years involved?

A. What was that?

Q. Were you ever paid this five thousand dollar amount around about June 30th of any of the three years in which you received it? [1561]

A. I can't recall.

Q. You stated, I believe, in reference to the poker sheets, that on occasions you made these up yourself? A. Occasionally, yes.

Q. I am going to ask you to examine these and state whether any of these were made up by you? I am referring to the 110 series.

A. There are some by me; yes, sir.

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(Testimony of Bert Busterna.)

Q. Will you indicate which ones were made up by you? A. This one.

Q. You have handed me 110F; was this made up by you? A. Yes, sir.

Mr. Avakian: I believe there are several sheets in 110F. Were they all made up by him?

Mr. Campbell: I will come to that in a moment.

Q. Do you recognize any of those?

A. Yes, sir; here is one.

Mr. Campbell: The witness has handed me 110 (e).

A. There is another one.

Mr. Campbell: The witness has handed me 110 (d).

A. That is all, those three.

Q. Now in regard to Exhibit 110F, which purports to be for December 31, 1946, when you say you made this up, to what portions of the exhibit do you refer? What did you make up on [1562] that? A. I can't see from here.

Q. I ask you, Mr. Busterna, what portion you made up. What figures did you put in, either on the face or the back of those sheets, 110F?

A. Well, here, there, sir; right over here. This 479 and 355, we taken off.

Q. You are referring to the totals of the columns on the sheet? A. That's right.

Q. Showing the amounts of loans and the returns and the take from the table; is that correct?

A. No, show the ins and outs and receipts of the day. As far as the IOU's and stuff like that, I

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(Testimony of Bert Busterna.)

don't know much about it. I don't know a thing about it.

Q. By IOU's are you referring to items on the right-hand column? A. Yes, sir.

Q. You didn't make those up? A. No, sir.

Q. Did you keep any record of those yourself?

A. No.

Q. Whose duty was that?

A. That was the clerk at 50 Mason Street.

Q. Do you know who at 50 Mason Street kept those records?

A. Well, the bookkeepers there, like Mr. Slater for one. [1563] After Mr. Slater was gone, I think Mr. Maundrell or the girl. There was other people working there.

Q. Now with regard to this sheet and to the portions on the left side where you have total. Calling your attention to the column, "Amount loaned," against which amounts are set forth opposite names in the left-hand column, to what does that refer?

A. This refers to when you start the games, you have different people to play, you might have to put somebody in or yourself, you have to play yourself in order to keep the games going, you have to fill in. It is losses and winning.

Q. Do those refer to amounts advanced to people employed by the house to keep the games going?

A. Not employed by the house. For people who would be around there, that you could put in. For instance, you have a game $22 limit, you have to have $20 to play and some people haven't got $20.

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(Testimony of Bert Busterna.)

Q. The house advances it?

A. The house advances, or else somebody that stays there a long time, you give them the money.

Q. What was done with the profits?

A. If they won, they get half; if they lose, it don't cost them nothing.

Q. On this 110F first page, I notice amount loaned is 355 and the amount returned is [1564] 480.50. A. That's right.

Q. It was a winning sheet, as far as the players that the house was backing, was concerned?

A. That's right.

Q. You have also included in the 355 the wages of four house men, is that correct, that is yourself and three employees? A. I don't know.

Q. I call your attention to $25 Busterna wage?

A. Yes, it is there. Evidently that is where they put it. I never know how they kept sheets or nothing.

Q. And you yourself know nothing about whether the club was operating at a profit or loss?

A. Well, we operated at a profit, sir.

Q. At a profit? A. A little profit, yes.

Q. Is that true during the years 1944, 1945 and 1946? A. Yes, sir.

Q. And you operated at a profit for each year?

A. If I recall it right, yes, sir.

Q. What was the source of your knowledge in that regard; that is to say, was it from books or records or from your personal observation?

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(Testimony of Bert Busterna.)

A. Personal observation. I don't know anything about the books, never seen a book or nothing.

Q. Had you been in that business before, Mr. Busterna? [1565]

A. No, that is the first time.

Q. Do you know whether or not a bank account was maintained for the business?

A. Bank account?

Q. Yes. A. I don't know, sir.

Q. Did you have access to any safety deposit box in connection with the business? A. No, sir.

Q. Did you have access to the safe at 52 Mason Street? A. No, sir.

Q. Now what was done with the winnings each day? You stated you delivered the poker sheets to 50 Mason Street? A. Yes, sir.

Q. You also delivered the winnings there, or did you? A. Delivered all; yes, sir.

Q. On those occasions would you receive a receipt from anyone? A. No, sir.

Q. In addition to the $25 a day which was paid you and the five thousand dollars you say which was paid you for 1943, 1944 and 1945 by Mr. Remmer, did you receive any further compensation?

A. No, sir, except that I owed some money myself to the club.

Q. You borrowed some money from the club?

A. I didn't borrow it. I just used it for myself to play lowball with.

Q. Did you owe that money at the end of [1566] 1946?

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(Testimony of Bert Busterna.)

A. I owed it for a period of a couple of years; yes, sir.

Q. Will you state whether or not that represented your personal gambling or gambling in behalf of the club?

A. That was my own personal gambling.

Q. Will you state whether or not that was an account owed by you to the 186 Club?

A. Well, just wrote an IOU, that's all.

Q. But it was owed by you to the club? You owed that to the Club? A. Yes, sir.

Q. How much did that amount to?

A. I am not sure whether 30 or 35 thousand, something of that sort.

Q. Do you recall the amount at the end of 1946?

A. That was the end. I didn't go any further with it.

Q. How much did you owe December 31, 1946, do you recall?

A. Supposed to be in the books. I don't remember whether 30, 31, 32, 33, or 35 thousand.

Q. I call your attention to 110F, the poker sheets for December 31, 1946, and to the column which you stated represented the IOU's or markers, and ask you whether or not your name appears upon that list?

A. No, it doesn't appear here, sir.

Q. Now will you state whether or not on that date you owed any money? [1567]

A. Well, I don't remember when I owed it. I know I owed within a period of a couple of years.

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(Testimony of Bert Busterna.)

What date I just couldn't tell you, I don't know.

Q. I show you the sheet January 1, 1944, and call your attention to the item on what you have called Marker, Bert, $3500.79; does that represent the amount you owed on that date?

A. That is my name here; yes, sir.

Q. Is that the amount that you owed on that date? A. It might have been.

Q. What is your best recollection?

A. Well, I couldn't say. It is my name, all right.

Q. I call your attention to 110 (d), poker sheets for December 31, 1945, and the item Bert, $8500.

A. That's right.

Q. Is that the amount that you owed on that date? A. It must have been; yes, sir.

Q. Now you say it amounted to 30 or 31 thousand dollars. Do you recall when it reached that amount? Do you recall what date it was that you owed that amount?

A. I couldn't recall the date. It was around '46.

Q. Do you recall what date in 1946?

A. No, sir; I can't recall the dates, sir.

Mr. Campbell: I am going to ask to have these two photostatic pages marked government's next in order for identification. [1568]

Q. Showing you plaintiff's Exhibit 149 for identification, I will ask you if you ever saw the original document of which that is a photostatic copy?

A. Yes, I have seen this.

Q. Where did you see it?

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(Testimony of Bert Busterna.)

A. Well, they do carry a sheet like that in the office of the club.

Q. Do you know what date this particular sheet was made up?

A. No, unless it is dated, sir, I couldn't tell you.

Q. Do you recognize the handwriting on this?

A. They are the sheets in the office—some one's handwriting, one of the boys, I don't know which one.

Q. Now calling your attention to the poker sheets 110(e) for January 1, 1946, and under the right-hand column, which you say represent the IOUs, there first appears Kyne, $28,170. Do you know what that refers to?

A. Well, it might have been a credit due to him, I couldn't tell you.

Q. That did not represent an IOU from Kyne to the club then? A. I couldn't say.

Q. The next appears "Tax box $1769." Do you know what that is?

A. That is when we run short of money, I think Mr. Kyne had this much money coming to him, credit to him. This tax box, we run short of money sometimes and we use the tax box money if we did need cash. [1569]

Q. What was the tax box money?

A. The tax box money is money that they take out for employers.

Q. That is withholding?

A. I don't understand, but that is the way I got it.

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(Testimony of Bert Busterna.)

Q. That was used in the conduct of the business?

A. That was put away and certain times we didn't have enough money to cash checks, we used that for replacement.

Q. As I understand, as to those first two items, Kyne and tax box, they represent money that the 186 Club owed rather than money that was owing to it?

A. I guess so, that's the way I figured.

Q. We have here Clemente $9115, what does that represent?

Mr. Gillen: Just a moment. I think that is not assisting the tryers of the fact. If a man knows, he knows; if he doesn't know, he can say so.

The Court: Well, the jury will understand. That is a matter on credibility.

Mr. Gillen: If the witness only thinks so, believes that to be so, it isn't very helpful to us.

The Court: The answer may stand.

Q. I call your attention to Clemente, $9115, what does that represent?

A. Sir, truthfully I couldn't tell you whether they owed us money or had money coming. I couldn't say because I don't [1570] know anything about the books. I am sorry to say I don't.

Q. There is an item here, Busterna $8500.

A. Well, that is money I owed, I guess must be, can't be any other way.

Q. That was money you owed or money owed to you? A. No, sir.

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(Testimony of Bert Busterna.)

Mr. Gillen: He is cross-examining his own witness.

Q. Now, Mr. Busterna, do you recall whether or not a 1946 return for the 186 Club was prepared?

A. No, sir. For that year I never even filed one myself.

Q. I am referring to the fiscal year ending June 30, 1946. Do you know whether or not a return was prepared or filed for that year?

A. I don't know anything they done outside the 186 Club.

Q. I am asking about the 186 Club, if a return was filed?

A. I don't know anything they done, sir, whether they made returns or not. I don't know anything about it.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Busterna, you testified that you originally heard that the 186 Club was for sale, is that true? A. That's right.

Q. And that hearing that, you went to Mr. Remmer and asked him if he would be interested in purchasing the 186 Club?

A. That's right. [1571]

Q. Of course, you had in mind when you made that proposal that you would become identified with it, have an interest in it, is that correct?

A. Yes, sir.

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(Testimony of Bert Busterna.)

Q. Did you negotiate for the purchase of that at all yourself, or did you leave that to Mr. Remmer and his associates?

A. I didn't do anything of the kind.

Q. Just advised him of the availability of the place, that is, it was for sale, is that correct?

A. That's right.

Q. And then subsequently you became a president of the enterprise and got $25 a day salary, is that correct? A. That is right.

Q. What hours did you work there?

A. Well, I worked, you might say all hours.

Q. I mean what was your usual time, night or day time? A. I never had any usual hours.

Q. Now you stated the place was open 24 hours a day, is that correct? A. Yes, sir.

Q. And there were three 8-hour shifts, were there not? A. Yes, sir.

Q. And for each shift there was a cashier in the cage, isn't that so? A. That is right. [1572]

Q. And he was the man who kept track of the money for his 8-hour shift, is that correct?

A. That is right.

Q. And at the end of this 8-hour shift he would make out a sheet as to how things stood at the end of his shift, is that true? A. That's right.

Q. The other man would take over from that, the succeeding cashier? A. That is right.

Q. Then there were employees, were there not, who took care of games from the floor and supplied chips, etc., floor men, so called?

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(Testimony of Bert Busterna.)

A. That's right, floor men.

Q. Now you were there from 1943 until 1947?

A. That's correct.

Q. Directing your attention to defendant's Exhibit A, the 186 Club was already incorporated when it was purchased by Mr. Remmer and his associates, isn't that true? A. That's right.

Q. In other words, that was incorporated on July 7, 1939, according to this exhibit, so that at the time you suggested to Mr. Remmer that he buy the place, it was already an incorporated club, incorporated under the laws of the State of California, is that true? [1573] A. That's right.

Q. Now do you recall an Internal Revenue agent, a Mr. Mooser, coming to the club and checking the club for a period of about a month, for the purpose of determining the approximate amount of business it did?

A. I remember something about it, yes.

Q. Is it within your knowledge that Mr. Mooser stated that the club would have to make the return as a corporation rather than partnership?

A. No, I never got into a conversation with him. I don't know anything about it.

Q. Was Mr. Slater the accountant who attended to the books of the club there?

A. At the time, yes.

Q. And during the time that Mr. Kyne was in the army, who was it that attended to the affairs of the club, 186 Club?

Mr. Campbell: Object to the question in that

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(Testimony of Bert Busterna.)

form as assuming that Mr. Kyne had anything to do with the affairs.

The Court: Objection overruled. You may answer the question.

A. I don't know. I don't remember exactly but I think Mr. Slater was still active at that time.

Q. Was there any other accountant that had anything to do with the affairs of the 186 Club?

A. I can't recall it. [1574]

Q. Was there a Mr. Shaw took care of some of the books? A. Never heard of him.

Q. Never heard of Mr. Shaw.

A. Never heard of him.

Q. Do you remember a Mr. Byrne, a public accountant? A. Mr. Byrne?

Q. Yes, do you remember a Mr. Byrne? Do you recall whether he had anything to do with the accounts of the 186 Club?

A. No, sir, I can't recall him.

Q. Now I understood you to testify that in addition to the money that you drew out of the club by way of salary and by way of any other dividend or profit, that you also took out of the club funds, money, to indulge in some personal gambling, is that correct?

A. Yes, I played the house play low-ball.

Q. That wasn't for the club or the corporation, it was on your own?

A. My own personally, yes.

Q. And you simply took from the funds of the club and put your marker in?

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(Testimony of Bert Busterna.)

A. Put chips in and lost them and had to be paid, so charged them to me.

Q. So you put your marker in?

A. That is right.

Q. There were other markers beside yours, were there not? [1575] A. Oh, yes.

Q. There were quite a considerable number of markers?

A. There was quite a few markers, yes.

Q. And I take it that this 31 thousand or 35 thousand, whatever it was, that you ultimately owed the club, didn't happen all at the same time, at once? I mean, it was something that went over a period of time?

A. No, it wasn't all at once. It was over a period of time.

Q. So if the records showed one time you owed 8 thousand or 86 hundred, you might say that might be so? A. Yes.

Q. And then if another time in 1946 the records showed that you owed $31,600, you would say that that might be accumulation—I wonder if I can cross-examine the witness without——

Mr. Campbell: I was simply holding up my hand.

Mr. Gillen: It is very distracting.

Q. (Continuing): ——of your markers over a period of time?

Mr. Campbell: Objected to as assuming a fact not in evidence. The books are the best evidence.

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(Testimony of Bert Busterna.)

The books and records here show no such figure.

The Court: You say the books do not show?

Mr. Campbell: $31,000, no, your Honor. Such records in evidence here do not reflect such a figure.

The Court: I thought they reflected a figure of 30 thousand. [1576]

Mr. Campbell: No, your Honor, as of the end of the period I read the item to the witness, $500.

The Court: I think that is correct. There was no such entry in the books. Let us have the question.

(Question read.)

The Court: I think, Mr. Gillen, there is nothing in evidence——

Mr. Gillen: I understand there is no documentary evidence, but certainly evidence of his indebtedness from his own testimony.

The Court: Objection sustained.

Q. Well, did you owe 31 thousand dollars at any time?

A. I might have, I don't know whether 31 or 35, it may be 36, I don't know. I am not positive whether it was thirty.

Q. Are you certain it was over thirty thousand dollars?

A. It was over thirty thousand dollars, yes.

Q. It was over thirty thousand dollars?

A. Yes.

Q. And that was an accumulation, was it, over a period of time?

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(Testimony of Bert Busterna.)

A. That was over a period of a couple of years, sir, if I recall it right. I am not positive.

Q. I understand you to say that you had no interest whatever or participation in anything concerning the Day-Night Cigar Stand, which was the liquor store and cigar stand in the front of the [1577] 186 Club? A. That's right.

Q. Now you testified it was your recollection that the amount of your markers, 31 thousand or 35 thousand, whichever it was, what was you owed at the end of 1946, is that correct?

Mr. Campbell: Objected to as stating a fact not in evidence. He didn't testify as to any particular date.

Mr. Gillen: Let us have the record.

The Court: That is my understanding at this time.

Mr. Campbell: No, your Honor, I went to considerable length to fix the date.

The Court: Let us look at the record.

(Question read.)

The Court: Answer the question.

A. Yes, sir.

Q. Did you ever pay those markers, 30 or 35 thousand dollars markers off? A. No.

Mr. Campbell: Objected to as immaterial. I ask the answer be stricken.

The Court: It may go out. What is your objection?

Mr. Campbell: My objection is it is immaterial

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(Testimony of Bert Busterna.)

what is the subsequent history for the obligation owing at that date. It is the obligation owing at that time, the last date of the period. [1578]

The Court: He may answer the question.

A. No, sir, I never paid it.

Q. You still owe the 186 Club 30 to 35 thousand dollars? A. That's right.

Q. Now do you have any recollection of how much the other markers amounted to, other than your own?

Mr. Campbell: Objected to—the books and records are the best evidence.

The Court: Objection overruled. Answer the question.

A. Really I couldn't tell you, sir.

Q. Do you know what the status was the end of 1946 with regard to markers other than your own?

Mr. Campbell: Same objection, the books and records are the best evidence.

The Court: Objection overruled. You may answer the question.

A. There are quite a few markers out. I couldn't recall the right amount.

Q. Isn't it a fact that practically all the profits of the 186 Club went out in markers?

Mr. Campbell: Same objection.

The Court: You may answer the question.

A. Well, I don't think all the profits went out for markers, but it was so we didn't make as much money as we thought we would make.

Q. Isn't it a fact that you had to replenish your

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(Testimony of Bert Busterna.)

bank roll [1579] frequently from other enterprises.

A. Certain days we run short of money, that is right, we had to go ask the office for funds.

Q. That is because you had markers rather than cash? A. That's right.

Q. And sometimes you even had to go to the social security box, the tax box, to get money, isn't that so? A. I just said that, yes, sir.

Q. And you presently have no independent remembrance of how the marker situation stood in regard to the 186 Club at the end of 1946?

A. All I know, the man working in the office took care of all books. I don't know anything about it, what they did or didn't do. The only time I knew when they run short of money and they asked me for money and I called up the office and got some whenever I could.

Q. Now, Mr. Busterna, I am going to hand you, with the clerk's permission, two photostatic sheets, designated plaintiff's Exhibit 149 for identification. Mr. Campbell showed you those two sheets before and you testified that they were the type of sheet that was kept by the club, do you recall that?

A. Yes, sir.

Q. Now does that refresh your recollection as to how the marker situation stood at the 186 Club, aside from your own markers? [1580]

Mr. Campbell: As of what date? I object unless the date is stated.

The Court: Can you supply the date you have in mind?

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(Testimony of Bert Busterna.)

Mr. Gillen: I asked him with regard to 1946 but I am asking him now if that assists him in recalling anything about the situation?

A. Well, this was the way they kept the markers.

Q. There is no date on either of those pages?

A. No.

Q. Is there anything about those pages that assists you to recall when that page may have been made out?

A. I couldn't recall even if there was a date in it, because I don't remember.

Q. Mr. Busterna, I am going to ask you to look at the left-hand column of the first page of this exhibit, the third entry from the bottom of the page, and I will ask you if you know who that refers to and what it refers to?

Mr. Campbell: I am going to make objection that the document until further identified—this can be supplied by stipulation—it is not in evidence, if the Court please. I think he can lay the foundation for the document.

The Court: It is not in evidence, Mr. Gillen. What is your purpose? If the question is just to have presented in the record the contents of the instrument, I think the objection is good. [1581]

Mr. Gillen: No, my purpose is to show a certain item to the witness and see if that aids him in identifying the document.

The Court: Then can't you reframe your question so it will appear to him that this is the purpose, rather than have him read something.

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(Testimony of Bert Busterna.)

Mr. Gillen: All right. I will withdraw the last question.

Q. I now ask you, Mr. Busterna, to look at the third from the last item on the left-hand side of the first page of that exhibit and tell me whether, looking at that, that refreshes your recollection in any respect as to the time that that sheet was made out or what period of time it represents?

Mr. Campbell: I am going to make an objection. As previously stated, in response to counsel's question and my questions, he does not recognize the handwriting, he doesn't know when it was made and he has never seen it before.

The Court: Objection will be overruled. It goes to the weight.

Q. Do you have the question in mind?

A. I don't know when this was made, sir. All I read here is my name, Bert, $31,600, that is all I know about it and there is no time or date I can recall.

Q. Do you have any independent recollection at this time of any period of time that you owed $31,600 to the 186 Club?

A. Will you repeat that again please? [1582]

Q. Do you have any independent remembrance in your mind now of when you owed, if you did at any time owe, the sum of $31,600 to the 186 Club?

A. Well, just as I went along, within a period of a couple of years.

Q. Now my question is now do you remember

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(Testimony of Bert Busterna.)

any particular time when the amount you owed the 186 Club was $31,600?

A. I am not positive whether I owe 31 thousand or 36 thousand.

Q. So your answer is you don't remember any specific time when you owed that exact amount?

A. I don't remember, sir.

Q. I understand you to say when Mr. Kyne was connected with the enterprise and other than the time he was in the army Mr. Kyne used to come and pick up the poker sheets on occasions and the money from the 186 Club, is that correct?

A. He did, yes.

Q. And they were taken over to Mr. Maundrell, or whoever was keeping books?

A. I don't know what he did, but the only time I can say Maundrell got the sheets is when I brought it over.

Q. And then when Mr. Kyne was away, you on occasions brought the sheets over to 50 Mason Street? A. That is right.

Q. And if there was some money, you brought over the money and turned it over to whoever was in charge of the office at that [1583] time?

A. Yes, sir.

Q. Some times Mr. Maundrell? A. Yes.

Q. Sometimes Mr. Slater?

A. Sometimes a lady there.

Q. A lady there, the secretary?

A. Secretary, yes, sir.

Q. Now among the persons who had an interest

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(Testimony of Bert Busterna.)

in the 186 Club was Mr. Nelus and Mr. Kopstick, you testified? A. Yes.

Q. Do you know what interest they had?

A. I couldn't tell you, sir. There were five or six in it, I don't know.

Q. And you said Mr. Nelus was now deceased?

A. Yes, and so is Mr. Kopstick.

Q. He is also dead? A. He is also dead.

Q. Did Mr. Nelus and Mr. Kopstick remain in the organization or withdraw?

A. I don't know. I heard they were partners but they never took active part in it, either one. It was seldom they come in.

Q. Was anything brought to your attention about reimbursing them for the investment that they made in the place? [1584] A. No, sir.

Q. Did you know that they were reimbursed for the investment that they made in the one-sixth interest in the enterprise between them?

A. I couldn't say, sir.

Q. Now you were designated as president of the club, is that correct? A. Yes, sir.

Q. And the returns that you made on taxes for the corporation to the government was not prepared by you?

A. The only tax returns I made was for money I got and Mr. Slater made them for me. Nothing else, I don't know anything about that.

Q. In other words, Mr. Slater helped you with your own personal return?

A. Yes, I just took care of my personal.

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(Testimony of Bert Busterna.)

Q. Do you know who made out the income tax returns for the corporation? A. No, sir.

Q. You said they were presented to you either by Mr. Kyne or Mr. Slater?

A. Yes, papers I signed, yes.

Q. Those papers Mr. Campbell showed to you?

A. Yes, sir.

Q. And as to the details of those, I assume that you left that [1585] up to the accountant to work it out? A. Yes, sir.

Q. Now do you recall how long Mr. Mooser, the Internal Revenue agent, was around the 186 Club?

A. No. There was one time I heard his name is all. I never had any conversation.

Q. Regardless of conversation, do you remember seeing him there? A. No, sir.

Q. You were there every day yourself, were you not, through the period of years that you were identified with the place? A. Yes, sir.

Q. And you were present there mostly at night or in the day time?

A. Well, just a question of when I must go there, whenever I felt like it. Sometimes I go out and sleep and eat and come back and go to work again.

Q. Did anybody point Mr. Mooser out to you or introduce you to Mr. Mooser, the Internal Revenue agent? A. No, sir.

Q. Did any one tell you Mr. Mooser was there

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(Testimony of Bert Busterna.)

checking the average business of the place regarding what tax should be paid?

Mr. Campbell: Objected to as hearsay.

The Court: Answer the question yes or no. [1586]

A. No, sir.

Q. When you say you heard Mr. Mooser's name mentioned, by whom did you hear it mentioned?

A. Mr. Willie Kyne.

Q. And what did Mr. Willie Kyne say about Mr. Mooser? Did he say he was an Internal Revenue agent?

Mr. Campbell: Objected to.

The Court: Objection sustained.

Q. Did he identify Mr. Mooser for you?

A. No, sir.

Mr. Campbell: Objected to as calling—he answered.

Q. How did you know it was Mr. Mooser the revenue agent Mr. Kyne was referring to?

Mr. Campbell: Objected to as incompetent.

The Court: You may answer the question.

A. He never pointed him out to me. I just don't know Mr. Mooser.

Q. I understand that, but you heard Mr. Mooser's name—how do you know it was Mr. Mooser, the revenue agent?

A. I don't know, I am just thinking about Mr. Mooser's name. I don't know where he was. Mr. Kyne just mentioned some time or other.

Q. Earlier I asked you question, do you recall Mr. Mooser, the Internal Revenue agent, was in the

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(Testimony of Bert Busterna.)

186 Club for some period of time checking the Club, and you said you had heard something [1587] about that, do you recall?

A. I heard the name Mooser but didn't hear about his being in the club.

Q. Did you hear he was an Internal Revenue agent?

A. I can't recall. It was quite a long time ago.

Q. You don't remember anything but hearing the name Mr. Mooser from Mr. Kyne?

A. Yes, sir.

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.) [1588]

January 3, 1951, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Campbell: May it please the Court, at this time, pursuant to stipulation which has been entered into, I wish to substitute photostatic copies for the original exhibits 147, 147A and 147B for identification.

Mr. Gillen: No objection.

The Court: Very well, the copies may be substituted.

Mr. Gillen: May it please the Court, in connection with the examination of Mr. Busterna, the government has previously produced the series 110 to

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110F, which your Honor will recall were so-called daily poker sheets from the 186 Club. At this time I would like to request counsel, through the Court, to produce the balance of the poker sheets for the 186 Club. This series of exhibits represents the first and last day of the years involved in the indictment, with no intervening poker sheets. It was my information those were all turned over to the government and were in the hands of the government and I would like to have them produced at this time.

Mr. Campbell: We have no objection. It will take a minute or two.

Mr. Gillen: In the interest of time, I can proceed with the examination. [1589]

MR. BUSTERNA

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. Mr. Busterna, although you testified that you personally had nothing to do with the keeping of books or records of the 186 Club, you do know, do you not, that the daily poker sheets that were kept by the cashiers represented the income and the output for that particular shift of each cashier, is that correct?

A. Well, the bookkeepers they kept their own books.

Q. Well, what I am getting at is this—each cashier did keep a sheet for his shift, did he not?

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(Testimony of Bert Busterna.)

A. For his own shift, yes.

Q. To show what money he disbursed and what money he took in, am I correct?

A. That is right.

Q. And those were the sheets that were turned over to Mr. Slater and from which the records of the club were kept and from which the income tax returns were made, isn't that true?

Mr. Campbell: Object to that question in that form, assuming a fact not in evidence. The evidence is they were delivered at 50 Mason Street.

The Court: Let us hear the question.

(Question read.)

Mr. Campbell: I submit further it is a compound question which can not be answered with a yes or no. [1590]

Mr. Gillen: I am not asking for a yes or no answer.

The Court: Let me have the question again.

(Question read.)

The Court: You may answer the question.

A. Well, they were sheets that were turned over to Mr. Slater or else the office at 50 Mason Street.

Q. And those were the records that were turned over from which the books were kept or income tax returns made for the club, isn't that so?

A. That's the sheets, yes.

Q. Outside of the cashiers and the floor men, you were the only partner or member of the cor-

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(Testimony of Bert Busterna.)

poration or officer of the corporation that put in full time, isn't that correct? A. That's right.

Q. The other men were employees, such as the shifts of cashiers and the floor men who looked after the floor, they were the only other full-time employees; is that true?

A. Put in full eight hours and they were through.

Q. And you were the only partner or official of the club who put in full time, is that true?

A. That's right, sir.

Q. Now you stated yesterday that you received $25 a day or that you took out $25 a day out of the bank roll of the club, that is true, is it not?

A. That's right. [1591]

Q. Now did you put that $25 in your pocket or did you use that for expenses in and about the club?

A. Well, I didn't file for the $25 a day I received from the 186 Club for the reason is that it was put in my pocket—well, there are a lot of fellows, small gamblers, whatever you call them, small players, lose five or ten dollars, after they had lost that they come to me always for a half dollar or dollar or two and by me giving to them at the end of the day I wound up with nothing.

Q. I understood you to say that you were not familiar at all with Mr. Mooser, the Internal Revenue man, spending about a month at the club checking on the average business that the club did. You were not familiar with that? A. No, sir.

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(Testimony of Bert Busterna.)

Q. You did state, however, that you received for three different years five thousand dollars a year, which you believed was a dividend on the profits of the club, is that correct?

Mr. Campbell: Assuming something not in evidence. He said he was paid——

The Court: Objection sustained.

Mr. Gillen: It is assuming a fact not in evidence, your Honor?

The Court: Yes, sir.

Mr. Gillen: I understood his testimony to be that he thought he was receiving 25 per cent of the profits of the club. [1592]

The Court: The ruling will stand.

Q. Well, you did testify that you received each year for three years, 1943, 1944 and 1945, five thousand dollars each year? A. Yes, sir.

Q. Now is it your understanding that the club each year made the same amount of money?

A. That I don't know. All I say is that at the end of the year that there was five thousand dollars handed to me.

Q. Now I am going to direct your attention to the prosecution's Exhibit No. 87A and that exhibit shows on the face that it was prepared by Louis H. Mooser, Jr., Deputy Collector of Internal Revenue at San Francisco, California, and it is the return of the 186 Club for the fiscal year beginning July 1, 1943, and ending June 30, 1944, and I am going to read you a portion of this return and ask you if this refreshes your recollection of what you re-

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(Testimony of Bert Busterna.)

ceived, Mr. Busterna. Schedule I reads as follows:

"During the month of June, 1944, Louis H. Mooser, Deputy Collector from the office of the Collector of Internal Revenue at San Francisco, California, called at the office of the above-stated corporation and examined its books and records for the fiscal period ending June 30, 1943, and required said corporation to file forms 1120-21 and 707 for said period. These returns were filed under Section 2606 of the I. R. code, which gives a deputy collector the authority to file such returns [1593] where either no records are kept or where records are not adequately kept. In the case of the 186 Club the records reported only the daily net take and were therefore not adequately kept and this was the status of the accounts of said corporation up to and including June, 1944, the date on which the Deputy Collector Mooser made his audit.

"Mr. Mooser determined from an examination that he made of the daily tally sheets that the daily average net take was $70. Mr. Mooser believes that this determination would cover the entire period up to June, 1944.

"The returns filed by the corporation for the fiscal year ending June 30, 1943, were prepared on this basis and have been approved by the Collector.

"In 1944 the taxpayer filed an application with the deputy commissioner Salary Stabilization Unit for the following annual salaries for its officers: Bert Busterna, president, $6,000; Attilio Casselini, vice-president, $4,000; W. E. Kyne, secretary,

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(Testimony of Bert Busterna.)

$5,000; Sylvan Lando, treasurer, $4,000; total $19,000. The Salary Stabilization Unit has approved said applications.

"The books of account for the fiscal year ending June 30, 1944, disclose a total net take of $13,265.15. In preparing corporation returns (112- and 1121) for the [1594] said fiscal year, the corporation is reporting its total net take for the year on the same basis as that which was used by Deputy Collector Mooser, $70 per day; 366 x $70, $25,620.00 (a)."

Let me ask you there, was it brought to your attention that although the net take shows for the club for that fiscal year was only $13,265.15, that the Club nevertheless used the figures of $70 a day which had been set up by Mr. Mooser and paid on $25,620 take, was that brought to your attention?

A. I don't know anything about that, sir.

Mr. Gillen (Continuing to read):

"However, when the returns for the prior period were prepared by the Deputy no provision was made for the compensation of administrative officers. This, however, has now been approved at $19,000 per year by the Salary Stabilization Unit. Therefore, the net taxable corporate income for the fiscal year ending June 30, 1944, is calculated as follows: (a) net take on the basis of Deputy Collector Mooser's findings (before administrative salaries) $25,630; (b) administrative salaries allowed by S. S. Unit, $19,000; net taxable income, $6,620."

Q. Now does that refresh your recollection, Mr. Busterna, that for that fiscal year you received $6,000? A. No, sir. [1595]

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(Testimony of Bert Busterna.)

Mr. Campbell: May the record show that there has now been produced, and we will turn over to the clerk, some three cartons, purportedly containing poker sheets of the 186 Club.

Mr. Gillen: It will be practical, from my standpoint, for me to continue my examination.

Mr. Campbell: I simply want the records to show that they have been produced and we are delivering them to the custody of the clerk.

Q. Now, directing your attention to the prosecution's Exhibit 88A, which is the tax return of the 186 Club corporation for the fiscal year commencing July 1, 1944, and ending June 30, 1945, there is set forth here, Mr. Busterna, a similar statement regarding the audit made by Mr. Mooser and the formula set by him at $70 a day, as in the other one, and in addition to that he set forth the following language:

"In 1944 the taxpayer filed an application with the Deputy Commissioner Salary Stabilization Unit for annual salaries for its officers, which has been approved, as follows: Bert Busterna, President, $4,500; Attilio Casselini, vice-president, $3,000; Wm. E. Kyne, secretary, $3,600; Sylvan Lando, treasurer, $3,000."

Attilio Casselini has an (a) in brackets and that shows Attilio Casselini resigned April 15, 1945, net salary paid during the fiscal year, from July 1, 1944, to June 30, 1945; and W. E. Kyne has a (b) behind his name and that (b) shows, "Served 7½ [1596] months, succeeded by Elmer F. Remmer, who served

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(Testimony of Bert Busterna.)

during the remaining 4½ months at the same rate, said W. E. Kyne earning $2,250 and Elmer F. Remmer earning $1,350.

"The books of account for the year 1944 disclose a total net of $20,533.15. In preparing the corporate returns, (1120 and 1121) for the fiscal year ending June 30, 1945, the corporation is reporting its total net take for the year on the same basis as that which was used by Deputy Collector Mooser, $70 per day; 70 x 365, $25,555. (c) However, when returns for the prior period were prepared by the Deputy, no provision was made for compensation of administrative officers. This, however, has been approved at $14,100 per year by the Salary Stabilization Unit, as stated hereinbefore, total salaries actually paid during the fiscal year ending June 30, 1945, were $11,100. Therefore, the net taxable corporate income for the fiscal year ending June 30, 1945, is calculated as follows: (c) net take on the basis of Deputy Collector Mooser's findings (before administrative salaries paid) $25,550. Administrative salaries allowed by Salary Stabilization Unit actually paid by the corporation, $11,100; net taxable income $14,450."

Now was that brought to your attention or explained to you? [1597] A. No, sir.

Q. Does that refresh your recollection that during that period you received salary in the sum of $4,500, received compensation for your full time services in the 186 Club in the sum of $4,500?

A. The only thing I got was $5,000 a year,

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(Testimony of Bert Busterna.)

whether it was from 25 per cent or anything else, I don't know.

Q. That is what you made your income tax return on?

A. That is what I returned my income tax on.

Q. Who made your return out?

A. Mr. Slater.

Q. And Mr. Slater didn't make your return out on $25 a day, but only for the actual amount you received, is that correct?

A. That's all. I tried to explain to him and he filed my income at five thousand dollars.

Q. You gave him the information and he prepared the return and you signed it, is that correct?

A. That is right.

Q. Now, there were other officers in this corporation who did not receive a salary, is that correct? A. You mean in the club room?

Q. Other officers of the corporation of the 186 Club?

A. Well, I don't know anything about it. Nobody received wages but me except for the rest of the help.

Q. Now, isn't it a fact that the reason the other officers didn't [1598] get any salary was because the 186 Club was so heavily laden with markers there was no more money to pay?

A. That I don't know. I can't answer.

Q. Isn't it a fact that by the end of 1946 there was something in excess of 60 thousand dollars

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(Testimony of Bert Busterna.)

worth of markers or IOUs in the 186 Club instead of cash?

A. Yes, sir, there was a lot of markers, but I don't know just how much.

Q. Isn't it a fact in addition to the markers there were five thousand odd dollars in bad checks at the 186 Club?

A. There was a few bad checks, yes, sir.

Q. Do you know whether there was five thousand dollars or more?

A. No, sir, I can't recall.

Q. Do you know whether the markers were 60 thousand dollars or more?

A. I can't recall that.

Q. Would it be your recollection at the time William E. Kyne returned from the service, which was in June, 1946, that you were obligated to the 186 Club in the sum of about 35 thousand dollars for markers or IOUs?

A. I owed that money within a p[illegible]d of a few years up until the end of '46.

Q. Mr. Busterna, just another question or two. Your recollection is that in 1946, or the end of 1946, you owed, you said, between 30 to 35 thousand dollars, or it might have been 36 [1599] thousand, that is what you said yesterday, is that correct? A. Yes, sir.

Q. Were the other markers from other people as large as that, if you know?

A. I couldn't say how much. There was a lot of markers.

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(Testimony of Bert Busterna.)

Q. You don't recall how much?

A. No, sir.

Q. You don't recall whether another 35 thousand or 60 thousand over and above your markers?

A. I couldn't say. There were quite a few markers but I don't know just how much.

Q. One of your duties was to OK people who bet on markers, isn't that correct?

A. Yes, sir.

Q. And also OK checks in instances, is that correct? A. That's right.

Q. The markers were treated the same as money on the account books, weren't they, on the sheets?

A. That I can't understand. It is up to the bookkeeper to explain that. They know how to carry it somehow. I don't know just how to carry it. All I know, when we run short of money we had to get it some place, so we called the office, 50 Mason Street, and informed the bookkeeper that we needed some money or Mr. Kyne, and naturally we got it, whether that day or the next day, we would give him the markers. [1600]

Q. In other words, so you could have money instead of markers?

A. You have to have cash money to work with, yes, sir.

Q. So the markers were then counted as money?

A. They were counted as money, yes.

Q. You called on 50 Mason Street quite often during the operation of that 186 Club, didn't you?

A. Well, not very often. Sometimes I would go

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(Testimony of Bert Busterna.)

every day and sometimes every other day or fourth day, just depends how I had time and so on.

Mr. Campbell: I think the question was confusing, when he called—whether he was making a visit or calling for money.

The Court: I think the witness understands.

Q. You understand when I said call on Mason Street I meant that you asked Mason Street for money quite often over the period of years?

A. Well, I never had to go over there, just to bring the sheets. When I needed money I generally go up.

Q. When you took over as manager of the 186 Club, the 186 Club was already a going concern; I mean, it had been operating as a social club and card room, had it not?

A. Yes, it was in operation.

Q. And it is true, is it not, that you kept some of the employees who had worked for the earlier owner on the job? A. That's right.

Q. And when you say that the cashiers or the bookkeepers or employees [1601] there worked out the way to keep track of the take or disbursements, it is true, is it not, that they continued with the same system as the club had been using before it was purchased by your group, isn't that so?

A. Yes, sir; there was some old-timers I kept there and they kept on using the same method as they did.

Mr. Gillen: Now, may it please the Court, that will conclude my examination at this time, with this

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(Testimony of Bert Busterna.)

exception, when we have an opportunity to go through the balance of those sheets, it may be we might want to ask Mr. Busterna some further questions.

Mr. Campbell: I think possibly that should be done at this time. I have some re-direct. It would seem better to dispose of this at this time.

Mr. Gillen: It will take a little time to go through those cartons.

The Court: In the event further cross-examination might suggest to you any additional redirect, we could handle it that way, Mr. Campbell, so you may proceed with your redirect now.

Mr. Campbell: Very well.

Redirect Examination

By Mr. Campbell:

Q. Mr. Busterna, on occasions when you delivered the sheets and the cash at 50 Mason Street, did you also deliver the markers which had been received during that same period? [1602]

Mr. Gillen: Just a moment. I am going to object to that as having been asked and answered in direct examination and improper redirect examination. Unless I am wrong, it is my understanding that the sheets reflected the markers and naturally if the sheets were delivered, the markers would be delivered also.

Mr. Campbell: That is what I am asking for.

The Court: Objection overruled. He may answer the question.

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(Testimony of Bert Busterna.)

A. I don't just know whether they kept the markers entirely in the office or whether they give them to me when I delivered the sheets.

Q. Where were the markers kept?

A. Well, the markers were kept like in one sheet.

Q. Now, were there separate individual IOUs?

Mr. Gillen: May I offer a suggestion? I think the witness is confused by the records of markers or the marker itself.

Mr. Campbell: I am attempting to bring that out.

Q. There were separate slips for each marker signed by the person who owed for it, is that correct? A. They kept one long sheet.

Q. I understand that.

A. And I don't know whether I turned in every day or every other day.

Q. By long sheet, are you referring to the entries on the poker [1603] sheet?

A. The same kind of a sheet, yes.

Q. Now, at the time a person would obtain money and put in a marker, as you say, was there an IOU which that individual signed?

A. No, sir. They carry the names just right down the line.

Q. Yes; did you have a signed acknowledgment or signed slip of paper from the player who got that money, that you advanced money to?

A. No, sir.

Q. That was entirely a matter of trust?

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(Testimony of Bert Busterna.)

A. Well, entirely a matter the fellow that was supposed to be ok, all right, and they come and asked me, we want a hundred dollars' worth checks or a thousand dollars and I see fit to let them have it with the understanding they would pay that day or the next day.

Q. Now, do I understand that the sheets on which that appeared were delivered to 50 Mason Street? A. Yes, sir.

Q. Do you know what, if any, efforts were made by the people at 50 Mason Street to collect on those markers? A. Can you repeat that, please?

(Question read.)

A. I wouldn't know, sir.

Q. Do you know whether or not some of those who are shown on [1604] the poker sheets with markers made payments directly to 50 Mason Street? A. I couldn't say.

Q. Do you know yourself whether or not the markers, as shown by the poker sheets that were shown by you truthfully and correctly set forth the amount of markers?

A. To the best of my knowledge it should have been, yes, sir.

Q. Do you know that for a fact, that they are correct?

A. I would say to the best of my knowledge they should be correct.

Q. Now, with regard to the markers, where you say you advanced a player a hundred or two hun-

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(Testimony of Bert Busterna.)

dred or a thousand dollars in chips, how soon ordinarily would those amounts be repaid?

A. Well, they should pay them whenever they did say they would, but most of them didn't pay.

Q. Well, what was the average in that regard?

A. Well, we got a lot and possibly kept on adding up to it. One guy would pay off and then another guy add so much.

Q. At the time these sums were advanced and further sums were advanced, I presume that you considered that the account was a reliable account, is that correct?

Mr. Gillen: Objected to as leading and suggestive and improper redirect.

The Court: It might be. Objection sustained.

Mr. Campbell: On the ground it is [1605] leading?

The Court: Leading and suggestive.

Q. Now, Mr. Gillen asked you something about having been named president of the corporation. When did you first learn that you were president of the corporation?

Mr. Gillen: Objected to as having been asked and answered yesterday on direct examination. He testified he never attended any meetings, was simply given papers to sign.

The Court: Objection overruled. He may answer the question.

A. I don't know, sir.

Q. What is your best recollection of the first time that you learned that you had been named

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(Testimony of Bert Busterna.)

president? A. I can't recall.

Q. At the time you started to work there or some time after that?

A. Well, I just can't recall it whether it was '43 or '44. I just don't know.

Q. How long did you continue to serve as president, do you know?

A. Nothing was said any more after I signed the first time. Just went on to 1947, I guess.

Q. As far as you knew, you continued to be president until 1947?

A. To tell the truth, I never paid much attention to it.

Q. I am going to show you plaintiff's Exhibit 87A, the corporation [1606] income and declared value excess profits tax return of the 186 Club for the fiscal year July 1, 1943, to June 30, 1944, and call your attention to the signature at the bottom, Attilio Casselini, president. Do you recognize Mr. Casselini's signature?

Mr. Avakian: May we have that question read?

(Question read.)

Mr. Avakian: May I see the return before the witness answers the question? I call attention to the fact that this is Attilio Casselini vice-president and not president.

Mr. Campbell: I did not catch that myself. That is correct.

Q. Do you recognize the signature of Attilio Casselini? A. Well, I don't recognize it.

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(Testimony of Bert Busterna.)

Q. Do you know whether or not he was vice-president? A. I couldn't tell you.

Q. And the signature of William E. Kyne, secretary, do you know whether or not he was secretary? A. I couldn't say.

Mr. Campbell: That's all.

The Court: Any further questions at this time, Mr. Gillen?

Mr. Gillen: No further questions at this time.

The Court: So you will please remain available in the event counsel desires to call you back as a witness again. [1607]

ATTILIO CASSELINI

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Attilio Casselini.

Q. Are you also known by another name, Mr. Casselini? A. Dutch White.

Q. Where do you live, Mr. Casselini?

A. 56 Laurel Drive, Fairbanks.

Q. That is in California?

A. In Marin County, yes.

Q. What is your present occupation?

A. At the present time nothing.

Q. What has been your occupation in the past?

A. Restaurant business.

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(Testimony of Attilio Casselini.)

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, sir.

Q. Were you at any time associated with him in any business? A. 186 Club.

Q. And when did you become associated in that business?

A. Well, when he first went into it.

Q. When was that? A. In '43.

Q. How long were you associated in that business?

A. About two years and four months. [1608]

Q. I call your attention—I believe you were in the court room when Mr. Gillen read from Exhibit 88A, the income tax return of that corporation, which recited that you resigned on April 15, 1945—does that refresh your recollection as to the actual time you left that business?

A. I resigned in April, 1944.

Q. April, 1944? A. No, '45.

Q. Now, did you take any active part in the management of the business?

A. No, none at all.

Q. What was the nature of your interest in the business?

A. Well, he give me a working part in the business and officer.

Q. When you say "he," who do you mean?

A. Mr. Remmer.

Q. What part did he give you?

A. Well, he gave me just a little part, which I don't understand nothing about it.

Q. Do you know how much?

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(Testimony of Attilio Casselini.)

A. It was one-sixth involved.

Q. Did you pay anything for that?

A. No, I paid nothing for it.

Q. Did you invest any money in it?

A. None at all. [1609]

Q. You say that was a working interest?

A. Yes, sir.

Q. Did you perform any services?

A. No. The only thing I did was to cash checks that was cashed in the club.

Q. You say you cashed checks, did you have an establishment close to the club at that time?

A. No, I had my business, I was running on Mason Street.

Q. How far was that from the 186 Club?

A. Two blocks.

Q. What was your business?

A. Restaurant business, and saloon.

Q. What was the name of the business?

A. Vanderbilt Club.

Q. Did Mr. Remmer have any interest in that?

A. No.

Q. You say the services you performed were occasionally cashing checks at your restaurant and bar?

A. Mr. Busterna used to send them up to me and I used to send them the cash there for the Club.

Q. How often did you do that?

A. Twice a week.

Q. Do you recall on the average the number and amount of checks that you cashed in that fashion?

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(Testimony of Attilio Casselini.)

A. Well, they varied, some 400 to 500 hundred, some varied [1610] varied 10 to 12 hundred, some varied to 16 hundred.

Q. In cashing those checks, is that the amount of the checks or the number?

A. That is the amount of the checks.

Q. Now, in cashing those checks, how did you perform that service?

A. Well, they used to send to me and I just worked in the afternoon and he would send them up, one of the employees, and my bookkeeper used to sign it with the Vanderbilt Club stamp.

Q. With your bank stamp?

A. No, the Vanderbilt Club stamp.

Q. Then what was done with the checks.

A. Then I would go down and cash them.

Q. And would you deposit them?

A. No, I would bring them right back to the club.

Q. In the event that any of the checks were subsequently dishonored, what occurred?

A. Well, I would have to phone him and leave word to call me and I would ask him about different checks that come back and he would send the money to me.

Q. It would be made good to you?

A. Yes, sir.

Q. Do you know whether or not the 186 Club had a bank account of its own at that time? [1611]

A. I don't think so.

Q. Now, when you say you had a working one-

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(Testimony of Attilio Casselini.)

sixth interest, what do you mean by working interest?

A. Well, I used to place a lot of seamen that hung around there.

Q. That is around the Vanderbilt Club?

A. Yes and naturally he knew these men were coming off the ship and asked me would I send them a card or something for the club, so I naturally did.

Q. You were to steer the customers there?

A. Yes, sir.

Q. And was that the only service you performed?

A. The only thing I done.

Q. Now, at the time you cashed these checks, to whom would you turn the cash over to?

A. I would either send it over or bring it over.

Q. I couldn't understand?

A. I either sent the money or bring it over.

Q. To whom?

A. To the cashier's office.

Q. What cashier's office?

A. At the 186 Club.

Q. Yes, or——?

A. Or I would bring it to them.

Q. How often were you on the premises?

A. I used to go in and play cards after I closed at night [1612] five or six times a month.

Q. Other than cashing checks and steering the sailors who came into your place to the 186 Club, did you perform any other duties?

A. None at all.

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(Testimony of Attilio Casselini.)

Q. Now, did you at any time receive any compensation by way of salary or wages from the 186 Club?

A. Well, I was to get so much at the end of the year.

Q. Did you ever receive that?

A. I never received it. The only thing I received is my tax money.

Q. By your tax money, to what do you refer?

A. I refer that I was to get so much by the year and the money that I was to get I had to pay taxes on.

Q. Do I understand that you were given sufficient money to pay the taxes on the salary, is that correct? A. $3,600 a year.

Q. Do I understand that you did not receive that money? A. No, sir.

Q. That is the salary itself?

A. I did not receive the salary. I received the money for the taxes on the salary.

Q. Now, were you aware that the 186 Club was incorporated?

A. Well, I was told by Mr. Kyne about 7 or 8 months after I was in there. [1613]

Q. Is that the first time you learned it was incorporated? A. That is the first time.

Q. Were you aware that you were listed as an officer of the corporation?

A. I was listed as an officer at that time, yes.

Q. When did you first learn that?

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(Testimony of Attilio Casselini.)

A. About four or five months after I was in there.

Q. What officer did you hold?

A. I held vice-president.

Q. Now, did you have any certificate or written agreement or anything in writing from any one, signifying the amount of your interest, or extent of your interest in the 186 Club?

A. None at all.

Q. Now, at the time you say you resigned——

A. Yes, sir.

Q. Did you receive anything in return for your interest? A. Nothing at all.

Q. Did you continue to have any interest in the club? A. Nothing.

Mr. Gillen: What was the last question?

(Question read.)

Mr. Gillen: I think that is asking for a legal construction. I move the answer be stricken.

The Court: Motion is denied.

Q. At the time you resigned, did you turn anything over by way [1614] property or documents to any one? A. No.

Q. Now, with regard to the tax money that was paid you while you were there, in what form did you receive that? A. In bills.

Q. Currency? A. Currency, yes.

Q. Who gave you that? A. Mr. Kyne.

Q. Where did he give it to you?

A. At my office.

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(Testimony of Attilio Casselini.)

Q. At the Vanderbilt Club? A. Yes.

Q. Do you know who the other officers of the corporation were?

Mr. Gillen: Just a moment—the record is the best evidence of that, may it please the Court, and it is incompetent, irrelevant and immaterial whether he knew or not.

The Court: Objection is overruled. He may answer the question.

A. Yes, I do.

Q. Who were the other officers?

A. Mr. Lando.

Q. What office did he hold?

A. I think he was treasurer.

Q. Yes. [1615] A. And Mr. Busterna.

Q. What office did he hold?

A. He was president.

Mr. Gillen: This is all, your Honor, set forth in the returns. I don't know why he should be calling on a witness on the stand to try to remember the officers, when it is in the record, introduced by the government. It is just a waste of time.

The Court: Objection overruled.

A. And there are two I didn't know are implicated, Mr. Nelus and some other fellow, a Mr. Kopestake.

Q. You say you didn't know they were implicated, what do you mean?

A. I didn't know they were in the club interest.

Q. When did you first learn that Mr. Nelus or Mr. Kopestake had any interest in it?

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(Testimony of Attilio Casselini.)

Mr. Gillen: Objected——

The Court: Overruled.

A. About five or six months.

Q. Five or six months from when?

A. The time when we started.

Q. Did Mr. Remmer have an interest, do you know? A. Yes, sir.

Q. Do you know what the amount of his interest was? A. I don't know. [1616]

Q. Did you know the extent of the interest of any of the other parties? A. No, I didn't.

Q. Now, do you know whether or not books and records were kept of the corporation?

A. Well, I wouldn't know that.

Q. Did you ever see any books or records?

A. No, never did.

Q. Were you familiar with the daily poker sheets? A. No.

Q. Did you ever see them?

A. Well, I saw the red sheet Mr. Busterna had. I used to ask him occasionally——

Q. What was the red sheet?

A. Sheet they had all the IOUs on.

Q. Did you see daily sheets showing the take and the payouts? A. No, never did.

Q. Now, I am going to show you plaintiff's Exhibit 87A, the corporation income declared value excess profits tax return, July 1, 1943, to June 30, 1944, and ask you if that is your signature?

A. Yes, this is mine.

Q. I call your attention to the printing, "vice"

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(Testimony of Attilio Casselini.)

immediately before the "president," is that your printing? A. Yes, sir. [1617]

Q. Now, did you prepare this return?

A. No, I didn't.

Q. Who did, if you know?

A. I wouldn't know. I think some boy by the name of Schrader or something like that. I didn't even know him.

Q. Are you familiar with the figures set forth herein? A. No, I wasn't.

Q. It shows on here that this was signed in the presence of the Deputy Collector Louis H. Mooser, do you recall him? A. Never knew him.

Q. Do you recall who was present at the time you signed this return?

A. At the time I signed it I think Mr. Kyne was there.

Q. Yes; any one else there?

A. Not that I know of.

Q. What is that? A. No.

Q. Now, there is attached to this return Schedule 1, document which has been read here this morning, setting forth your salary as four thousand dollars, did you ever receive that? Did you see that at the time you signed the return?

A. No, I didn't.

Q. Did you read the return at the time you signed it? A. No, I never.

Q. Did you ever, as vice-president or as holding an interest [1618] in the 186 Club, attend any meeting of the officers? A. None whatever.

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(Testimony of Attilio Casselini.)

Q. You say never ever?

A. None whatever.

(Jury and alternate jurors admonished and short recess taken at 11:00 o'clock.)

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. CASSELINI

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Casselini, at the time you left the 186 Club, did you submit any letter of resignation or any document of any kind?

A. None whatever.

Q. Did you at that time inform anyone that you were leaving?

A. Yes, Mr. Busterna, when I told him.

Q. At the time you left?

A. I was leaving.

Q. And you recall when that was?

A. That was in April, about the middle of April.

Q. Of 1945? A. Yes.

Q. And after that did you have any connection whatever with the 186 Club? [1619]

A. None whatever.

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(Testimony of Attilio Casselini.)

Mr. Campbell: I think that is all.

Cross-Examination

By Mr. Gillen:

Q. Mr. Casselini, your name of Dutch White you carried since you were a boy?

A. That is right.

Q. That is because you happened to have very blonde hair, they used to call you Dutch White?

A. When I was a young fellow, yes.

Q. Now, aside from the Vanderbilt Club, which you have mentioned here, you formerly were the owner of what is called Charles Fashion Restaurant on O' Farrell Street, San Francisco?

A. Yes, sir.

Q. And you sold your interest out there some time ago?

A. Sold out about two years and three months ago.

Q. At the Vanderbilt, which was described by you as restaurant bar on Mason Street, two blocks away from the 186 Club, you say that you had the patronage of a lot of merchant seamen, is that correct? A. Yes.

Q. And they used to ask you a good place to play cards and you would direct them to the 186 Club?

A. Yes, sir.

Q. You used to go there yourself to play cards?

A. Five or six times a month I used to [1620] play.

Q. Now, you said, Mr. Casselini, that you

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(Testimony of Attilio Casselini.)

weren't familiar with the poker sheets, but that you did see a sheet with a lot of IOUs on it, is that correct? A. That is correct.

Q. And you inquired about the IOUs on occasions, isn't that so? A. I did.

Q. Now, as a matter of fact, isn't it true that the reason you inquired about the IOUs and the reason you finally resigned in '45 was because you were told by Mr. Busterna that there were no profits to pay your salary? A. Right you are.

Q. And you decided not to be bothered any more and you offered your resignation, isn't that correct? A. That's right.

Q. And were you shown the number of markers in explanation of why there was no money to pay your salary?

A. Well, they did for about six months, they showed me every two or three weeks.

Q. Did you check the markers yourself to determine in your own mind or get any idea approximately how many markers there were or what they amounted to? A. No, I didn't.

Q. Were there a good many of them?

A. Quite a few of them. [1621]

Q. Now, Mr. Campbell asked you when you did withdraw from the corporation whether or not you turned in any documents, do you recall his question? A. I did not.

Q. Now, you knew, did you not, that a social club of this nature, under the laws of California,

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(Testimony of Attilio Casselini.)

has no stock? There is no stock issued to the stockholders? A. That's right.

Q. Now, you say that the returns for the corporation were prepared by some man by the name of Slater? A. Shrader or something.

Q. Did you think Mr. Slater was a lawyer?

A. He was a lawyer, I think, for the 186 Club.

Q. As a matter of fact, aren't you referring to Mr. Slater, the public accountant?

A. Public accountant, that's right.

Q. Now, when you signed, Mr. Campbell asked you if you signed the returns as vice-president of the corporation in the presence of any one?

A. I did.

Q. And your answer was that you signed it in the presence of Mr. Kyne. You don't recall that there was anybody else present? A. No.

Q. Now, Mr. Mooser, I note, in prosecution's Exhibit 87A, has signed as the officer administering the oath and on the 15th [1622] day of November you appeared before L. A. Mooser, Jr., a Deputy Collector of Internal Revenue. You signed that you appeared before him—you don't recall his being present when you signed?

A. No, I don't recall him.

Q. Did you know that the 186 Club had initially started out as a partnership and due to the fact that Mr. Mooser said it would have to make a return as a corporation, that is why officers were elected and corporate officers were put in office?

A. Well, I was told by Mr. Kyne at the time.

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(Testimony of Attilio Casselini.)

Q. Did you know that Mr. Mooser had audited the books and had stayed around the 186 Club for a period of approximately a month to check the average of the business being done?

A. Mr. Kyne told——

Mr. Campbell: I will object to conversation.

The Court: Listen to the question and answer the question. Do you know? If you do, say yes, if you don't say so.

Q. Do you know of your own knowledge?

A. No, I didn't.

Q. Did you ever meet Mr. Mooser?

A. No, I didn't.

Q. Did you ever see Mr. Mooser around the 186 Club? A. I never did. [1623]

Q. You didn't know him to see him?

A. No.

Q. So if he was there, you wouldn't know him?

A. No.

Q. When you refer to Mr. Nelus and Mr. Kopestake, that was Jesse Kopestake, was it not? Did you know Mr. Kopestake? A. Yes, I did.

Q. And Mr. Nelus, did you know him?

A. Yes, I did.

Q. You said that you learned some time after you became identified with the organization that they also had an interest, is that correct?

A. Yes.

Q. And you didn't know what the extent of their interest was? A. No.

Q. Did it come to your attention that their in-

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(Testimony of Attilio Casselini.)

vestment was paid off to them out of the proceeds and profits of the 186 Club? Did that come to your attention? A. I wouldn't know.

Q. You didn't know that they had withdrawn and that they had been paid off the cash investment that they had made? A. I didn't know that.

Q. Now, Mr. Casselini, who was it that made out your individual income tax return?

A. Well, it was my bookkeeper at the time, but then later on [1624] Mr. Hubner took care of it.

Q. Mr. Hubner is the tax lawyer in San Francisco? A. Yes, sir.

Q. Conrad Hubner? A. That is right.

Q. You say initially your bookkeeper made out your individual income tax return? A. Yes.

Mr. Campbell: Objected to as immaterial as to his individual tax return.

The Court: He has already answered the question. The answer may stand.

Q. Who was the bookkeeper that made out your income tax return, your individual return?

A. I can't think of his name.

Q. Was he the person who kept——

A. Keep books for the Vanderbilt Club.

Q. When you first became identified with the 186 Club, did he make out your return?

A. Yes, sir.

Q. This bookkeeper? A. Yes.

Q. How many years did he make out your return? A. Two years.

Q. So that the time while you were identified

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(Testimony of Attilio Casselini.)

with the 186 [1625] Club your own bookkeeper made out your returns, is that correct?

A. That is right.

Q. It is true, is it not, that he told you where you were credited with salary and entitled to salary, that you were required to pay taxes on that, whether you received it or not?

Mr. Campbell: I object—it is calling for hearsay.

The Court: Let me have the question.

(Question read.)

The Court: Objection sustained.

Q. Well, did you ever inquire as to why you had to pay income taxes on a salary that you didn't receive?

Mr. Campbell: Objected to as immaterial, incompetent.

The Court: Objection overruled. Answer the question.

A. Yes, he had told me——

Mr. Campbell: Just a minute—I am going to object.

The Court: Answer that yes or not. It has been answered.

Q. Did you inquire as to why you had to pay an income tax on salary even though you did not receive the salary? A. Yes, I did.

Q. Were you informed the reason was that under the law you would have to pay where you were credited with salary or credited with profits or dividends, whether you received them or not?

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(Testimony of Attilio Casselini.)

A. Yes, that's right. [1626]

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Mr. Campbell: I have some redirect, but first I ask that some exhibits be brought down. While we are waiting for them, I am going to ask to have given an identification number this certified document dated October 26, 1951.

Clerk: 150.

Mr. Campbell: I will ask a question or two while I am waiting for the return.

Q. Mr. Casselini, referring again to plaintiff's Exhibit 87A, the corporation income and declared value excess profits tax returns for the fiscal year July 1, 1943 to June 30, 1944, for the 186 Club, on which you have identified your signature, I call your attention appearing on the 3rd sheet under the heading, "Questions": Question 10: "Is this return made on the basis of cash receipts and disbursements," and the typewritten answer, "Yes." Now at the time you say you conferred with whoever it was told you you had to report the salary whether or not you received it, do you know whether or not this return and that statement of cash receipts and disbursements as the basis for filing of the return was before you?

A. Was before you?

Q. The person who told you that you had to re-

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(Testimony of Attilio Casselini.)

port the salary whether you received it or not?

Mr. Avakian: Just a moment. That is objected to, your [1627] Honor, as incompetent, irrelevant and immaterial, because the material point there would be whether Mr. Casselini's return was prepared on cash accrual basis, not whether the corporation's return is on a cash and accrual basis.

The Court: Let me have the question.

(Question read.)

Q. Was before him, the person giving that advice.

The Court: I do not understand the question. I don't see how the witness can understand it.

Mr. Campbell: Very well.

Q. Mr. Casselini, Mr. Gillson asked you if you were advised that you should report on your individual return the salary from the 186 Club whether or not you received it. Do you recall that?

A. Yes, sir.

Q. Now, who was it that gave you that advice?

A. My bookkeeper.

Q. Now, at the time that he gave you that advice, do you know whether or not he had seen the returns as filed by the 186 Club?

Mr. Avakian: Now, your Honor, we make the same objection I made that the material thing would be whether Mr. Casselini's return was on cash or accrual basis, not whether the corporation's was. He would report his income on one

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(Testimony of Attilio Casselini.)

basis or the other, regardless of what the corporation did.

The Court: Let me have the question. [1628]

(Question read.)

The Court: You may answer the question.

A. He had not.

Q. Now, do you recall, Mr. Casselini, whether or not the salary as set up in the 186 Club returns was reported by you individually on your original returns or on an amended return?

A. I do not remember.

Q. For the purpose of refreshing your recollection, I am going to show you what purports to be your 1943 individual income tax return.

Mr. Avakian: Your Honor, we object to this method of attempting to refresh his recollection for the reason he is attempting to show a 1943 return, whereas the testimony is a corporation tax return showed a salary to him from the corporation for the first time in 1944 and the corporation returns specifically says that no salary was set up for the year 1943, so his individual 1943 return would be completely immaterial.

The Court: There is nothing before the court.

Mr. Avakian: He is attempting to show the witness——

The Court: He has a right to show the witness anything.

Mr. Gillen: He said to refresh his memory.

The Court: There is nothing before the Court.

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(Testimony of Attilio Casselini.)

Mr. Campbell: I would like to have this given a number for identification, your Honor.

Clerk: 151. [1629]

Mr. Gillen: May I ask counsel's statement, for the purpose of refreshing his memory, be stricken from the record. May we have it read?

The Court: It may stand. Read the question to the witness.

(Question read.)

Q. (Continuing.) And will ask you whether or not on your return of income tax for 1943, your original return, if you reported any salary from the 186 Club?

Mr. Avakian: Just a moment. I object to that, your Honor, as not proper re-direct, because there is nothing in the cross-examination as to salary for 1943. The only salary talked about in cross-examination or direct examination was for the years 1944 and 1945 and it is only for those years that the tax income returns show any salary, and moreover the tax returns specifically state that no salary was set up for the year 1943. That is not a proper re-direct question.

The Court: Objection overruled. Answer the question. A. I don't remember.

Q. Let me ask you this, is that your signature?

A. Yes, this is my signature.

Mr. Campbell: I am going to offer this in evidence as government's Exhibit 151.

The Court: Admitted, 151.

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(Testimony of Attilio Casselini.)

Q. Do you recall whether or not subsequently in 1943 you filed [1630] an amended tax return?

A. What is that?

Q. Do you recall whether or not you later filed an amended 1943 individual return?

A. I do not remember.

Mr. Campbell: May this document be numbered the same number A for identification, 151A for identification?

Q. I am going to show you government's Exhibit 151A for identification and ask you if that is your signature? A. Yes.

Q. I will ask you to examine this return, which purports to be for the year 1943 and ask you whether or not that refreshes your recollection on the matter of whether or not on the amended return you reported salary from the 186 Club for the year 1943? A. Well, I didn't get any salary.

Q. I know, but that is not the question.

(Question read.)

Mr. Avakian: Just a moment. I offer the objection that the document is the best evidence. It hasn't been offered in evidence, so no statement from it should be read.

Mr. Campbell: In view of counsel's statement, I will offer it in evidence as government's 151A.

The Court: It may be admitted in evidence, 151A.

Mr. Campbell: I would like to read from government's [1631] 151, the individual income tax

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(Testimony of Attilio Casselini.)

return of Attilio Casselini, for the year 1943, which bears receipt and stamp of the Collector of Internal Revenue of April 29, 1944, under the heading of "Income," item appearing as (9) Income from partnerships, $8,221.50, referring to Schedule C-3. Schedule C-3 contains no information. Exhibit 151, amended individual tax return for the calendar year 1943 of Attilio Casselini, reports dividends four thousand dollars, income from partnerships $6,221.50, and under the heading of "Income from Partnerships" "See Schedule C-3," and on C-3 is mentioned Club Vanderbilt $6,221.50. Nothing further set forth.

Mr. Avakian: May we inquire whether 151A shows anything about salary in the amended return?

Q. Mr. Casselini, the item of dividend for four thousand dollars, will you state to what that refers?

A. Well, I don't know.

Q. Did you receive dividends from any source for that year? A. None whatever.

Q. Do you know what the four thousand dollars as set forth on your return represents?

A. I do not.

Q. Who prepared this return for you?

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled.

A. At the present time I couldn't know. [1632]

Jury and alternate jurors admonished and noon recess taken at 11:50.

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January 3, 1952, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. CASSELINI

resumes the witness stand on further

Redirect Examination

By Mr. Campbell:

Q. Mr. Casselini, I am going to show you defendant's Exhibit "P," which purports to be a partnership return income for the calendar year 1943 of the 186 Club, which is signed by William E. Kyne, and ask you if you have ever seen that document before? A. No.

Q. Do you recognize the signature of Mr. Kyne?

A. No, I don't.

Q. This document recites under partner share of income, credits Attilio Casselini, $2,000. Did you receive any such sum in 1943? A. None at all.

Mr. Campbell: You may cross examine.

Mr. Gillen: No further questions, your Honor.

(Witness excused.)

Mr. Campbell: May I inquire through the Court, your Honor please, in regard to the witness Busterna, whether or not he can be released also?

Mr. Golden: The situation is the records we asked for [1633] and received, as your Honor noted, are three full cartons. It has been physically

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impossible to do anything on them. We suggest he may be excused and I am sure Mr. Campbell can agree if we want him back he may be recalled, is that satisfactory?

Mr. Campbell: Yes.

The Court: Mr. Busterna, you are going to be excused but you will be subject to call by either side. You may be excused with that understanding.

RODRICK PERKINS

a witness on behalf of the plaintiff, having been previously sworn, was recalled and testified as follows on

Direct Examination

By Mr. Campbell:

Q. Mr. Perkins, in connection with your employment by Mr. Graham and Mr. McKay, did you also have as part of your duties the making of any entries in the books of the Cal-Neva, Inc.?

A. Yes, sir.

Q. I am going to show you plaintiff's Exhibit 146 for identification, and ask you to examine it and state whether or not, in the course of your duties, you made entries in that book? Do you find entries you made there?

A. Yes, sir, these, I made and here.

Q. Now, what is that book that you have?

A. General ledger of Cal-Neva, Inc.

Q. That is general ledger of the Cal-Neva?

A. Yes, sir. [1634]

Q. And you recognize it as such?

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(Testimony of Rodrick Perkins.)

A. Yes, sir.

Mr. Campbell: This will be offered in evidence as government's 146.

Mr. Avakian: Your Honor, as a matter of clarifying through this witness, the prosecution is offering the entire document and not simply the entries he made?

Mr. Campbell: No, I am offering the entire document.

The Court: Admitted in evidence, 146.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Perkins, I believe you stated that you made some of the entries in this general ledger, plaintiff's Exhibit 146? A. Yes, sir.

Q. And did you do that in the course of employment by the Cal-Neva, Inc.? A. Yes, sir.

Q. During what period of time were you employed by that corporation?

A. I first did the work in 1930 and I think I left it in '35 and went back again in 1939 or 1940, I am not sure, and I left in 1941, although there are probably some entries in 1942.

Q. Were you employed by Cal-Neva subsequently to 1942?

A. I think that in the wintertime I made out checks and paid a few bills. [1635]

Q. During what years, Mr. Perkins?

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(Testimony of Rodrick Perkins.)

A. I think it was in 1942 and 1943, but I am not positive about it.

Q. And your duties, during the time you were employed there, were of a bookkeeping nature, is that correct? A. Yes, sir.

Q. Did you keep records other than this general ledger, which is prosecution's Exhibit 146?

A. What do you mean by records?

Q. Well, did you do any other bookkeeping besides what is reflected in these books?

A. I do not think so.

Q. The general ledger which you have identified, prosecution's Exhibit 146, contains certain accounts for the owners of the stock of the corporation, does it not? A. I think it does.

Q. I call your attention, Mr. Perkins, to several sheets under the general designation of "Assets," entitled J. C. McKay account No. 8; W. J. Graham account No. 9; and E. Remmer account No. 10, will you examine those three sheets and state to us what each account represents?

Mr. Campbell: Objected to on the grounds that the records speak for themselves, except as to such entries as this particular witness may have made.

The Court: Read the question. [1636]

(Question read.)

The Court: Objection overruled. You may answer the question.

A. Well, there are various items for each one of these gentlemen, various amounts of charges against their personal account.

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(Testimony of Rodrick Perkins.)

Q. Well, let us take the first one, the sheet that relates to Mr. McKay, what is the first entry on that sheet?

A. The first sheet shows Lambeth for radio repairs, $7.90.

Q. Does that represent a payment made by Cal-Neva on behalf of Mr. McKay in that amount?

Mr. Campbell: If he knows. The books speak for themselves.

The Court: State that if you know.

A. Yes, I think that is what it does.

Q. With your experience as a bookkeeper, that is what that entry means to you, is that correct?

A. Yes.

Q. Is that then charged on the books of account against Mr. McKay, that amount?

A. Yes, that is what is charged.

Q. That means then, does it not, Mr. Perkins, that on account of that transaction Mr. McKay owes the Cal-Neva corporation the amount you just read, seven odd dollars?

Mr. Campbell: Objected to as calling for his conclusion and opinion. The man has not been qualified as an expert; it [1637] is not within the scope of direct examination.

The Court: Well, during the course of this trial we have had many exhibits here and permitted the custodian bookkeeper to explain items. I think it is a good thing to do. Objection will be overruled.

(Question read.)

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(Testimony of Rodrick Perkins.)

A. Yes, that is what it means.

Q. Are there a number of entries in that account showing payments made by Cal-Neva on behalf of Mr. McKay? A. Yes, sir.

Q. And is the entry made showing the amount owed by Mr. McKay to Cal-Neva on account of each of these transactions?

A. Well, there are various credit items.

Q. What do you mean by credit items?

A. Well, Mr. McKay, for instance, would pay for some items that belonged to Cal-Neva. Then his account would be credited with the amount of money he spent on behalf of the corporation.

Q. Can you give us an example from the book before you of one of those?

A. There is an entry in the amount of $14,606.95.

Q. What is the date of that?

A. Date is September 30, 1937. That was for money spent by Mr. McKay for furniture and fixtures, namely, a safe and construction account of 13 thousand dollars and gambling equipment and publicity of 25 thousand. Mr. McKay spent that money for improvements. [1638]

Q. That, then is a transaction in reverse—transaction of Mr. McKay making payment on behalf of the corporation, is that right? A. Yes.

Q. So then that reduces the amount he previously owed the corporation on the books, is that right? A. That is right.

Q. And is that a running account that reflects

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(Testimony of Rodrick Perkins.)

transactions of that nature from time to time as they appear?

A. This account goes from '37 to '39.

Q. Is it continued on the next page?

A. No, that is all for Mr. McKay.

Q. Isn't the final entry in Mr. McKay's account in June of 1946?

A. Yes, that's true. The final entry was in June of 1946.

Q. And in connection with each of the transactions, does this account show the balance of the account after each transaction?

A. Not after each month. After a series it does.

Q. At periodic intervals, is that correct.

A. Yes.

Q. And in every instance where there is a balance entered there prior to June of 1946, would you state whether the balance shows an obligation owing by Mr. McKay to Cal-Neva or an obligation owing by Cal-Neva to Mr. McKay?

Mr. Campbell: Objected to as immaterial. [1639]

The Court: Objection overruled. Answer the question.

A. It looks like Mr. McKay owes the corporation.

Q. That is true in every instance where the balance is entered?

A. Well, in one part of 1947 there is a credit balance. The rest of them ore debits.

Q. By debit balance you mean that Mr. McKay owed the corporation? A. Yes.

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(Testimony of Rodrick Perkins.)

Q. When was that account cleared to the zero balance? A. In June of 1946.

Q. And was a payment made by Mr. McKay to or on behalf of Cal-Neva at that time to balance the account?

A. It shows check record 37, $3,602.04, but I can't find the check at this time.

Q. At any event, was there a payment there to or on behalf of the corporation made by Mr. McKay?

A. It was made to Mr. McKay probably by the corporation.

Q. Immediately prior to that entry, didn't Mr. McKay owe the corporation that amount of money?

Mr. Campbell: I submit, this is all immaterial.

The Court: Well, I don't think it is proper cross-examination, but I have not heard any objection on that ground.

Mr. Campbell: I will object on that ground.

Mr. Avakian: May I be heard on that. [1640]

The Court: I do not want to rule that out now at this late state where you have gone into it so far. I can't see where any of it is proper and the witness identified the record.

Mr. Campbell: I thought I made that objection.

The Court: I didn't hear it.

Mr. Campbell: I thought I had. If not, I will make it at this time.

The Court: Well, it will be overruled.

Q. Let us take the entry just prior to June of 1946, Mr. Perkins, what does it show?

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(Testimony of Rodrick Perkins.)

A. A balance of $3,602.04.

Q. A debit balance against Mr. McKay of $3,602.04 to the corporation, is that correct?

A. Yes.

Q. Since that debit balance was wiped out and reduced to zero by entry of June, 1946, does that not mean that in June of 1946, Mr. McKay made payment of $3,602.04, either to the corporation or on behalf of the corporation?

Mr. Campbell: Objected to as argumentative. The records speak for themselves.

The Court: It is. Objection sustained.

Q. Can you tell us what that entry means?

Mr. Campbell: Objected to as asked and answered.

The Court: Objection overruled. [1641]

A. I didn't make the entry myself, but here is the original entry, if you want to look at it.

Q. Will you tell us what it is?

A. It just says, "Credit accounts receivable Remmer, McKay and Graham," with the various items to those accounts.

Q. Will you turn to the next sheet in that ledger, namely, the account of Mr. Graham. Have you found that? A. Yes.

Q. And does that likewise reflect the number of transactions in which the corporation advanced money to or on behalf of Mr. Graham and in which Mr. Graham in some instances advanced money to and on behalf of the corporation?

Mr. Campbell: Objected to as opening a new

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(Testimony of Rodrick Perkins.)

subject matter not within the scope of the subject matter.

The Court: Objection sustained.

Mr. Avakian: I would like to be heard on that because we think it is important.

The Court: I can't see where it is proper.

Mr. Avakian: I would like to explain where I think it is important.

The Court: I do not think it is. I do not want to take up the time.

Mr. Avakian: Isn't your Honor going to let me explain why I think it is. It is an exhibit that the government introduced. [1642]

The Court: The ruling will stand.

Q. Would you refer to the next account, that of Mr. Remmer. Have you found that?

A. Yes, sir.

Q. And does that account of Mr. Remmer's contain a number of entries showing transactions between Cal-Neva and Mr. Remmer?

Mr. Campbell: Same objection.

The Court: Same ruling.

Mr. Avakian: I would then request, for the record, an opportunity to explain why we think this is material.

The Court: My view of it is make this gentleman your own witness.

Mr. Avakian: Your Honor, they presented these books.

The Court: The ruling will stand.

Mr. Avakian: Your Honor, doesn't any ques-

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(Testimony of Rodrick Perkins.)

tion relating to this book relate to direct examination, because that is in evidence?

The Court: The ruling will stand. The ruling will stand.

Q. And do I understand your Honor——

The Court (Interceding): I am not going to make any more explanation. I said the ruling will stand. Now, don't pursue it any further.

Mr. Avakian: Might I ask another question?

The Court: Go ahead and ask.

Mr. Avakian: Of your Honor? [1643]

The Court: No, I am not on the stand.

Q. Are there entries in prosecution's Exhibit 146 which show loans made by Cal-Neva Corporation to Mr. Remmer during the year 1944, 1945, and 1946?

Mr. Campbell: Same objection.

The Court: Same ruling.

Mr. Avakian: In view of your Honor's ruling, I would respectfully like to move that prosecution's Exhibit 146 be stricken from the evidence on the ground that we are not being permitted to cross-examine and if we are not being permitted to cross-examine on the theory the exhibit is not within the scope of direct examination, it should not be in evidence.

The Court: Motion denied.

Q. Mr. Perkins, did you yourself make any entries in that book relating to transactions between Mr. Remmer and the corporation?

A. I made some of them.

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(Testimony of Rodrick Perkins.)

Q. Would you identify for me the entries which you made of that nature?

A. I have one here on the 7th of November, 1938.

Q. What is that entry?

Mr. Campbell: Pardon me. That is objected to as being not within the scope of the direct examination.

The Court: Objection sustained.

Mr. Avakian: May I be heard on that, your Honor?

The Court: No, sir. [1644]

Q. Are there other entries there reflecting transactions, entries which you made, reflecting transactions between Mr. Remmer and the corporation?

Mr. Campbell: Objected to as not within the scope of direct examination.

Mr. Avakian: He was questioned on that, as to whether he made some entries in that book.

The Court: You may answer that question, yes or no. A. Yes.

Q. Will you find the next entry which you made.

Mr. Campbell: Is that a question?

Mr. Avakian: I am asking him to find it. When he finds it, I will put the question to him.

A. Yes, sir

Q. Will you state what that reads?

Mr. Campbell: Objected to as not within the scope of direct examination.

The Court: Objection sustained.

Q. Are there other entries which you made

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(Testimony of Rodrick Perkins.)

reflecting transactions between Mr. Remmer and the corporation? A. Yes, sir.

Q. Would you state what the next entry is?

Mr. Campbell: Objected to as not within the scope of direct examination.

The Court: Objection sustained. [1645]

Mr. Avakian: May it be understood, your Honor, that I am being precluded from inquiring——

The Court (Interceding): No, I only make rulings when the occasion arises.

Mr. Avakian: Very well.

Q. Will you then find the next transaction? Let me know when you have found it, Mr. Perkins.

A. I have found it.

Q. Would you first give me the date of it?

Mr. Campbell: Objected to as not within the scope of direct examination.

The Court: Objection sustained.

Q. Will you state what the entry is?

Mr. Campbell: Same objection.

The Court: Objection sustained. I think we have enough.

Mr. Avakian: That was my suggestion.

The Court: It is my suggestion you desist from pursuing this matter any farther.

Mr. Avakian: I just wanted to make the record, your Honor.

The Court: You have already made the record.

Mr. Avakian: May I have prosecution's Exhibit 146, Mr. Perkins. Your Honor, at this time I would

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(Testimony of Rodrick Perkins.)

like to read to the jury certain portions of this exhibit.

The Court: You may read it. [1646]

Mr. Avakian: Reading to the jury from the section of Exhibit 146 entitled "Assets," "Account No. 8, J. C. McKay," under date of May, 1937, balance forwarded $2,687.92; August 2, 1937, Lambet for repair radio, posting reference D-6, charge $7.90; August 27, 1937, Cash, posting reference D-7, charge of $5,000; September 30, 1937, posting reference J-2, a credit of $14,606.95 and a credit balance of $6,911.13. On September 30, 1937, posting reference D-9, a charge of $1520. September 30, 1937, posting reference D-9, a charge of $7986.95, with a debit balance of $2595.82. On September 30, flowers for Blight funeral, posting reference D-12, $25.75. September 30, 1937, King's fire extinguisher, posting reference D-12, $6.25, and a debit balance of $2627.82.

With the Court's permission, I am going to read only some of the entries that intervene here, unless counsel desires to have me read them all. Do you care to look at this, counsel, first to determine?

Mr. Campbell: No.

Mr. Avakian: On October 31, 1937, a debit balance of $6895.82. Several entries later on, August 26, 1938, a debit balance of $11,395. Several entries below that on May 13, 1938, a debit balance of $16,037.02. Several entries below that on January 31, 1939, a debit balance of $3,455.67. A number of entries below that on September 30, 1939, a debit

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(Testimony of Rodrick Perkins.)

balance of $3,602.04, and in the next entry, which is final entry of [1647] this account, June, 1946, showing a credit of $3,602.04, with a balance of zero.

From the next sheet in prosecution's Exhibit 146, entitled, "W. J. Graham Account No. 9," I would like to read certain of the entries. On May 1, 1937, balance forwarded $2,817.26. On October 31, 1937, a debit balance of $6,904.01. On August 29, 1938, a debit balance of $11,404.01. Skipping a number of entries and going to November 30, 1942, a debit balance of $4,002.30, and a final entry following that, June 30, 1946, a credit of $4,002.30, leaving a balance of zero.

Turning next to the next sheet, which is entitled "E. Remmer Account No. 10." The first entry is May 1, 1937, balance forwarded, $5,292.40. Skipping a number of entries and going to April 30, 1943, a debit balance of $10,652.77. Skipping a number of entries and going to December 31, 1944, a debit balance of $17,886.66. April 30, 1945, a credit of $24.98. Another entry April 30, 1945, a credit of $7,500. Another entry on April 30, 1945, showing a charge of $8,000 and a debit balance at that time of $18,361.68. On July 31, 1944, a charge of $2,000 and on August 31, 1944, a charge of $5,000, leaving a debit balance on that date of $25,361.68. On April 3, 1946, a charge of $2,500. On April 30, 1946, cash and charge of $51,086.34 and on the same date, April 30, 1946, by checks included in cash, showing a credit of $2215.69, and a debit balance on that date of $76,732.33. On April 30, 1946,

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(Testimony of Rodrick Perkins.)

a charge [1648] of $7,000 and debit balance of $83,732.33. June 30, 1946, a credit of $83,732.33, leaving a balance at that time of zero. September 30, 1946, a credit of $50,000. October 31, 1946, a credit of $47,300. March 31, 1947, a credit of $5,000. July 31, 1946—I am sorry—under heading of July 31, 1947, but under column description year 1946 is entered there is charge of $7,724.11. Under date of August 30, 1947, with description 1946, there is a charge of $7,724.11. Under date of September 30, 1946, Graham and McKay $100,000 as a charge. January 31, 1947, E. Remmer charge $40,000. April 30, 1947, charge $15,000, with a balance shown on that date, a debit balance, of $68,148.22. April 30, 1947, a credit of $20,000. April 30, 1947, a charge of $97,300. April 30 of 1947, a credit of $34,705.83, leaving a debit balance of $110,742.39. On April 30 of 1948, a credit of $100,000, leaving a debit balance on that date of $10,742.39, and that is the final entry in this account.

May I ask the Court's permission to reconsider its ruling and permit me to examine?

The Court: The ruling will stand. Any further questions?

(No further questions.)

(Witness excused.)

Mr. Campbell: At this time we will offer into evidence plaintiff's Exhibit 150.

Mr. Golden: Your Honor, this exhibit is being

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offered [1649] without any witness on the stand and we would like to be heard on the proposition in the absence of the jury.

The Court: Very well. You make an objection, do you?

Mr. Golden: Yes, your Honor.

The Court: The jury will be excused.

(Jury and alternate jurors admonished and excused at 2:20.)

(In the Absence of the Jury.)

(NB 331—pp. 31-48.)

3:15 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Campbell: At this time, if the Court please, I wish to offer in evidence the exhibits which have been marked government's Exhibits 150 and 150A for identification.

The Court: They will each be admitted in evidence, of course subject to the objections. The record will show the proceedings we have had in regard to them.

Mr. Campbell: If I may read very briefly from these documents.

The Court:

Mr. Campbell: Plaintiff's Exhibit 150 is document which is headed "Certified October 22, 1951." The Certificate sets forth: (Reads) All of which is set

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forth under the seal of the Treasury Department and there are attached some ten pages, [1650] setting forth some information, giving names and numbers of bonds, places of issue, serial number of bond, denomination of bond and if bond has been redeemed by the United States, the date of the redemption. Plaintiff's Exhibit 150A is also certified under the seal of the Treasury Department of the United States and contains figures of a large number of bonds, United States Savings Bonds, of the original bonds, bearing also the date of redemption of the bond, amount paid and the paying officer, in most instances banks, bearing the endorsement of the person in whose name the bonds were issued, either that of Elmer Remmer or Helen Remmer. Without reading the individual bonds, and subject to correction, these exhibits would show that at cost price there were outstanding at the end of each of the years indicated cost price of bonds in the following amounts, as shown by these exhibits: as of December 31, 1942, $1200; December 31, 1943, $562.50; December 31, 1944, $10,481.25; December 31, 1945, $17,081.25; December 31, 1946, $17,081.25.

FRANK CAVANI,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name please?

A. Frank Cavani.

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(Testimony of Frank Cavani.)

Q. Where do you reside, Mr. Cavani?

A. 323 19th Avenue, San Francisco, California.

Q. What is your business or occupation? [1651]

A. Bartender.

Q. Where are you presently employed, Mr. Cavani? A. No place.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, I am.

Q. How long have you known him?

A. Oh, quite a while, about 36 or 37 years.

Q. Have you ever been associated with him in business? A. Yes, I have.

Q. When did you first become associated with him in business? A. At the 110 Eddy, 1943.

Q. Now there was some testimony here, the fact that you had been interested or acquired from Mr. Remmer a tavern in Tracy, California?

A. How far back do you want to go?

Q. Well, at any time did you acquire it?

A. I did, year 1925.

Q. And did you acquire a tavern from him at that time? A. No, no tavern.

Q. What was it you received?

A. Rooming house and liquor store, card room.

Q. What was the name of the establishment?

A. I believe Ludwig rooming house.

Q. What was the name of the card room?

A. I don't remember; just a card room. [1652]

Q. Did you have any other business transactions with him from that time in 1925 until you became associated in 110 Eddy Street?

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(Testimony of Frank Cavani.)

A. Not outside working for him.

Q. Where did you work for him?

A. At Cal-Neva Lodge, 1934, '35, '36, '37, '38, '39, '40, '41, '42, '44, and '45.

Q. Now let us see, that is 1934 to 1945?

A. Yes, sir.

Q. And you say you worked for him there as a bartender? A. Yes, sir.

Q. What was your method of compensation, that is to say, was it by way of salary or wages?

A. Salary, yes.

Q. Did you have any interest in Cal-Neva by way of interest in the profits? A. No.

Q. Or working interest?

A. No, just working.

Q. Now that was, was it not, seasonal employment, Mr. Cavani?

A. Yes, during the summer time, summer months.

Q. The Lodge was only open during the summer months?

A. Yes, that is right, from June, around June 10th until September 6th or 7th.

Q. When did you become associated with him in 110 Eddy Street? [1653]

A. Well, I come back from Cal-Neva in the fall of '42 and about a month or so later saw Mr. Remmer and he asked me if I wanted to go to work at 110 Eddy as a bartender and I told him I would. After all, I had to work some place, so I worked during that year 1942 and on in 1943 and he told

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(Testimony of Frank Cavani.)

me if I was interested in the proposition in El Cerrito, California.

Q. He asked you if you were interested in the proposition in El Cerrito? A. Yes.

Q. During 1942 until the spring of 1943, when you say you were working for him as bartender, that was at 110 Eddy Street? A. Yes, sir.

Q. What did you receive for your services there?

A. Just bartender wages.

Q. Union scale, I presume? A. Yes, sir.

Q. Did you have any interest in the business itself? A. Not in 1942.

Q. Up until the spring of 1943?

A. That is correct.

Q. Did you then go to work over in El Cerrito?

A. No, I didn't.

Q. Did you at any time work in the 21 Club and San Diego Social Club in El Cerrito? [1654]

A. Not one day.

Q. Do you know whether or not the licenses of the 21 Club were in your name?

A. Yes, sir, I do.

Q. Over what period of time were they in your name? A. The year of 1943.

Q. Do you recall whether or not you reported the income from the 21 Club? A. Yes, I did.

Q. Did you have any interest of any kind in the 21 Club? A. Not at all.

Q. I am going to show you plaintiff's Exhibits 72 and 72A, being respectively the partnership return of income for the fiscal year January 1, 1944,

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(Testimony of Frank Cavani.)

to September 30, 1944, being 72, and 72A being partnership return of income for the calendar year 1944, and ask you if it is your signature which is attached to each of those? A. Yes.

Q. And I call your attention on Exhibit 72A that the signature here is Frank Cavani over the typewritten word "Partner." Were you a partner in that enterprise?

A. No. Is this the 21 Club?

Q. What is your answer? A. No, sir.

Q. Do you recall ever seeing this before? [1655]

A. I believe I have if my name is there.

Q. Do you recall who presented it to you?

A. Yes, a fellow named John Simmons I believe.

Q. I call your attention to the name of the person preparing the return, Slater?

A. Bob Slater. Yes, I know him well.

Q. Who is Bob Slater?

A. Bookkeeper for Mr. Remmer at 110 Eddy.

Q. Does that refresh your recollection as to who gave you this return to sign?

A. Well, all I know, Mr. Simmons that year he informed me that I had to file my income tax for the 21 Club because I had the license in my name.

Q. And you signed the document which was presented to you? A. I did.

Q. I understand you, you never worked a day there? A. Not one day.

Q. Now I am going to ask to have this letter, with the attached two sheets, marked for identification, 152 for identification. I am going to show you

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(Testimony of Frank Cavani.)

this document, 152 for identification, which is purportedly addressed to you, and ask you if you received that document? A. No, I never did.

A. No, I never did.

Q. Did you ever see it before?

A. I do not believe I have, no, sir. [1656]

Q. Examine the top sheets and state whether or not you have seen those before, or copies of them? A. No.

Q. Now, Mr. Cavani, did you have any connection with any place in El Cerrito in connection with Mr. Remmer? A. Not at all.

Q. Now with respect to 110 Eddy Street, aside from your employment by Mr. Remmer at Cal-Neva, is that the only business in which you were associated with Mr. Remmer? A. Yes, sir.

Q. At any time? A. That is the only one.

Q. Now I believe you stated you began to work there in 1942? A. That is right.

Q. Who hired you to work there?

A. Clarence Bent.

Q. Mr. Bent is presently deceased?

A. Yes.

Q. Do you recall when he died?

A. He died in the spring of '43. It was around Easter time.

Q. Who managed 110 Eddy Street during that period of time in 1942 and until the spring of 1943?

A. Mr. Bent, Mr. Clarence Bent.

Q. After his death who managed the place?

A. Well, I believe I took over. [1657]

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(Testimony of Frank Cavani.)

Q. After you took over the active management of the place, what arrangement did you have for compensation?

A. Well, Mr. Remmer gave me the same compensation he was giving me at the 21 Club in El Cerrito.

Q. What was the proposition he gave you?

A. I was to get 25 per cent of the business.

Q. You say you were to get? A. Yes, sir.

Q. Will you explain what you mean by that?

A. Well, that is what he told me, I was going to get 25 per cent of the business?

Q. When were you given that?

A. As soon as I went to work, as soon as I took charge of 110 Eddy, right around May of that year.

Q. Did you have any written agreement of any kind? A. No, not at all.

Q. Will you state whether or not that was to be 25 per cent of the profits or 25 per cent of the assets of the business? A. The whole thing.

Q. How long did you continue there at 110 Eddy Street?

A. Until we closed on the 19th of October, 1947.

Q. What happened to the assets of the business at that time? A. Well, we moved out.

Q. Yes?

A. The landlord raised my rent from $210 to $730 a month, so [1658] we decided it was too much rent and couldn't afford it.

Q. What did you do with the equipment?

A. We stored part of it in 53 Mason and part of it in the basement of the Menlo Club.

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(Testimony of Frank Cavani.)

Q. Where is it now? A. It must be there.

Q. What was done with the stock on hand, liquor? A. We moved it to 52 Mason Street.

Q. Where is it now?

A. Well, what is left is at the 186 Club.

Q. Do you still have an interest in that liquor?

A. No, sir.

Q. Did you receive anything for your interest in the partnership at the time the business closed up?

A. No, there was money in the bank when we closed 110 Eddy and it was used for 186 Eddy Street to remodel it, in other words, and it took quite a bit of money.

Q. Were you interested in 186 Eddy?

A. Yes, up until July of this year.

Q. When did you become interested there?

A. Well, when we opened up, around 1948, I think June, '48, I am not sure. It was in '48.

Q. So that that particular operation you are speaking of was not in operation in 1946?

A. No. We were at 110 Eddy in '46. [1659]

Q. What is the operation at 186 Eddy Street which you became interested in?

A. Well, there was a store there and we remodeled it and made a bar.

Q. What is the name of the establishment?

A. Bones Corner.

Q. That is at the corner of Eddy and Taylor?

A. Correct.

Q. Now during the years 1943, 1944, 1945, and

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(Testimony of Frank Cavani.)

1946 did you receive anything from the 110 Eddy Club other than your salary or wages?

A. Yes, I did, I received $1500.

Q. When did you receive that?

A. I believe it was in '46.

Q. Do you recall when in '46?

A. No, I don't off-hand. It should be in the book.

Q. For what purpose were you paid that?

Mr. Avakian: Object to that, the books are the best evidence. They are in evidence.

The Court: Let me get the question.

(Question read.)

The Court: Objection overruled. Answer the question.

A. Well, there was money in the bank and Mr. Remmer decided to get some money out of it, so he took some money and I did and so did Mr. Thomas C. Turner, he was another partner at 110 [1660] Eddy also.

Q. Is that all that you ever received at any time other than your wages? A. That's all.

Mr. Gillen: Objected—the books are the best evidence. They should be referred to to get the best evidence.

The Court: Objection overruled. Answer the question.

A. That is all.

Q. At the time the business was closed up, what was done with the license?

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(Testimony of Frank Cavani.)

A. I brought it up to the State Board and I left it to the State Board to be used with this new 186 Club.

Q. That same license was used in connection with your present 186 Club?

A. That is correct.

Q. Now when you became associated with the 110 Eddy Club, the 25 per cent interest, who else had an interest in that club? A. In 1943?

Q. In 1943 when you became interested?

A. Later in that year——

Q. I mean at the time you became interested, not later in the year, the time you first acquired any interest?

A. There was Mr. Kyne, Mr. Remmer and myself.

Q. Later on was anybody else connected?

A. Yes. [1661]

Q. Who? A. Thomas C. Turner.

Q. When did he come into the arrangement?

A. Oh, he come in the middle of that summer, August.

Q. Summer of what year? A. '43.

Q. How long did he remain in the business?

A. He remained until we closed.

Q. So that after he came in there remained four of you continuously? A. That's correct.

Q. Do you know an Arthur Pratt?

A. I know of him, yes.

Q. Do you know whether or not he purportedly had an interest in 110 Eddy Club?

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(Testimony of Frank Cavani.)

A. Before I came in, when I went to work at 110 Eddy, Mr. Arthur Pratt was the sole partner or owner under the establishment, but I never saw him come in the place, only once or twice.

Q. Do you know when he sold out his interest in 110 Eddy? A. No, I don't.

Q. You say you became interested in 1943?

A. That is correct, sir.

Q. What is your recollection as to whether or not Mr. Pratt was still in the business when you were there? [1662]

A. I don't believe he was. I understood Mr. Pratt went to Portland, Oregon, which is before I went in, before I took the place at 110.

Q. I am going to show you plaintiff's Exhibit 8, partnership return of income for the year 1943 for 110 Eddy Street, and the listing of partners as being W. E. Kyne and Arthur Pratt. Did you ever see that return before?

A. No, I don't believe I have.

Q. Now I understand from your testimony that you were a partner during 1943?

A. That is correct.

Q. Do you find anything on this return indicating that? A. No, I don't.

Q. Now who kept the books and records of the 110 Eddy Street when you were there?

A. First of all, when I first moved in there, there was a fellow by the name of Bob Slater.

Q. Yes?

A. He kept the books and I don't know just

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(Testimony of Frank Cavani.)

exactly when, the last part of '44 I believe, Harold Maundrell took over from then on.

Q. Now did Mr. Slater, and then Mr. Maundrell, keep those books on the premises at 110 Eddy Street or was the information supplied to them somewhere else?

A. No, they had their own office. [1663]

Q. In what manner was information as to receipts and disbursements supplied to them?

A. Well, Mr. Slater had the key for the premises at 110 Eddy and he used to come in the morning and he had also the combination to the safe, and he would open the safe and go in the safe and take the sacks out of the safe, the sack of the previous day's receipts of the cash register and he would take them to his office, count the money, and he would deposit the money in the bank and then tell us if there was any shortage or anything like that. Mr. Slater used to do that himself.

Q. You say a cash register tape was kept?

A. Yes, sir.

Q. Now was there other income there or other sources of revenue besides the selling of drinks at the bar?

A. No, that's all, just strictly a bar.

Q. Were there pin ball machines?

A. No, just a juke box.

Q. Now during the period of time that you were connected with 110 Eddy Street, to whom did you look for your instructions, Mr. Cavani?

A. Instructions for what?

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(Testimony of Frank Cavani.)

Q. For the conduct of the business?

A. Well, from Mr. Remmer, from Mr. Turner, so on, from all of us.

Mr. Gillen: All of us? [1664]

A. Yes, me and Turner were inside the place; I worked day shift and Turner worked night shift, or opposite.

Q. Now during the time that you were there, were there any occasions upon which Mr. Remmer took money out of the business?

A. Not at 110 Eddy. Mr. Remmer had nothing to do with the cash at 110 Eddy. I would take it over to Harold Maundrell or Mr. Slater, he used to take the money himself, and when Harold Maundrell took over I went over in the afternoon and took the money over to Harold Maundrell. I would take the slip and tape from the register and Mr. Maundrell would tell me how much to bank.

Q. My question was, during that period of time did Mr. Remmer ever withdraw any money from that business?

A. He might; if he did, it should show in the book.

Q. Do you recall occasion on which Mr. Remmer drew some nine thousand dollars?

A. Yes, I do.

Q. When was that?

A. I don't know the date but I knew he withdrew nine thousand dollars. He asked me how much money we had in the bank. I said I would have to go down and see, so I did and I came back

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(Testimony of Frank Cavani.)

and told him how much we had, so he said, "Get a check for nine thousand."

Q. Did you get the nine thousand dollars?

A. Yes. [1665]

Q. Who did you get it from?

A. The bookkeeper made out the check for nine thousand dollars and I went down to the bank and got the cash.

Q. What did you do with the cash after you got it? A. I took it to Mr. Remmer.

Q. What size bills were involved?

A. One hundred dollar bills.

Q. Do you recall in what year that was?

A. Well, it was either the year 1945 or 1946.

Mr. Campbell: I am going to have this document marked for identification as 153, for identification.

Q. Mr. Cavani, did you pay anything, incidentally, with regard to acquiring your 25 per cent interest in the 110 Eddy Club?

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled. Answer the question.

(Question read.)

A. No, not a cent.

Q. Will you state whether or not you had any arrangements with any one whereby your share of profits was accumulated for that purpose?

A. That is right.

Q. With whom did you have that arrangement?

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(Testimony of Frank Cavani.)

A. Mr. Remmer.

Q. What was the amount of interest that was to be accummulated [1666] for your 25 per cent interest?

A. My part of the payment was fifteen thousand.

Q. For the 25 per cent interest?

A. Yes, sir.

Q. And what were your arrangements as to how that fifteen thousand was to be paid?

A. Well, took it out of the profits as we go along.

Q. Now do you know how much of that had accumulated by the end of the year 1946?

Mr. Avakian: Objected to, the records are the best evidence. The records are in evidence, your Honor.

The Court: Objection overruled.

Mr. Campbell: This is one of the parties to the transaction.

A. Their record should be in the book.

Q. What is your recollection?

A. I don't know. I couldn't answer that because the bookkeeper took care of all the financial end.

Q. Did you pay any attention to that?

A. Not exactly, no. I was getting my wages and I was going along with that.

Q. I am just going to ask you to read over this first, 153 for identification.

(Jury and alternate jurors admonished and recess taken until 11:00 o'clock January 7th, at 4:00 p.m.) [1667]

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January 7, 1952, 11:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. CAVANI

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Cavani, before the recess on Thursday you were testifying concerning the 110 Eddy Street bar and I believe you stated that you had some interest in that establishment, is that correct?

A. That is correct.

Q. What was the extent of your interest?

A. Twenty-five per cent.

Q. And when did, or when were you to receive that 25 per cent interest?

A. Well, when my part was paid.

Q. How much was to be paid for your part?

A. Fifteen thousand dollars.

Q. During the period of time that that operated, was that amount paid, do you know?

A. No.

Q. You had not acquired your interest up to the time the place was closed?

Mr. Gillen: Objected to; this was asked and answered on Thursday last. My recollection is Mr. Cavani spoke of change [1668] from one establishment to another, the rent was raised and they moved

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(Testimony of Frank Cavani.)

to another establishment and reinvested in another establishment.

The Court: He may answer the question.

(Question read.)

A. No, I did not.

Q. Are you acquainted with Arthur Pratt?

A. Slightly.

Q. When did you first meet him?

A. Well, I was tending bar at 110 Eddy the fall of '42 and part of '43 and I seen Mr. Pratt come in and out of the place. I didn't even know he was a partner, to tell you the truth.

Q. When did you first learn he was a partner?

A. Well, I heard Clarence Bent talk about it.

Q. He was one of the partners there?

A. Yes, sir.

Q. When was that that you first learned that?

A. Well, probably in 1942, I imagine. Mr. Pratt took no part in the operation at any time.

Q. How long did Mr. Pratt continue to be a partner there, if you know?

A. I don't know. He was a partner in '43.

Q. Will you state whether or not, during the period of time that you were to acquire a partnership interest if Mr. Pratt was also a partner? [1669]

A. No, I didn't think he was.

Q. Do you know when Mr. Pratt ceased to be interested in 110 Eddy Street?

A. No, I don't.

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(Testimony of Frank Cavani.)

Q. Do you know any of the details surrounding that? A. I don't.

Q. At the time you entered into this oral agreement as to your acquisition of the 25 per cent interest, who did you discuss that matter with?

A. Mr. Remmer.

Q. Did you at that time learn who, if any one, were also partners or were to become partners in 110 Eddy Street?

A. No, the only thing I know Mr. Clarence Bent was a partner. I know that when I was working, and I know Mr. Remmer was a partner and Mr. Kyne. That's all.

Q. Were you told, or did you learn at that time as to the extent of their purported partnership interest? A. No, I didn't.

Q. Do you recall when Mr. Bent died?

A. Yes.

Q. When was that?

A. Well, it was around Easter time in '43.

Q. Do you know whether or not any one replaced him as a partner there?

A. No, I don't, outside of me. [1670]

Q. Was that when you acquired your interest?

A. Well, it was in that year, around May some time, last part of May.

Q. Was that before or after Mr. Bent died?

A. After.

Q. Was that the same year in which you had this talk with Mr. Remmer about becoming a partner?

A. Yes, Mr. Remmer called me. I was in Liver-

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(Testimony of Frank Cavani.)

more with my daughter when Mr. Bent passed away.

Q. You had previously worked for Mr. Bent?

A. That's right.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Cavani, first of all, with regard to the 21 Club and the San Diego Social Club in El Cerrito, California, it is a fact, is it not, that you had initially been offered a 25 per cent interest in those two enterprises, which were together in the same building, is that correct?

A. The 21 Club, sir.

Q. The 21 and San Diego Social Club, you had been offered a 25 per cent interest?

A. In the 21 Club, yes.

Q. Not in the San Diego Social Club?

A. No, sir.

Q. That was the bar and restaurant? [1671]

A. Bar and restaurant.

Q. And it is true, is it not, that while that 21 Club was being prepared for opening, that is renovated, by putting fixtures and everything in, that you applied for on-sale liquor license?

A. That is correct.

Q. And took it out in your name, contemplating you were going to become a partner and manage the 21 bar and restaurant, is that correct?

A. Right.

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(Testimony of Frank Cavani.)

Q. It is true, is it not, that before the 21 Club opened and before you became actively engaged in the operation of it that Mr. Bent died, isn't that so?

A. That is right, sir.

Q. And I believe you said a moment ago at the time he passed away you were at your daughter's home in Livermore and Mr. Remmer called you and advised you of Mr. Bent's death? A. Yes.

Q. It is true, is it not, Mr. Remmer then suggested to you that since you had worked for some time at the 110 Club that it might be practical for you to take the same kind of interest, that is, 25 per cent interest, in the 110 Club and stay there rather than go to the 21 Club at El Cerrito, is that correct? A. Yes, sir.

Q. And you agreed to do that? [1672]

A. I did.

Q. And thereafter you acquired your partnership interest in the 110 Club where you had been working as bartender, is that true?

A. That's right.

Q. Then, if I recollect your testimony, it was to the effect that you never did a day's work at the 21 Club? A. Never.

Q. But your name was on the license because you had applied for it while they were getting ready to open the 21 Club? A. That is right.

Q. And thereafter Mr. Simmons, who was the accountant who took care of the 21 Club's accounts for the year 1944, had you sign the partnership income tax return, is that true?

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(Testimony of Frank Cavani.)

A. Yes, that's right.

Q. Now, when you signed the partnership income tax return, I take it that you had no independent knowledge of the business doings of that enterprise, the 21 Club? A. I did not.

Q. The accountant merely sent you the return to sign and you signed it, is that correct?

A. That's right.

Q. Now, I take it that you made your own individual income tax return that year for your personal return? A. Yes, I did. [1673]

Q. Who prepared your personal return?

A. Mr. Slater.

Q. And that was the man who took care of the enterprises in San Francisco, is that correct?

A. Yes, sir.

Q. So then the facts of the matter are that Mr. Simmons, George E. Simmons, prepared the partnership return for the 21 Club and your own individual income tax return was prepared by Mr. Slater? A. That is correct.

Q. And likewise Mr. Slater prepared the return for the 110 Club, is that correct?

A. That is right.

Q. Do you recall how it was brought to your attention by Mr. Simmons that he wanted you to sign the return?

A. Well, bartender working——

Mr. Campbell: I object—it is obvious the answer is not responsive to the question. It calls for a yes or no answer.

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(Testimony of Frank Cavani.)

The Court: Let us have the question.

(Question read.)

The Court: You can answer that yes or no. Do you recall? A. No, I do not.

Q. How did the return come into your hands?

A. Mr. Simmons sent it over by a fellow I knew working at the [1674] 21 Club.

Q. And was it delivered to you or left with some one? A. It was left at 110 Eddy.

Q. With whom was it left?

A. One of the bartenders.

Q. Do you recall the bartender's name?

A. No, I do not recollect. He was working there at the same time.

Q. Was there any note or instructions with it?

A. Yes.

Q. What was the note?

Mr. Campbell: Objected to—the note is the best evidence.

Q. Have you found the note since last testifying? A. Yes, I found it last week.

Q. Do you have it in your possession?

A. Yes, I have.

Q. Will you produce it?

A. Funny, I had it last night. I can't find it now. I wonder if I left it in my coat. Can I go look?

The Court: Yes.

A. Here it is.

Mr. Gillen: May I have this marked for iden-

BLEED THROUGH– POOR COPY

(Testimony of Frank Cavani.)

tification, please? This note which you handed me and which has been marked defendant's Exhibit B-1, is that the note that accompanied [1675] the 1944 income tax return for the 21 Club, sent to you by Mr. Simmons to be signed by you because the liquor license was in your name?

Mr. Campbell: I object to the question in that form. It is assuming a fact not in evidence. It contains a number of elements.

The Court: The witness has already testified there was a note.

Mr. Campbell: The question assumes that Mr. Simmons sent it to him on account of something in Mr. Simmons' mind.

The Court: May I have the question?

Mr. Gillen: May I state that was testified to on Thursday by Mr. Cavani that Mr. Simmons had him sign the income tax return because the liquor license was in his name.

The Court: May we have the question?

(Question read.)

The Court: Objection sustained. The first part of the question may stand, not the latter part.

Mr. Gillen: Is your Honor——

The Court (Interceding): I sustain the objection to the entire question.

Mr. Gillen: I have the answer on Thursday, page 1566 of the transcript, on Mr. Cavani's testimony, that that was information given to him to sign the return because the liquor license was in

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(Testimony of Frank Cavani.)

his name, if your Honor wishes me to read it. [1676]

The Court: I don't think that would alter as to the ruling here. The ruling will stand.

Q. Is this the note that accompanied the 1944 tax return Mr. Simmons sent you?

A. That is right.

Q. It was left by a man named Len at the 110 Eddy Club?

A. No, he was working at the 21 Club.

Q. Who was Len? A. A bartender.

Q. Was he the man sent over with the return?

A. He is the one that left it at 110 Eddy.

Q. Was this note you have handed me left with the return at the 110 Eddy Club?

A. That is right.

Mr. Gillen: I offer this in evidence.

Mr. Campbell: No objection.

The Court: It may be admitted.

Mr. Gillen: With the Court's permission——

Mr. Campbell: May I suggest to the court, on numbering of defense exhibits we went through the alphabet and are now starting A-1. I think there might be some confusion whether or not A-1 relates to A, so may I suggest on this second group we use 1 followed by the letter A.

The Court: Let it stand this way.

Mr. Gillen: With the Court's permission, I would like to [1677] read this exhibit and then I should like to pass it to the jury so we may——

Mr. Campbell: I will stipulate that is in Mr. Simmons' handwriting.

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(Testimony of Frank Cavani.)

The Court: You may read it and pass it to the jury if you desire.

Mr. Campbell: I will stipulate it is in his handwriting.

Mr. Gillen: I think the jury can see his handwriting.

Mr. Campbell: Very well.

Mr. Gillen: This is Exhibit B-1: "Len, have Frank Cavani sign and then drop in mail box. G. E. Simmons." And the Court has indicated I will be permitted to show this Exhibit, B-1 and prosecution's Exhibit 72-A, being income tax return for the year 1944, made out for the 21 Club and on the reverse side of the return, at the left lower corner will be found the signature of Mr. G. E. Simmons.

Q. Now, Mr. Cavani, referring now to plaintiff's Exhibit 72A, did you examine it when you signed it? A. I don't remember.

Q. Do you know that there was shown for 1944, 21 Club, a five thousand dollar loss, $5540.87, did you notice that?

Mr. Campbell: At the time he signed it?

Mr. Gillen: Yes, at the time he signed.

A. That is what it shows, yes, sir.

Q. Do you recall whether you noticed that at the time and that you [1678] discussed it with anybody? A. Yes, I did.

Q. You did notice it at the time? A. Yes.

Q. Now, you were never a partner in the 21 Club as you have stated, is that correct?

A. Never, no.

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(Testimony of Frank Cavani.)

Q. Now, what salary did you draw at 110 Club?

A. At the 110 Club?

Q. Yes. A. In San Francisco?

Q. Yes.

A. I started at $75 and worked for a little short while and then I was raised to $100 a week.

Q. Mr. Cavani, in answer to a question by Mr. Campbell on Thursday last, you stated while you were working there as bartender in 1942, and before you acquired an interest, that you were receiving the standard wage of bartenders, is that correct? A. That's right.

Q. And then when you became a partner in this 25 per cent working interest, you received a salary of $75 a week and then $100 a week subsequent, is that correct? A. That's right.

Q. Now, that $75 a week which you received at first and later $100 a week by way of salary, you put that in your pocket, [1679] did you not? I mean, that is what you took home? A. Sure.

Q. Now, as to the profits over and above your salary, you did not take out any of those profits—they were left on the books to acquire your interest in the physical assets of the business, is that right?

Mr. Campbell: Objected to—the books are the best evidence.

The Court: I think that is a good objection. Objection sustained.

Mr. Gillen: I am going to show him the books, your Honor, but what I am trying to get at, and I think it is proper for me to do, I want to show what

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(Testimony of Frank Cavani.)

he did with the profits and what he did with his salary. In other words, the salary he lived on and the profits he left in the business. I just wanted to ask that question so the jury can get it in their minds.

The Court: You may answer the question. Read the question.

Mr. Gillen: I think I can save time by asking another question.

The Court: Very well.

Q. Mr. Cavani, you were really then deriving from that partnership two types of income, one by way of salary, which you lived on, and another share in the profits of the business toward [1680] acquiring a full interest in the business, is that right? A. That is right.

Q. I believe you stated the other day you had drawn out of the business from profits the sum of $1500? A. That is right.

Q. And that was over and above your salary, isn't that correct? A. That is right.

Q. So then that we may get it fully in our minds, the salary you always drew and you lived on that, that was your living? A. That is right.

Q. And the profits you did not draw, except you say at one time you drew $1500?

A. That is right.

Q. Now, Mr. Cavani, is it not a fact that you drew more than $1500—as a matter of fact, you drew $2900, some of which was devoted to the pay-

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(Testimony of Frank Cavani.)

ment of your income tax on the profit that was credited to your account in the books?

A. Well, the books will show.

Q. I am going to show you the prosecution's Exhibit 112, which has been identified, as I recall, as ledger of the 110 Eddy enterprise, and I am going to invite your attention particularly to the page headed "Frank Cavani." Will you look at this page, Mr. Cavani, and tell us if that refreshes your recollection as to the credits you had and what withdrawals you made?

Mr. Campbell: May I ask a question on voir dire? [1681]

The Court: Yes.

Q. (By Mr. Campbell): Mr. Cavani, did you have anything to do with keeping that record?

A. No, none whatsoever.

Q. Did you ever see that record before?

A. Well, the bookkeeper might have shown it to me.

Q. Do you have any recollection of ever having seen it before? A. No, I do not believe so.

Mr. Campbell: I am going to object to the question. The record speaks for itself.

Mr. Gillen: The question is perfectly proper, may it please the Court.

The Court: Read the question.

(Question read.)

The Court: Do you understand that question? Does the fact that looking at that book calls to

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(Testimony of Frank Cavani.)

mind that you knew something about the amounts there stated?

A. Well, the bookkeeper was telling me when I paid anything like income tax——

The Court (Interceding): But does it call to your mind, to your own recollection?

A. Well, it is my name there, yes.

Q. Reading from your account, it shows that as of December 31, 1944, the net profit credited to you for the year 1944, out of the 110 Eddy Street enterprise was $3170.30. Do you recall [1682] whether or not that was the amount credited to you at that time. A. For the year?

Q. Yes, for the year 1944, that your share of the net profits was $3170.30? A. I think so.

Q. And then the next item shows that on March 14, 1945, you drew for payment on federal income tax the sum of $580.11, which reduces your credit on the books to $2590.19. Do you recall that you did draw down that amount of money to pay your income tax on the profits of that organization?

A. Yes.

Q. Then on the same date, March 14, 1945, it shows the withdrawal for a 1945 estimate of the profits that would be made for the year 1945, the sum of $150, which was paid to the Internal Revenue Department, does that refresh your recollection that you paid on an estimate?

A. That is correct.

Q. And that was charged against you as a debit and reduced your credit on the books to $2440.19.

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(Testimony of Frank Cavani.)

On April 12, 1945, there is an item here for 1944 State income tax—that is the State of California income tax—for the sum of $29.75, and you were shown to have withdrawn that for payment of your State income tax on the net profit for that year, 1944? A. That's right. [1683]

Q. And that reduced your credit on the books to $2410.44. Now, on May 31, 1945, there is an item here showing for 1943 net profit, you were credited with $3121.74, which raised your credit on the books to $5532.18. Do you recall that you were given a credit for net profit more than you had in 1943?

A. Well, if it is in the books, it must be right.

Q. Now, on June 6, 1945, on your 1945 estimate for the second quarter you are shown to have been deducted with another $150 to pay the Internal Revenue Department on your estimated second quarter installment, which reduced your credit on the books to $5382.18. Do you recall that you did make installment payments on that estimate for the year 1945? A. Yes, I did.

Q. Then on September 12, 1945, the third installment on estimate for 1945 shows that you were debited with another $150 drawn for payment to the Internal Revenue Department, which reduced your credit on the books to $5232.18. You did make your third installment payment to the Internal Revenue Department, is that correct?

A. The bookkeeper would have it in the books, I don't know. He asked me to sign those checks and I did accordingly.

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(Testimony of Frank Cavani.)

Q. Now, on December 28, 1945, it shows a withdrawal by you of the sum of $1500 from your credit on the books, which reduces your credit on the books to the sum of $3732.18. This is the $1500, I take it, that you referred to in your examination by [1684] Mr. Campbell on Thursday? A. That is right.

Q. You drew that on your credit on the books, $1500, is that correct? A. Yes.

Q. On December 31, 1945, there shows for estimate on 1945 income tax return, fourth quarter, payment of the sum of $150, which reduces your credit on the books of 110 Eddy Club to $3582.18. Do you recall that you did make your fourth quarter payment, is that correct?

A. Yes, that is right.

Q. Now, the 110 Club returns, I believe you testified, the 1945 return was prepared by Mr. Maundrell and the 1946 return was prepared by Mr. Ayton? A. Yes.

Q. Another public accountant who worked there for the enterprises? A. That's correct.

Q. Now, did Mr. Remmer, the defendant here, have anything to do with the actual operation of the 110 Club during all the time that you were there, either during the time you were employed there as salaried bartender or during the time that you were there as 25 per cent working interest partner and serving also in the capacity of bartender?

A. Well, he used to come in and out once or twice a week, not [1685] every day, but he never had any part of operating the tavern at all.

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(Testimony of Frank Cavani.)

Q. Did he take any part, to your knowledge, in keeping any books or accounts of the tavern there?

A. No, sir.

Q. Now you, however, did take out cash register tapes and put the money in a sack and put it in the safe, is that correct?

A. That's right; either me or Mr. Turner. There was another man there too.

Q. Whoever happened to be there?

A. Whoever happened to be there at night time, yes.

Q. I believe you said that during the time Mr. Slater kept the books there, it was Mr. Slater who used to come there in the morning and take off the money and take the cash register tapes and go on over to his office, is that correct?

A. That is correct.

Q. And that he would count the money over there, make deposits in the bank and bring back the necessary change, is that true? A. That is true.

Q. Then during the time that Mr. Maundrell succeeded Mr. Slater in keeping the books, it was your practice to take the cash register tapes and the money over to Mr. Maundrell; isn't that correct? A. Yes, sir. [1686]

Q. And then Mr. Maundrell would make the bank deposits and you would pick up the change that was necessary to operate the establishment; is that correct?

A. Well, I go to Mr. Maundrell with the daily receipts and he would figure it out, how much I

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(Testimony of Frank Cavani.)

have to bank; he gave me the bank book and slip with the amount of money to bank and I would bank it and then bring the bank book to Mr. Maundrell.

Q. I understood you to say that at one time—I don't have the date in mind now—that the landlord of the premises known as 110 Eddy raised the rent. Did the lease expire, Mr. Cavani?

A. Yes, expired sometime in 1947, I believe around June.

Q. And when the lease expired, under the new lease the rent had been raised materially; is that correct? A. Correct.

Q. Can you give us the figures?

Mr. Campbell: Objected to as immaterial, if the Court please. It is past the indictment date and would have no bearing on the issues here.

Mr. Gillen: We are pursuing this man's interest, who is a partner in an enterprise.

The Court: You may answer the question.

A. It was raised from $210 a month to $750 a month.

Q. And it was determined that was excessive; I mean, you couldn't operate with that expense?

A. Yes, I told Mr. Remmer about it and he said just to move [1687] out of the place.

Q. So then I understood you moved out of the place and at some later time some of the fixtures and some of the stock and so on was moved into the 186 Club? A. Well, later on, yes.

Q. Now with regard to Mr. Arthur Pratt, you

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(Testimony of Frank Cavani.)

stated in your testimony on Thursday that it was your recollection that Mr. Pratt had moved——

The Court: I think we are going into another branch; we will take our recess at this time.

(Jury and alternate jurors admonished and noon recess taken at 11:50 a.m.)

January 7, 1952—1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. CAVANI

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Q. I asked you, Mr. Cavani, regarding Mr. Pratt. I believe you stated on Thursday that it had come to your attention while you were in the 110 Club that Mr. Pratt had moved to the State of Oregon from California; is that correct?

A. That is what I was told; yes, sir.

Q. Do you recall about when that was?

A. No, I do not. [1688]

Q. Was it in 1943?

A. I believe it was that year.

Q. Now my associate called my attention this morning when I said in two different questions that after closing the 110 Eddy that you moved into 186 Club. What I had in mind was to say that you

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(Testimony of Frank Cavani.)

moved into the 186 Club and that was converted from a storeroom into a cafe and tavern?

A. That is correct.

Q. Now I talked to you this morning about the 1944 income tax return that was filed on behalf of the 21 Club. I am referring now to the one that was prepared by Mr. Simmons, prosecution's Exhibit 72A. At the heading of that it is designated, is it not, "Frank Cavani, doing business as 21 Club"; is that correct? A. That's right.

Q. Now do you have a recollection now, Mr. Cavani, that within a few days thereafter Mr. Slater submitted for your signature—and I will show you prosecution's Exhibit 72 in evidence—another partnership return for the 21 Club for the year 1944, or at least for the period of time from January 1 to September 30, 1944, showing the same loss of $5540.27, that that was merely put down as the 21 Club, without Frank Cavani's name being in the title; isn't that correct? A. 21 Club, yes.

Q. Now do you have a recollection of this second return being [1689] submitted to you for your return? A. I don't believe so.

Q. Well, this was prepared by Mr. Slater, was it not, as it appears on this exhibit?

A. Yes, that's right.

Q. Mr. Slater's signature appears in the lower left-hand corner and your signature appears in the lower right-hand corner? A. That is right.

Q. Do you recall whether or not you called attention of Mr. Slater at the time he presented

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(Testimony of Frank Cavani.)

that to you to sign, that you had already signed an income tax return for the 21 Club?

A. Yes, I did.

Q. And you stated in your direct examination the other day that Mr. Simmons told you that, although you were not a partner, it was necessary for you to sign because your name was on the license? A. That is correct.

Q. When did he tell you that?

A. He told me before the filing for the income tax.

Q. Before the income tax was filed?

A. Yes.

Q. He was going to have to have you sign it because your name was on the license; is that correct? A. That is right.

Q. Subsequently your name was taken off the license? [1690] A. That is correct.

Q. That was while you were working for the 110 Club; is that correct? A. Correct.

Q. This morning I did not have at hand the continuation of your personal account as a partner of the 110 Club. The last item here read this morning from prosecution's Exhibit 112 was an item on December 31, 1945, you paid the fourth quarter of 1944 estimated tax, $150, leaving a balance to your credit in the 110 books of $3582.18. Do you recall me asking you about that this morning?

A. Yes.

Q. Now plaintiff's Exhibit 112A—I will show

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(Testimony of Frank Cavani.)

you here, Mr. Cavani—that is the pick-up or continuation for the next entry of your account.

Mr. Campbell: May I question on voir dire?

The Court: Yes.

Q. (By Mr. Campbell): Mr. Cavani, have you ever seen that record before?

A. Well, I don't know. I might have. The bookkeeper kept the books.

Q. Did you have anything to do with keeping that account? A. No.

Mr. Campbell: Objected to as calling for conclusion.

The Court: Objection sustained. [1691]

Q. I will ask you to look at it and tell us whether or not the first entry on this account, as of January 1, 1946, shows a balance to your credit?

Mr. Campbell: Objected to—the record speaks for itself.

The Court: Objection sustained.

Q. What does it read on that page?

Mr. Campbell: Same objection.

Mr. Gillen: Well, your Honor.

The Court: Either counsel or the witness may read the exhibit.

Q. What is the first entry that appears there?

A. I don't know a thing about bookkeeping, Mr. Gillen; that's out.

Q. Well, at the extreme right of the page, the first entry, January 1st, at the extreme right of here, what is entered there?

A. You mean the amount?

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(Testimony of Frank Cavani.)

Q. Yes. A. $3548.18.

Q. Isn't $3582.18? A. That's correct.

Q. Now showing you prosecution's Exhibit 112, I will ask you that in the year 1945, December 31st, it shows a balance of $3582.18; is that correct?

A. That is what it says here.

Q. Now, Mr. Cavani, on the same date, January 1, 1946, there [1692] appears to your credit, as one-fourth of the profits for the year 1945, to balance $5532.50, bringing your total of your credit to $9114.68. Does that refresh your recollection you were given a credit at the beginning of 1946 for the 1945 profits and that you had, as of the beginning of the year 1946, a $9114.68 credit?

A. I wouldn't know.

Q. Well, was it approximately that, do you recall?

A. Well, if the books say so, it must be. I don't know anything about keeping the books.

Q. On March 13, 1946, there is shown here to have been drawn by you for the Collector of Internal Revenue the sum of $999.12. Do you recall that you did draw $999.12 to pay your income tax for 1945? A. If that is in the book, it is correct.

Q. Well, is it your recollection that you paid your income tax on all the profits that you made in the 110 Club by drawing from your credit account?

A. That's right.

Q. And also there appears another item on the same date, March 13, 1946, payable to the Collector of Internal Revenue, check No. 448, for $225, ap-

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(Testimony of Frank Cavani.)

parently an estimate on your 1946 return, leaving a balance to your credit on the books of the 110 Club of $7890.56. Does that refresh your recollection that is approximately the amount you had on hand at that time? [1693]

A. It must be, Mr. Gillen, if it is in the book. I had nothing to do with keeping the books.

Q. On April 13, 1946, check No. 591, there was paid to the Franchise Tax Commissioner, that would be California, who collects the California tax, the sum of $49.16, leaving a balance to your credit on the books of $7841.40. Do you recall that you also drew from your credit account on the books to pay your State income tax?

A. Whatever the books say; I don't know.

Q. Now there appears also on the books a payment on June 13, 1945, to the Collector of Internal Revenue, the sum of $225, and item September 12, 1945, by check No. 744, payable to the Collector of Internal Revenue, in the amount of $225, and on January 12, 1946, check No. 825, the sum of $225, payable to the Collector of Internal Revenue. Would it be your recollection that those were the installments on your estimated income tax for the year 1946 that you paid, installments of $225 apiece?

A. Probably it is.

Q. That left you, as at the end of the year 1946, a balance of $7166.40 as of the end of 1946. Does that refresh your recollection that this was what you had on hand by way of credit out of your profits that you permitted to remain on the books of the

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(Testimony of Frank Cavani.)

110 Eddy Club as your working interest in one-fourth the profits at that time? [1694]

A. Well, it must be if it shows in the books.

Q. You don't have any independent recollection of these amounts, I understand?

A. No, I haven't.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Cavani, with relation to these books shown here, I believe you testified you had nothing to do with keeping them? A. No.

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled.

Q. What was your answer?

A. No, I didn't.

Q. Did you, particularly during the years 1944, 1945 and 1946 and the first half of 1947, examine the books and records of 110 Eddy Street?

A. Did I examine them?

Q. Yes.

A. No, I just took the word of the bookkeeper; what he told me to do, I done it.

Q. And that bookkeeper you say was who?

A. The first bookkeeper was Bob Slater, next Harold Maundrell.

Q. And who hired Mr. Bob Slater, if you know?

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, not proper redirect [1695] examination.

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(Testimony of Frank Cavani.)

The Court: Objection overruled.

A. That I wouldn't know. He was bookkeeper when I was working at 110 Eddy.

Q. Who hired Mr. Maundrell to keep the books there? A. I believe Mr. Remmer.

Q. During that period of time did you ever receive a profit and loss statement? A. Yes.

Q. Do you still have those?

A. No, I didn't keep them. Mr. Maundrell was telling me if we went in the red or showed a profit or something.

Q. Were you given written statements in regard to profit and loss? A. Yes.

Q. Do you still have those?

A. I believe I still have some of those.

Q. Do you have those with you?

A. No, I haven't.

Q. Now in regard to the amounts that were charged against your account on the books for payment of taxes, who arrived at the amounts of those payments? A. The bookkeeper.

Q. Did you have anything to do with figuring those out? A. No.

Q. Did you sign the checks with relation [1696] to those? A. Yes, I did.

Q. Prior to the drawing of those checks, did you have discussions with anyone concerning them?

A. Well, Mr. Maundrell told me about paying the tax. He give me the amount and made the check out and I signed the check and sent it to the Revenue Department.

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(Testimony of Frank Cavani.)

Q. Did you have anything to do with figuring out the amount? A. No, no.

Q. Did you have anything to do with figuring out the amount on returns that you signed?

A. No.

Mr. Gillen: Objected to as asked and answered several times.

The Court: The answer may stand.

Q. Now, as I understand your testimony, you stated that before Mr. Bent's death you were working only at regular Union bartender's wages; is that correct? A. That is right.

Q. And then after Mr. Bent's death, when you entered into this arrangement with Mr. Remmer, that you were to ultimately receive 25 per cent; is that correct?

A. Whatever the profit showed, yes.

Q. After $15,000 was paid?

A. That is right.

Q. And you then went on to a salary of $75 a week? [1697] A. That is correct.

Q. Who fixed that salary?

A. Well, myself, I believe; me and Mr. Turner decided to take $75 a week.

Q. Did you and Mr. Turner discuss that with anybody? A. No, just me and Mr. Turner.

Q. Mr. Turner is dead, is he not? A. Yes.

Q. When did he die?

A. He died in '48 or '49; I am not sure.

Q. Was his arrangement, if you know, similar to your arrangement?

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(Testimony of Frank Cavani.)

A. That I couldn't tell you.

Q. You don't know? A. I don't know.

Q. Now when you raised to $100 a week, how was that arranged? Who arranged that?

A. We did it ourselves.

Q. You and Mr. Turner? A. That's right.

Q. Now you say that this arrangement which you had with Mr. Remmer was made in the spring, I believe, of 1943, after Mr. Bent's death; was that correct? A. Yes, in May.

Q. When did Mr. Turner come into [1698] 110 Eddy? A. Later that year.

Q. Now were the terms under which Mr. Turner was to come into the business discussed with you?

A. No. I was sick that year, around the middle of July.

Q. Did you ever learn the terms of Mr. Turner's being in the business? A. No, never did.

Q. Did you conduct any of the negotiations with Mr. Turner about coming into the business?

A. No.

Q. Now you stated that originally you had been offered a 25 per cent interest in the 21 Club. Who offered you that?

Mr. Gillen: Objected to as asked and answered.

The Court: He may answer the question.

A. Mr. Remmer.

Q. Now relating to the matter of license of the 21 Club being in your name, did you confer with anyone other than Mr. Remmer regarding that?

A. No, I didn't.

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(Testimony of Frank Cavani.)

Q. Did you have anything to do with figuring out the amount? A. No, no.

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(Testimony of Frank Cavani.)

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A. No, I didn't.

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(Testimony of Frank Cavani.)

Q. Now showing you defendant's B-1, the note to Len, signed G. E. Simmons, with a portion of the paper torn away. Do you recall whether or not anything was written on there?

A. No, I believe I tore it myself, had some telephone number or something.

Q. When did you tear it? [1699]

A. I don't know. This has been in my possession for the last seven or eight years.

Q. Did you, Mr. Cavani, make a particular point of saving that document?

Mr. Gillen: Objected to as improper redirect. Counsel is cross-examining and attempting to impeach his own witness in cross-examination.

The Court: Objection overruled. Answer the question.

A. Can I have the question?

(Question read.)

A. This one here?

Q. Yes.

A. No, I never did. I just happened to run across it last week. I was laying out some things at home and happened to run across it, so I just put it in my pocket; no intention of keeping it.

Q. Now you found it for the first time last week? A. That's right.

Q. I presume you showed that to Mr. Gillen then; is that right? A. This morning, yes.

Q. I don't recall whether or not you identified the person whose first name was Len that appears on this note? A. Len, yes.

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(Testimony of Frank Cavani.)

Q. Did you identify him as to his last name?

Mr. Gillen: He said he was a bartender. [1700]

Q. Do you recall his last name?

A. Len Wylie.

Q. Do you know where he is located at the present time?

A. He is a bartender in San Francisco.

Q. You testified, I believe, both on direct examination and cross-examination, regarding $1500 that was paid to you in addition to your salary. Who paid that money to you?

A. The bookkeeper wrote the check and I signed the check and I cashed the check.

Q. Who, if anyone, determined the amount that was to be paid at that time?

A. I don't remember. My partner, I believe.

Q. Was there any meeting of anyone before those checks were written out?

A. No, not that I recall—myself, Mr. Turner, Mr. Remmer and Mr. Maundrell.

Q. And who decided how much was to be paid each individual at that time?

Mr. Gillen: Of course, that is improper redirect and assuming something was decided. It is my recollection this man said he merely drew $1500 out of his account.

The Court: Objection overruled. Answer the question.

(Question read.)

A. I don't know. I guess the money was in the

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(Testimony of Frank Cavani.)

bank and we just get something out of it. [1701]

Q. Do you have any recollection about it?

A. No, I haven't. I know I drew this $1,500, that is all I know, and I don't know if we had a meeting or not, I don't remember.

Q. Do you recall whether or not at that time amounts were also paid to Mr. Remmer and Mr. Turner?

Mr. Gillen: Objected to, the books are the best evidence of that.

The Court: Objection sustained.

Mr. Campbell: Very well. At this time I wish to read, if the Court please, from Plaintiff's Exhibit 112, heretofore identified as the ledger at the 110 Eddy Street, under account of heading "Personal" account headed "Frank Cavani," under date of December 28, 1945, on account check 102, debit of $1,500. On account of William E. Kyne, the last entry appearing herein is as of May 31, 1945. The account of Elmer Remmer, there is shown a debit on December 17, 1945, item United States Treasury bonds, check 104, $3,000. The account of Thomas C. Turner, December 28, 1945, on account check No. 102, $1,500. Account of Arthur R. Pratt, last entry, closing entry, is as of December 31, 1944.

Mr. Gillen: May I ask counsel the way he reads the Kyne account shows nothing drawn?

Mr. Campbell: I stated the last entry shown on Kyne as of May 31, 1945. [1702]

Mr. Gillen: It shows no amount drawn?

Mr. Campbell: The only amount drawn, on

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(Testimony of Frank Cavani.)

April 30, 1945, State I. C. 1944, follows reference see 30.

Mr. Gillen: That was the period of time Mr. Kyne was in the service and Mr. Remmer had power of attorney, isn't that so?

Mr. Campbell: I think the record speaks for itself.

The Court: I think it does. The statement will be stricken from the record.

Mr. Campbell: That's all.

Recross-Examination

By Mr. Gillen:

Q. Mr. Cavani, you mentioned finding that paper, a note from Mr. Simmons, which is Defendant's Exhibit 1-B, among your papers last week. You recall answering Mr. Campbell that?

A. Yes.

Q. You returned to San Francisco over last week end, did you not? A. That's right.

Q. You returned to San Francisco what date?

A. Last Thursday night. I don't know the date.

Q. And you returned to Reno when?

A. Last night about 12:00 o'clock.

Q. When you say you found this old note among your papers, do you mean you found that among your papers in San Francisco over the week end when you were home? [1703]

A. Yes, Friday.

Q. And you showed that to me at the Golden Hotel in Reno?

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(Testimony of Frank Cavani.)

A. I showed it to you in court.

Q. I mean this morning, at the Golden Hotel, you showed me this note, did you not?

A. I told you I found it, yes.

Q. Now, Mr. Cavani, you stated in your redirect examination to Mr. Campbell that you did not know the arrangement of Mr. Turner in connection with the 110 Club. You knew he had a one-fourth interest, the same as you had?

A. No, I didn't. He had never consulted with me at any time.

Q. Let me show you prosecution's Exhibit 82, 1945 income tax return for the 110 Eddy Club, prepared by Harold Maundrell, signed by yourself, in which it sets forth, does it not, in Schedule I, that Mr. Thomas C. Turner had a one-fourth interest, the same as you? Isn't that so?

A. Yes, that is what it says here.

Q. Does that refresh your recollection that you knew that Mr. Turner had a one-fourth interest the same as you?

A. I believe it was the same partnership, yes.

Q. I show you prosecution's Exhibit 83, which is income tax return for the partnership of 110 Eddy Street for the year 1946, prepared by Mr. Slater and signed by yourself, in which it is set forth also that Mr. Thomas C. Turner had a one-fourth interest, the same as you. [1704]

A. That is what it shows.

Q. Now you stated that you were ill when Mr.

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(Testimony of Frank Cavani.)

Turner first became associated with the 110 Eddy enterprise? A. That is right.

Q. How long were you laid up?

A. I was laid up quite a bit. I broke my right shoulder and I was laid up with that for almost three months.

Q. Was there some other illness that kept you away from your business?

A. Also had an ulcer.

Q. For what period of time over the year were you laid up?

A. The first time from the first week of July until about the middle of August.

Q. After the broken shoulder?

A. No, broke my shoulder afterwards.

Q. Then what period of time were you laid up after that?

A. I was laid up most of the year.

Q. And Mr. Turner came in when you were first ill? A. That's right.

Mr. Gillen: I think that is all.

Mr. Campbell: That is all.

The Court: Any reason why the witness could not be finally excused?

Mr. Gillen: I think not.

The Court: You may be excused. [1705]

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SOL SANFORD EZRALOW

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Sol Sanford Ezralow.

Q. Where do you live? A. Los Angeles.

Q. What is your present business or occupation?

A. Certified public account, engaged in practice for myself.

Q. Engaged in private practice of your profession? A. Yes.

Q. Were you formerly connected with the Internal Revenue Department? A. Yes, I was.

Q. In what capacity?

A. I was a revenue agent out of the San Francisco division.

Q. And for what period of time?

A. 1944, and I separated from the Internal Revenue service the early part of '47, but my last work I did was in 1946.

Q. In other words, I take it, you had some accumulated leave? A. Right.

Q. Which was used at the end of your service?

A. Right.

Q. Now, in connection with your duties as an Internal Revenue agent, were you assigned to make certain investigations with [1706] relation to the affairs of Elmer Remmer? A. Yes.

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(Testimony of Sol Sanford Ezralow.)

Q. Do you recall approximately when you commenced that investigation?

A. I believe the returns was assigned to me the latter part of 1945, November or December of 1945.

Q. Was that investigation still in progress at the time you terminated your connection with the Internal Revenue service; that is to say, your active connection? A. Yes, it was.

Q. And had you completed your investigation at that time? A. No.

Q. And at the time that you terminated your connection with the Internal Revenue Service, what did you do with whatever material and records you had gathered to that point?

A. I turned them over to Mr. O'Connell, who is also in the agent's office.

Q. Are you referring to Mr. John O'Connell?

A. Yes, I believe that is correct.

Q. What is his position with the Internal Revenue?

A. Well, I am not exactly sure. I think he was head of what is called the Fraud Squad.

Q. At any rate, you left the survey record with him? A. Yes, that is correct.

Q. Now, in connection with your investigation of Mr. Remmer's [1707] affairs during the period of time that you were connected with the case, did you secure various books and records of various enterprises in which Mr. Remmer had, or was purported to have an interest? A. Yes, I did.

Q. And in that connection did you also obtain

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(Testimony of Sol Sanford Ezralow.)

certain income tax returns, including individual income tax returns and partnership returns of Mr. Remmer in these various enterprises of the partnerships and corporations, and also of the individuals who purported to be partners in those various enterprises? A. Yes, I did.

Q. With regard to the various returns and records, which you obtained, did you analyze those returns for the purpose of ascertaining what they disclosed as to the purported ownership as shown on the returns of the various individuals whose names appeared thereon in the various enterprises?

Mr. Avakian: Your Honor——

Mr. Campbell: It is a preliminary question.

Mr. Avakian: The question is so broad, I feel we should object unless narrowed down to the particular returns or people or enterprises he is talking about so we will have an opportunity to know how to cross-examine.

Mr. Campbell: That will be the next question.

The Court: You may answer the question. [1708]

A. The answer is yes.

Q. In that regard, Mr. Ezralow, did you prepare charts for each of the years, 1943, 1944, and 1945, which analyzes those returns to which you have referred and in the manner in which I have indicated? A. Yes, I did.

Q. I am going to ask to have these documents marked the government's next number in order, with the number 154, 154A, and 154B respectively, for 1943, 1944, and 1945 respectively. Now, without

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(Testimony of Sol Sanford Ezralow.)

referring to the contents themselves, and to assist counsel in examining these documents, Mr. Ezralow, I notice that there are certain squares in your charts in red and certain squares in blue. Will you distinguish between the purpose of the blue and the red squares in general terms, without referring to the contents?

A. The blue squares indicate entities. The red squares indicate individuals.

Q. And by entities are you also referring to the entity filing a return, either partnership, individual or corporation? A. Correct.

Q. And the red squares indicating the individuals would be those reflected on those returns as having an interest in those entities?

A. Correct.

Q. Incidentally, were these charts prepared by you during the [1709] period of time that you were employed as an Internal Revenue agent and as a portion of your duties as an Internal Revenue agent? A. Yes.

Mr. Campbell: It may take a little time for counsel to examine these.

The Court: We will take a short recess for about 10 minutes.

(Jury and alternate jurors admonished and recess taken at 1:45 p.m.)

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2:00 P.M.

(Defendant present with counsel.)

The Court: I understand counsel have a matter they would like to present in the absence of the jury.

Mr. Avakian: Your Honor, since the jury was already out, we thought we might anticipate the offering of these documents.

The Court: You contemplate offering them?

Mr. Campbell: Yes.

Mr. Avakian: We thought we would raise the objection at this time, your Honor. These three sheets, 1943, 1944, and 1945, purport to be charts—if your Honor can see them from that distance; I will hand them up in a moment—and apparently what Mr. Ezralow did for his own guidance and as part of his own work papers was set forth in blue square, for example, [1710] the B. & R. Smoke Shoppe, and then connect that up with lines with red squares, for example, Remmer, Kyne and Lando, to show, I believe from his testimony, that the 1943 return of the B. & R. Smoke Shoppe listed Remmer, Kyne and Lando as having an interest in the B. & R. Smoke Shoppe, and there are a number of these blue squares which list the business in which different people have an interest and then by connected red squares the names of the people purported to have an interest in them. Now, our objection to these three sheets, your Honor, is this—at the top of each one is the heading "Related Interest" and then the year, and the implication of that obviously, if this goes before the jury, is that every entity

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listed on each of these sheets is an interest which is related in some way with the income tax investigation of Mr. Remmer.

Mr. Campbell: I will agree that the word "related interest" can be eliminated to shorten the argument.

Mr. Avakian: The exhibit itself sets forth the names of many entities that are not connected with this case; at least, so far as the evidence goes. For example, on the chart for 1943 there is a blue square entitled "Club Vanderbilt." Now, there is no evidence in this case that Mr. Remmer had any interest in the Club Vanderbilt, and on the contrary Mr. Cavani, who did have an interest in the Vanderbilt, specifically testified, in response to Mr. Campbell, that Mr. Remmer did not have an interest in the Club Vanderbilt. [1711] Then an entity entitled Clark Creek Lodge, and there has never been mentioned in this case and nothing here to show that Mr. Remmer had any connection with that, and then there are names of various individuals in red squares connected with Clark Creek Lodge, who likewise have not been mentioned in this case; for example, Edwin D. Chioso.

The Court: I have this thought now. Matters relating to entities or establishments which are not connected here with Mr. Remmer in the evidence, would have no place in the case.

Mr. Campbell: That is probably true, your Honor.

The Court: Such as the Club Vanderbilt and Clark Creek Lodge.

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Mr. Avakian: Your Honor, there is an extensive list of names that have no connection in this case and it would also show that the connecting lines and squares are so intertwined that the squares would be blocked out. Let me read additional names of entities.

The Court: First, if this exhibit is to be admitted at all, or an exhibit similar to this, I would suggest that new documents be prepared which enter only matters in evidence here.

Mr. Avakian: That is our thought, your Honor.

Mr. Campbell: That can be done. We will have charts prepared which will eliminate these entities that [1712] have no connection.

The Court: Do you agree with the thought I just expressed, that if any charts are to be introduced here they should be based entirely matters having to do with the evidence in this case, matters covered by the evidence having to do with the defendant.

Mr. Campbell: Yes, your Honor, but inasmuch as such charts will be prepared from these charts I would put in here for identification and showing the derivation prior to substituting other charts which will be prepared.

Mr. Avakian: May I suggest in that connection, your Honor, that the charts which are placed in evidence here should be prepared from evidence in this case, not from unrelated material. The evidence in this case connects up Mr. Remmer with various businesses——

The Court: We don't know what this witness is going to testify to.

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Mr. Avakian: Whatever his testimony is, will be part of the record and the charts should be based on the record at the time the charts are produced.

The Court: We will see what develops.

Mr. Campbell: The objection should be made then rather than at this time.

The Court: We will see what the new charts will have. [1713]

Mr. Avakian: Perhaps this one point will obviate the question. Under Cal-Neva, as a blue entity, there is only one red square in 1943, 1944, and 1945, in which are the names of Elmer F. Remmer and Helen Remmer. The evidence in this case shows William Graham and James McKay also had an interest in Cal-Neva during those three years. Now, it could be that Mr. Ezralow did not investigate those other cases, but the evidence in this case shows that the people interested in Cal-Neva were not simply Remmer, but also McKay and Graham.

The Court: Maybe so, but it is my view we have just seen this witness on the stand for a few moments and it may be that his evidence will cover a long period of investigations and if those investigations and results can be summarized by a chart, I think it will tend to simplify the case for the Court and the jury.

Mr. Avakian: As long as it is based on evidence in the record at the time, we have no objections.

The Court: We can meet that when it comes. I understand these documents, 154, 154A, and 154B, are merely marked for identification, will not be offered in evidence.

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Mr. Campbell: No, your Honor.

The Court: Now, are we ready to proceed with the jury?

Mr. Golden: There is one matter, if your Honor wishes [1714] to take it up while the jury is out. Your Honor reserved ruling on defendants' Exhibit E for identification.

The Court: I do not remember reserving any ruling in this entire case.

Mr. Avakian: Last Thursday at the end of the day Mr. Campbell asked you to reserve ruling admitting Exhibit E for identification.

Mr. Campbell: I have not been able to locate copy of the record. We thought we had Mr. Mooney's testimony written up, but I have not been able to locate that.

The Court: You want further time?

Mr. Campbell: Yes, your Honor.

The Court: Very well. Call in the jury.

(Jury returned into court at 2:20.)

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. EZRALOW

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now Mr. Ezralow, prior to the recess you testified that you, during the course of your em-

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(Testimony of Sol Sanford Ezralow.)

ployment in this matter, secured certain books and records. Incidentally, during that period of time, that is to say, from May, 1945, through the termination of your services in December, 1946, were you also engaged in other investigations unrelated to this case? A. Yes. [1715]

Q. So that I take it that all of your time was not devoted to this matter?

A. That is correct.

Q. Now, with regard to the records which you received from Mr. Kyne and Mr. Maundrell, in the course of your investigation, will you state generally what those records were and of what concerns?

A. Well, I asked Mr. Kyne for some records. I also asked Mr. Maundrell for some records, and I specifically recall Mr. Kyne furnished me with a list of cashier's checks. I asked for any information that I could use as a basis to determine the income of, I think the B. & R. Smoke Shoppe. I think it was a horse race betting——

Mr. Avakian: The witness is not answering the question. He was asked to identify records and I ask that portion be stricken, particularly as to his characterizing the business. He is relating conversations and conclusions.

The Court: Let us have the question.

(Question read.)

Mr. Campbell: I will reframe the question.

The Court: The answer will go out.

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(Testimony of Sol Sanford Ezralow.)

Q. Will you state the names of the various enterprises concerning which you received books and records? You are referring to work sheet that you made, Mr. Ezralow?

A. That is correct. When I left the Bureau I prepared a summary [1716] of the work I had done and that is what I am referring to.

Q. Was that prepared by you in December of 1946? A. Yes, that is correct.

Q. And that is a matter that is in your handwriting?

A. That is right. It is in my handwriting.

Mr. Campbell: That may be marked for identification and you may refer to it for the purpose of refreshing your recollection. 155 for identification, consisting of some 4 pages, containing handwritten memorandums in pencil.

Mr. Avakian: May we see it, counsel?

Mr. Campbell: Well, it is marked for identification, not in evidence.

(Question read.)

A. Well, there is the B. & R. Smoke Shoppe, which was in a diary form and for each day there was an amount listed which represented——

Q. Before you come to any description of the records, will you state the various enterprises concerning which you received books and records?

A. The B. & H. Smoke Shoppe, 110 Eddy, Day-Night Cigar Store, 186 Club.

Q. Does that complete the list concerning which you received books and records?

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(Testimony of Sol Sanford Ezralow.)

A. I believe that is correct.

Q. And concerning which of these enterprises did you receive [1717] records from Mr. Kyne?

Q. Mr. Kyne gave me a list of cashier's checks. That was on the B. & R. Smoke Shoppe. He also furnished me with a diary that was on the B. & R. Smoke Shoppe, and there was some journals and ledgers in connection with the 110 Eddy and Day-Night Cigar Store. I either got those from Mr. Kyne or Mr. Maundrell, I am not sure which. And then on the 186 Club Mr. Maundrell gave me a carton full of what he referred to as poker sheets. They were wrapped up in a rubber band. Each day had several sheets wrapped in a rubber band in a carton, grocery store size carton.

Q. Now, at the time you received these various records from Mr. Kyne and from Mr. Maundrell, do you recall whether or not receipts were given for them?

A. I do not think so. I am not sure, but the relationship was very friendly and I think either they did not ask for them or the question just wasn't raised as to receipts.

Q. Now, what, if any, arrangements did you have—or did you have any arrangements, for returning the records or for making them accessible?

A. Well, at the time these records were given to me, at that time I said I would meet them for a little while because I wanted to analyze them in my office and if they ever wanted to refer to them or look at them while I had them, they were free to

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(Testimony of Sol Sanford Ezralow.)

do so, that when I was through with them they could have them [1718] back.

Q. And was that arrangement still in effect at the time you left the service? A. Yes, it was.

Q. And will you state whether or not, during the time you had them and while you were still in the service, access was obtained to them by Mr. Kyne or Mr. Maundrell or any one in their behalf, if you recall?

A. No, I do not recall any one ever asking for them.

Q. Were any requests ever made of you for their return? A. I do not recall, no.

Q. Now, with relation to the B. & R. Smoke Shoppe, will you state, to the best of your recollection, what records were shown you and for what years? You have already referred to cashier's checks.

A. Well, I recall a diary, I guess it was about size 5½ by 9, where there is one figure shown for each day and had a "W" next to the figure or an "L." I asked Mr. Kyne what that meant. He said the "W" represents win and the "L" represents loss and when the day's transactions were over, the result was put down.

Q. I am going to show you plaintiff's exhibits 111 and 111A, which purport to be diary or daily reminder for the years 1942 and 1943, and ask you if you saw those two exhibits in the course of your investigation?

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(Testimony of Sol Sanford Ezralow.)

A. This appears to be 1942. These both look familiar as the [1719] books I looked at.

Q. Would it be your best recollection then that these were seen by you in the course of your investigation? A. Yes.

Q. Now, did you also, in the course of your examination of the records which were made available to you of the B. & R. Smoke Shoppe, see a similar book with relation to the year 1944?

A. Yes.

Q. Will you describe the appearance of that book, to the best of your recollection?

A. To the best of my recollection it was almost identical with those I have just seen.

Q. That is to say 111 and 111A?

A. Those two books you just showed me.

Q. What were the nature of the entries that you observed in that 1944 book?

Mr. Avakian: Objected to—the book itself is the best evidence.

The Court: Objection will be overruled.

Mr. Avakian: May the witness be instructed not to answer as to the contents then, your Honor.

The Court: Yes, I will watch that and see what develops here.

Mr. Avakian: Thank you.

(Question read.) [1720]

The Court: Just state generally the nature of the entries, without stating what they were.

A. They were similar to the book I just looked at.

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(Testimony of Sol Sanford Ezralow.)

Q. That is to say 111 and 111A?

A. These black books, that show win and loss for each day.

Q. Do you recall whether or not more than one entry per day was shown in that book, 1944?

Mr. Avakian: Objected to—the record is the best evidence. May I call your Honor's attention that the exhibits introduced by the government show that the 1943 and 1945 books were returned to Mr. Semenza, but no showing that the government ever returned 1944 books so the last record is it is in the possession of the government and I think that the book itself should be produced.

(Question read.)

The Court: You may answer this question.

A. I do not think so.

Mr. Avakian: May we ask that that be stricken, if he doesn't know.

Q. What is your best recollection?

Mr. Avakian: He says he doesn't think so.

The Court: Let him answer the question.

A. My recollection is that there was one figure for each day. That is my best recollection.

Q. I call your attention to the diary for 1943 and to the fact [1721] that under each day there is one figure with "Win" or "Lose" opposite, that is, aside from certain side notations, and ask you if the entries in the 1944 diary which you observed were similar in nature to the entries which you observe in that book?

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(Testimony of Sol Sanford Ezralow.)

Mr. Avakian: Object, the 1944 diary itself is the best evidence and unless and until its absence is explained in some way, its contents should not be put in the record.

The Court: We are not going to let the contents be put in the record.

Mr. Avakian: He has asked if it is similar to something in the record—that is giving the contents.

The Court: He did not say definitely. Objection overruled.

A. Yes, it was similar.

Q. Do you recall when you last saw the 1944 diary?

A. It was in my office at the time I left the Bureau in 1946.

Q. Have you seen it since that time?

A. No, I have not.

Q. Do you know, of your own knowledge, what became of that diary? A. No, I do not.

Q. Now, will you answer this yes or no—did you make an examination of that diary for the purpose of ascertaining the profit or loss incurred by the B. & R. Smoke Shoppe for the calendar year [1722] 1944?

Mr. Avakian: May that be answered yes or no?

Mr. Campbell: I asked him to answer yes or no.

A. Yes.

Q. And in making such examination, did you also have before you the partnership return of income as filed by the B. & R. Smoke Shoppe?

A. Yes.

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(Testimony of Sol Sanford Ezralow.)

Q. As a result of that examination, did you have a discussion with any one as to the figures which you ascertained as being the profit or loss incurred by the B. & R. Smoke Shoppe as shown by the 1944 diary to which you have referred? Answer yes or no. A. Yes.

Mr. Avakian: Just a moment. May the answer be stricken until I object?

The Court: Yes, it may go out.

Mr. Avakian: I object to that part of the question which states as a result of his examination, because that implies a question which is conclusion. We think it should be a factual inquiry as to whether he did or not.

Mr. Campbell: I will reframe the question.

Q. Having completed your examination of the 1944 Diary and 1944 partnership return of income, did you have a discussion concerning those matters with any one? Answer yes or no?

Mr. Avakian: Objected to as contrary to the evidence. [1723] He already testified when he left the Bureau he had not completed his examination, that the investigation was still in progress and he turned his work over to some one else.

The Court: Objection overruled. Answer the question.

A. Yes.

Q. And with whom did you have that discussion?

A. Mr. Kyne.

Q. Now, as a result of the examination of that diary and of the 1944 return, did you prepare, in the

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(Testimony of Sol Sanford Ezralow.)

course of your official duties, and as a part of your official duties, a report relating to such examination?

Mr. Avakian: Objected to, your Honor, as leading and suggestive and again calling for a conclusion with that phrase, "as a result." It is not a factual question, but a conclusion as to what the result was for something he did. We think a simple direct question of factual nature would serve this purpose.

The Court: Objection overruled. Answer the question.

(Question read.)

A. I prepared an information report.

Q. Is that a report which is prepared as part of the official duties of a Revenue agent?

A. Yes, it is.

Q. Do you have before you now a copy of that report? A. Yes, I do. [1724]

Mr. Campbell: May this be marked 156 for identification.

Q. Calling your attention to plaintiff's Exhibit 78, the partnership return of income for the calendar year 1944 for the B. & R. Smoke Shoppe, I will ask you to examine that and state if that is the partnership return of the B. & R. Smoke Shoppe which you had before you at the time you examined the diary to which you refer? A. Yes, it is.

Q. Now, subsequent to your examination of the diary you stated that you had a conference with Mr. Kyne, is that correct? A. Yes.

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(Testimony of Sol Sanford Ezralow.)

Q. Now, I will ask you whether or not at the time of such conference, if any agreement was reached as to the amount of profit and loss for the B. & R. Smoke Shoppe for the year 1944?

Mr. Avakian: This is a question which obviously calls for hearsay.

The Court: Let me have the question.

(Question read.)

The Court: Objection sustained.

Mr. Campbell: May I point out two matters in that connection, your Honor?

The Court: Yes.

Mr. Campbell: The testimony here shows the records of the B. & R. Smoke Shoppe for the year 1944 were kept by the witness Kyne; that record further shows that he purported to [1725] be a partner in the enterprise. I am not asking for the language of the conversation in my question. The question, I believe, calls for a yes or no answer, as to whether or not agreement was reached at that time.

Mr. Avakian: Your Honor, that obviously is a conclusion.

The Court: The ruling will stand.

Mr. Campbell: Very well. If the Court please, may I withdraw this witness for a few moments to lay further foundation for certain testimony?

The Court: You may do so.

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MR. LYNN HARKNESS

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Mr. Campbell: I intend to call him for a limited purpose at this time.

Q. Will you state your name, please?

A. Lynn Harkness.

Q. What is your business or occupation?

A. Internal Revenue agent.

Q. To what office are you assigned?

A. San Francisco.

Q. How long have you been an Internal Revenue Agent? A. A little over six years.

Q. Now, as a part of your employment, were you assigned to the investigation of the affairs of Elmer Remmer? [1726] A. Yes, sir.

Q. And when was that assignment made, if you recall? When did you come into the picture?

A. I came into it about October 15, 1947.

Q. And was that after Mr. Ezralow had left the service? A. Yes, sir.

Q. Now, do you recall at the time you came into the case, were certain records and books turned over to you in connection with the investigation?

A. They had previously been——

Mr. Avakian: That can be yes or no, your Honor.

The Court: Read the question.

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(Testimony of Lynn Harkness.)

(Question read.)

The Court: Answer, yes or no. A. Yes.

Q. By whom were they turned over to you?

A. They were turned over to me by either Mr. Kyne or Mr. Maundrell.

Q. I think you misunderstood my original question. Were certain records turned over to you that were already in possession of the Internal Revenue service?

A. They were not turned over to me directly.

Q. Did you use certain books and records in connection with your investigation?

A. I used certain books and records, yes. [1727]

Q. In connection with that, did you examine what purported to be the 1944 diary or record book of the B. & R. Smoke Shoppe?

A. Yes, sir.

Q. At a subsequent date did you have occasion to deliver such records as you had of the B. & R. Smoke Shoppe to any one else?

Mr. Avakian: Objected to as leading and suggestive. Every question Mr. Campbell asks contains testimony and calls either a yes or no answer.

The Court: Objection overruled. Answer the question.

A. What records we had that we were using were left in Special Agent's office in care of Mr. Weaver.

Q. I believe you stated that you had seen this 1944 diary? When was the last time you saw that record?

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(Testimony of Lynn Harkness.)

A. Well, some time during the investigation and prior to the time that we turned them over to Mr. Weaver.

Q. Have you subsequently made a search for that record? A. Yes, sir.

Q. Do you know what has become of it?

A. No, sir.

Q. Have you searched the files and records of the Internal Revenue agent in San Francisco?

A. Yes, sir.

Q. And in the Reno Internal Revenue Agent's?

A. Yes, sir.

Q. Have you also made inquiries of the Special Agent? [1728] A. Yes, sir.

Q. And have you been able to locate that record?

A. No, sir.

Q. During the course of your examination did you make a complete transcript of the entries in the 1944 diary? A. Yes, sir.

Q. Do you have that?

A. I do not have it with me. I can get it.

Q. Where is it? A. Upstairs.

Q. Would you get that? You have handed me a three-page pencil document consisting of three accounting pages. I will ask you if that is the transcript to which you refer? A. Yes, sir.

Q. Does that set forth the daily entries as you observed them in that 1944 record?

A. Yes, sir.

Mr. Campbell: May this be marked for identification?

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(Testimony of Lynn Harkness.)

Q. Is this transcript made by you, Mr. Harkness? A. Yes.

Q. Were you able to ascertain what happened to the original record? A. No, sir.

Q. Now, I notice about the third page, after the red letter "A" appears certain figures. Were those taken by you from the diary [1729] or were they obtained from some other source? Appearing under the red letter "A." Answer that yes or no. Pardon me—will you answer whether they were obtained from the diary or some other source?

A. Obtained from some other source.

Mr. Campbell: This lower portion then I will remove.

Q. The totals appearing hereon and the summary by months are your totals? A. Yes, sir.

Q. But taken from the transcript as set forth on the preceding page? A. Yes.

Mr. Campbell: I will cause to be removed the portion appearing from other sources.

Mr. Avakian: May the removed portion be marked for identification, your Honor?

The Court: Very well—157A for identification.

Mr. Campbell: At this time I offer in evidence Exhibit 157.

Mr. Avakian: Your Honor, we object to the admission in evidence of Exhibit 157 in the present state of the record, because no proper foundation has been laid for the introduction of secondary evidence. Mr. Harkness testified he turned the 1944 diary, the actual original record itself, over to Mr.

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(Testimony of Lynn Harkness.)

Weaver. We haven't heard from Mr. Weaver as to what happened [1730] to it.

The Court: Objection sustained.

Mr. Campbell: That is not his testimony.

The Court: Objection sustained. I think that is the testimony.

Mr. Campbell: May I ask the witness a question as to what he did with the 1944 diary?

The Court: Yes.

A. I said I turned over what books and records as were there to Mr. Weaver.

Q. Did that include the 1944 diary?

A. No, it did not.

Mr. Avakian: May I ask the witness on voir dire?

The Court: Yes.

Q. (By Mr. Avakian): Did you have such record to turn over to Mr. Weaver? A. No.

Q. When did you first learn that the 1944 diary was missing?

A. At the time I looked up the records to leave in Special Agent's office I noticed that the diary was missing.

Q. When was that?

A. I would say March or April, 1949.

Q. You testified that you were assigned to this case in October of 1947, is that correct?

A. Correct. [1731]

Q. And some time after that you saw the 1944 diary? A. Yes.

Q. Do you recall when you last saw it?

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(Testimony of Lynn Harkness.)

A. Well, I couldn't say exactly. Some time in that period I worked on it during that period.

Q. Was Mr. Weaver also working on the case at that time? A. Not actively.

Q. When did Mr. Weaver start actively working with these records, if you know.

Mr. Campbell: These records?

Q. These various records that you had in your possession in connection with this case after you were assigned?

A. He was assigned to the case the entire time, but he wasn't active on the work.

Q. Was he active at all?

A. I wouldn't say at all.

Q. He was inactive, although assigned?

A. He was assigned to do some work.

Q. Prior to the time you say you boxed these records? A. Yes.

Q. Did he actually look at any of these records prior to the time you boxed them? A. Yes.

Q. Do you know whether or not Mr. Weaver looked at the 1944 diary prior to the time you boxed these records? [1732]

A. I really don't know.

Mr. Avakian: Your Honor, I submit Mr. Weaver is here and we should have the proper foundation laid for secondary evidence.

The Court: I think so.

Mr. Campbell: Very well.

Q. Let me ask—you stated you are an agent.

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(Testimony of Lynn Harkness.)

What was the position occupied by Mr. Weaver?

A. Mr. Weaver was special agent.

Q. In making an examination of this nature, what are the responsibilities of a revenue agent and what are the responsibilities of a special agent?

A. A revenue agent's responsibility is determining the tax liability.

Q. And what is primarily the responsibility of a special agent?

Mr. Avakian: Objected to——

Mr. Campbell: I will withdraw the question.

Q. Mr. Harkness, in regard to determining the tax liability, whose function is it in the investigation to make examination of the books and records?

A. That is the revenue agent's.

Q. And that was your function in connection with this case? A. Yes, sir.

Mr. Campbell: I think that is all. You may cross-examine. [1733]

Mr. Avakian: I understand this witness will be called later?

Mr. Campbell: Oh, yes.

Mr. Avakian: May we defer our cross-examination until that time?

The Court: Very well.

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MR. RAY A. WEAVER

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Ray A. Weaver.

Q. What is your business or occupation?

A. Special Agent of the Intelligence Unit of the Bureau of Internal Revenue.

Q. How long have you been connected with the Bureau of Internal Revenue?

A. Sixteen years.

Q. You are also a certified public accountant?

A. Yes, sir.

Q. As part of your official duties as special agent of the Intelligence Unit, did you participate in the investigation of the affairs of Mr. Remmer?

A. Yes, I did.

Mr. Campbell: I might say to your Honor, I am calling this witness for limited purpose at this time and will recall [1734] him for general purposes at a later stage.

The Court: Very well.

Q. Mr. Weaver, will you state in general the duties of an Intelligence Unit agent in an investigation of this nature, where there is also assigned revenue agents in the case?

Mr. Avakian: The general question we think is incompetent, irrelevant and immaterial. What he

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(Testimony of Ray A. Weaver.)

did in this case may be material, but as to the general nature of duties in the general situation, we do not think that is proper here.

The Court: Objection overruled. Answer the question.

A. The general duties of a special agent are to determine whether any reported income is the result of a fraudulent act on the part of the taxpayer and if so, to secure whatever evidence may be available of such acts.

Q. Does that include the auditing of the books?

A. Not ordinarily, although it may in certain circumstances require some auditing.

Q. Now, turning specifically to the records of the B. & R. Smoke Shoppe, will you state whether or not there came into your possession during your connection with the investigation the 1944 diary record of the B. & R. Smoke Shoppe?

A. I have no recollection of ever seeing the 1944 diary itself. I remember at one time discussing the transcript which the revenue agents had made from the 1944 diary and at that time noticing the large discrepancies between the diary—— [1735]

Mr. Campbell: Never mind the findings.

A. At that time I asked where the 1944 diary was and commenced looking for it.

Q. Were you able to find it?

A. No, sir.

Q. Was a search made at that time?

A. Yes, sir.

Q. Did you participate in the search?

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(Testimony of Ray A. Weaver.)

A. I did.

Q. Have you since examined any records to which you have access? A. Yes.

Q. Have you been able to find that record?

A. No, sir.

Q. Do you know what became of it?

A. I have no idea what became of it.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, will you tell us when you made this search for the 1944 diary?

A. I have no recollection of the exact time. I would say it would probably be late in 1948 or early in 1949. That would be my best recollection.

Q. Do you recall when Mr. Kyne was on the witness stand in this case? A. Yes. [1736]

Q. Do you recall while he was on the stand Mr. Campbell asked him to step down and look into a certain box to see if the 1944 diary was there?

Mr. Campbell: Objected to as improper cross-examination. The record will speak for itself; not within the scope of direct.

The Court: Objection sustained.

Mr. Avakian: I am asking him if he recalled that request was made of Mr. Kyne.

The Court: Objection sustained.

Mr. Avakian: It is part of the search made for the record, your Honor.

The Court: Objection sustained.

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(Testimony of Ray A. Weaver.)

Q. At the time Mr. Kyne was on this stand testifying, did you know that the 1944 diary was missing?

Mr. Campbell: Objected to as immaterial and not within the scope of direct examination.

The Court: Objection sustained.

Mr. Avakian: May we be heard on it your Honor?

The Court: No.

Q. At the time Mr. Kyne was on the stand did you make a suggestion to Mr. Campbell that he have Mr. Kyne step down from the stand to look at that box?

Mr. Campbell: Objected to——

The Court: Objection sustained. [1737]

Mr. Campbell: I ask the jury be instructed not to draw any inference——

The Court: I do not think the jury will draw any inference. They have been instructed many times, and I will instruct them again, they are to be guided and rely only on the evidence which is properly admitted in evidence coming from the witness or documents. The remarks of counsel or the remarks of court and interchanges between counsel and between the court and counsel are not evidence and not to be considered.

Mr. Avakian: We think it is material.

The Court: There is nothing before the court.

Mr. Avakian: We want to be heard on that objection.

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(Testimony of Ray A. Weaver.)

The Court: I do not want to stop to hear it now. Let's proceed.

Mr. Avakian: You mean you are not going to let me explain why I think it is material?

The Court: I made a ruling and I am not going to hear any further about it.

Mr. Avakian: Well, you can see the position I am in.

The Court: I can see your position and that is it.

Q. You said it was late in 1948 or early in 1949 that you made this search for that diary?

A. That is my best recollection. [1738]

Q. And that you also requested the assistance of any agents of the Bureau in making that search?

A. The revenue agents who had done the investigation.

Q. Who were those?

A. Revenue agents Morgan and Harkness.

Q. What is Mr. Morgan's first name.

A. Robert.

Q. And Mr. Harkness is the witness who just left the stand? A. That is correct.

Q. Were you completely satisfied after that search had been made that that diary was lost?

A. Yes.

Q. Did you make any report to any other officials of the Bureau to the effect that that dairy was lost?

Mr. Campbell: Objected to as immaterial and incompetent, not within the scope of direct.

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(Testimony of Ray A. Weaver.)

The Court: He may answer the question yes or no.

A. No.

Q. Did you at any time make any report to any government representative connected with this case, to the effect that that document was missing?

A. Yes, I believe so.

Q. And to whom?

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled. He may [1739] answer the question.

A. We did; the attorneys connected with the case.

Q. Who specifically? A. Mr. Shelton.

Q. Mr. Shelton is sitting here at the counsel table? A. That is right.

Q. Who else?

A. I am not sure whether I told Mr. Campbell or not.

Q. When did you tell Mr. Shelton?

A. It would be at least a year ago.

Q. And you do not recall whether or not you told Mr. Campbell? A. No, I do not.

Q. Now do you recall during the summer of 1949 you returned certain records of the B. & R. Smoke Shoppe to Mr. Semenza? A. Yes.

Q. Did you tell him at that time that the Bureau had lost the 1944 diary?

Mr. Campbell: Just a minute. That question is objected to as not within the scope of direct examination.

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(Testimony of Ray A. Weaver.)

The Court: He may answer.

Mr. Campbell: Further assuming a fact not in evidence.

The Court: He may answer the question.

A. No, because I was not sure the Bureau had lost it.

Q. Did you tell him it was lost, it was missing?

A. It wasn't in the records turned [1740] over to him.

Q. Answer my question.

A. I didn't say that specifically, no; it wasn't necessary, it just wasn't there.

Q. And you never said it was missing?

A. He had a list of the records himself, he could see.

Q. Do you understand my question? Did you say anything to Mr. Semenza about the 1944 diary being missing?

A. I don't know as I made any specific comment on the diary.

Mr. Avakian: Your Honor, we feel in order to make proper showing on our objection to the transcript to be offered that we ought to be permitted to explore further on certain factors in which objections have been sustained and we again respectfully ask the Court to reconsider the objections.

The Court: No, the ruling was made to one of your objections excluding Exhibit 157, that was this transcript was it not—and then counsel requested permission to call a witness, counsel for

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(Testimony of Ray A. Weaver.)

the government, in aid of a further laying of foundation and I think that has been made and I am going to admit the exhibit in evidence, No. 157 is admitted.

Mr. Avakian: My point is, we have not been permitted to develop our objection——

The Court: You have already stated your objection.

Mr. Avakian: Yes, and our objection, your Honor, is that we have not been permitted to cross-examine properly on the [1741] foundation as to the loss of the original record.

The Court: Have you any further cross-examination?

Mr. Avakian: Yes, on questions on which objections have been sustained, that is what we want to be heard on.

The Court: I am not going to hear it. The exhibit is admitted in evidence, No. 157. Any further questions?

Mr. Avakian: I understand he is going to be recalled?

Mr. Campbell: For general purposes, yes.

Mr. Avakian: We will defer further cross-examination.

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MR. EZRALOW

recalled to the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Ezralow, based upon your examination of the diary, 1944, of the B. & R. Smoke Shop, what did that book disclose as being the net profit of the B. & R. Smoke Shoppe for the year 1944?

Mr. Avakian: Just a minute. Now, your Honor, we object to that because the transcript of that book, 157, which has been received as secondary evidence, was prepared not by this witness, but rather by Mr. Harkness and if there is going to be any questioning as to what that contains, I think it should be addressed to the man who prepared it, not to the man who left the service before it was prepared. It is not a proper question of this witness.

The Court: The objection is sustained. The exhibit is [1742] in evidence and counsel may read from it.

Mr. Campbell: Yes, I will read from this exhibit and I will withdraw the question. Reading from plaintiff's Exhibit 157, which is headed, "B. & R. Smoke Shoppe. Summary of Wins and Losses 1944, taken from diaries supplied by William E. Kyne." There is set forth in two columns the date and then "Win" or "Lose," lose or win figures in parenthesis for each day. At the end is a total, 12/30/44, total $11,834.35. There is also set forth a monthly summary showing January

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(Testimony of Sol Sanford Ezralow.)

$1342.10, February $1090.50, March $348.50, April loss $3354.50, May gain $2883, June $289, July loss $1105, August gain $2704, September $4191, October $1333.50, November $1202.74, December $910; total $11,834.85.

Q. Now calling your attention to this exhibit, at the time you made your examination did you observe—to the best of your recollection, Mr. Ezralow—the figures which are set forth in this transcript in the records which you saw?

A. If I can see Exhibit 156 I could tell you.

Q. Exhibit 156 for identification, for the purpose of refreshing your recollection.

A. What was the question now?

Mr. Campbell: I will reframe the question.

Q. Going into that transcript, do you now recall whether or not you saw substantially the same daily figures as set forth in that transcript? [1743]

A. Well, the result of the transcript is the same as the figure on the letter that I wrote at that time, so I assume they are the same.

Q. You have compared the figure on the memorandum which you made on October 8, 1946, with the figure used in Exhibit 157, is that correct?

A. Within $10 of being the same.

Q. Now after you made that examination, I believe you stated at the time you had before you plaintiff's Exhibit 78, return of the B. & R. Smoke Shoppe for 1944, which shows a total income of $1200, do you recall that? A. Yes.

Q. Now, did you discuss, Mr. Ezralow, with

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(Testimony of Sol Sanford Ezralow.)

any one, the difference between the profit as shown by the diary which you examined and the return which has been filed for the year 1944?

A. Yes.

Q. And with whom was that discussion?

A. Mr. Kyne.

Q. Now did you at that time have any discussion relative to the accuracy of the figures as set forth in the diary? Answer yes or no.

Mr. Avakian: Unless it is shown that the defendant was present, we do not think——

The Court (Interceding): Answer yes or no.

A. What was the question again? [1744]

(Question read.)

A. Yes.

Q. Now will you state what that conversation was?

Mr. Avakian: Now, your Honor, we object. This is obviously hearsay, no showing the defendant was present.

The Court: Objection sustained.

Mr. Campbell: May I make one statement for the record, your Honor?

The Court: Yes.

Mr. Campbell: The evidence shows Mr. Kyne held Mr. Remmer's power of attorney at that time.

The Court: The ruling stands.

Mr. Campbell: Very well.

Q. Now do you know whether or not subsequent to your examination of that diary and of that return, if an amended 1944 return was filed

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(Testimony of Sol Sanford Ezralow.)

with respect to the partnership net income of the B. & R. Smoke Shoppe?

Mr. Avakian: May we have the question read?

The Court: Yes, you may.

(Question read.)

Mr. Avakian: May we point out the return and amended return are in evidence.

Mr. Campbell: I am asking if he knows.

The Court: Answer the question yes or no.

Q. Do you know? [1745] A. No, I do not.

Q. I call your attention to defendant's Exhibit "O," a partnership return of income for 1944 of the B. & R. Smoke Shoppe, reporting net income of 12 thousand dollars and marked "Amended" and with file date April 14, 1947, Collector of Internal Revenue, and ask you if that date of April 14, 1947, was subsequent to your leaving the service? A. Yes, it is.

Q. Was that date, however, subsequent to your examination of these books and records and the conversation you have referred to as having had with Mr. Kyne?

Mr. Avakian: I think the answer to that is plain. It is in the record and I think counsel is just trying to emphasize something.

The Court: Objection overruled. Answer the question.

A. Yes.

Q. Now aside from the list of cashier's checks and the diaries did you see any other records of the B. & R. Smoke Shoppe, do you recall?

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(Testimony of Sol Sanford Ezralow.)

A. I do not recall any other records of the B. & R. Smoke Shoppe.

Q. Do you recall whether or not during a portion of the time that you were assigned to this case that Mr. Kyne was away in the service?

A. To my recollection while I was on the case he was not in the [1746] service.

Q. I believe you stated you came into the case in 1945?

A. 1945. I believe my first interview with the taxpayer's representative was in 1946.

Q. Do you recall when in 1946 that you first interviewed any one purporting to represent the taxpayer?

A. I am very very vague as to exactly when it was. Probably the early part of 1946.

Q. Do you recall when it was that you first saw Mr. Kyne?

A. I know I saw him after he was out of the service. I do not know if I could exactly fix the month, but I remember talking to him about his having been in the service.

Q. Was that the first time you saw him upon the matter after he came out of the service?

A. I believe so.

Q. Now will you state for what particular years, or in relation to what particular years, you were examining the records of the B. & R. Smoke Shoppe and the other enterprises which you examined into?

A. Well, I was examining for all open years.

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(Testimony of Sol Sanford Ezralow.)

Q. Up to and including what year or years?

A. '45, '44, '43, I believe '42.

Q. Now with regard to the year 1945, did you see any records of the B. & R. Smoke Shoppe?

A. Just the diary. [1747]

Q. I am going to show you plaintiff's Exhibit 11B, the red covered diary for the year 1945—there is only one entry in this book, appears under date of January 1, 1945—and ask you if you saw that book in the course of your examination?

A. I don't recall seeing it.

Q. Do you recall seeing any other book in relation to 1945? A. I don't believe so.

Q. Do you recall seeing any record which relates to 1945?

A. My only possibility would be the checks. I can't recall.

Q. Did you see anything by way of the daily account of profits or losses either in the diary or ledger or any other form?

A. No; of course, this is a long time ago.

Q. I understand. I am asking for your best recollection. Now, you stated that you were shown certain records of cashier's checks and in that connection I am going to show you plaintiff's Exhibit 116, which purports to set out certain lists of checks issued between December 31, 1943, and December of 1946. Of course, that includes a period of time after you left the service, is that correct?

A. Correct.

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(Testimony of Sol Sanford Ezralow.)

Q. It was in December, 1946, that you left the service? A. That is right.

Q. Will you examine these and see if those contain the lists which were shown to you as you stated by Mr. Kyne?

A. Yes, many of these sheets are familiar to me; given to me by Mr. [1748] Kyne.

Q. Now subsequent to your examination of the list of cashier's checks and of the diary records or check records and what other books and records, if any, were made available to you, did you have any discussions with any one connected with the B. & R. Smoke Shoppe as to the adequacy of records maintained for the purpose of reflecting true and correct income? Answer that yes or no.

A. Yes.

Q. And with whom was that discussion had?

A. Two people. I mentioned it to Mr. Kyne and I also mentioned it to Mr.—I have forgotten his name now.

Q. Maundrell?

A. Maundrell, exactly.

Q. During the period of time that you were engaged in this investigation, did you ever have any discussions with Mr. Remmer? A. No.

Q. Did you at any time request to or attempt to see or meet with Mr. Remmer for the purpose of discussing matters relating to the B. & R. Smoke Shoppe and the other businesses?

Mr. Avakian: Just a moment. This is objected to, your Honor——

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(Testimony of Sol Sanford Ezralow.)

The Court: Objection sustained.

Q. Now in connection with your investigation, did you see books and records purporting to be those of 110 Eddy Street? [1749]

A. Yes, I did.

Q. Incidentally, who turned those over to you for examination?

A. Either Mr. Maundrell or Mr. Kyne, I don't recall which one now.

Q. Do you recall of what they consisted?

A. Yes; cash receipts and disbursement record, the check disbursement record, general ledger, general journal, and cancelled checks arranged numerically and bank statements arranged chronologically.

Q. I am going to show you plaintiff's exhibits 112 and 112A, purporting to be records of 110 Eddy Street, and ask you if those were among the records which you examined and which you stated were given to you, you believe by Mr. Maundrell, for examination?

Mr. Avakian: Mr. Maundrell or Mr. Kyne, he said.

Q. Mr. Maundrell or Mr. Kyne?

A. This book, 1946, I never saw it.

Q. 112A? A. I believe I saw this one.

Q. Referring to plaintiff's Exhibit 112?

A. That is correct.

Q. Now at the time you left the service had you completed your investigation into the affairs of 110 Eddy?

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(Testimony of Sol Sanford Ezralow.)

A. I believe that is correct with regard to 110 Eddy.

Q. What is correct? [1750]

A. I had examined the records for the open years and I set forth all my questions and work papers and did come to a conclusion as to what the understated or overstated income was. I didn't come to a conclusion, but set forth all I had done and what questions were raised by my examination.

Q. But had the investigation been completed?

A. No, if I understand your meaning of conclusion conferences with the taxpayer and writing of the final report, the answer is no.

Q. I also include in that the making of the final determination as to the amount of income or loss from business for the years examined.

A. No, no, had not reached that point.

Q. Now with regard to the 186 Club, will you state what records were made available to you?

A. 186 Club I was given a box of poker sheets, wrapped in a rubber band, in a cardboard box the size of a vegetable can box, cardboard box. This was given to me by Mr. Maundrell.

Q. Were you given any other records in relation to the 186 Club or did you observe other records with relation to the 186 Club?

A. I think—well, there was a binder that summarized these poker sheets, but I couldn't make very much sense out of it. I couldn't come to any conclusion on it.

Mr. Avakian: I ask that the last part be

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(Testimony of Sol Sanford Ezralow.)

stricken as [1751] not responsive, as opinion and conclusion.

The Court: It may stand.

Q. Were you given any other books or records or were you shown any other books or records?

A. Well, no, I guess not. I talked to a fellow by the name of Byrne to help me interpret these sheets.

Q. Who was Mr. Byrne?

A. Mr. Byrne, as I recall, was an accountant that had some connection—I am not sure—I think Mr. Byrne was accountant during the year——

Q. Of the 186 Club? A. I believe so.

Q. Did you observe or were you shown any minute books, corporate minute books?

A. No, no, not at all.

Q. Did you make inquiry of any one regarding corporate minute books?

A. Well, I asked questions concerning whether or not it was a corporation——

Q. We can't go into your conversation, that is conversation you had now. Who did you have discussions with concerning the affairs of the 186 Club, the individuals?

A. I talked to Mr. Kyne. I talked to Mr. Maundrell. I talked to Mr. Mooser.

Q. Mr. Mooser who is the deputy [1752] collector? A. That is right.

Q. Who made some previous examination?

A. Yes. I also talked to Mr. Slater concerning the 186 Club.

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(Testimony of Sol Sanford Ezralow.)

Q. Did you have any discussions with Mr. Turner or Mr. Casselini?

A. No, I don't recall ever meeting those people.

Q. Or with Mr. Remmer concerning the 186 Club? A. Never saw Mr. Remmer.

Q. Did you have any discussions with Mr. Remmer regarding any of these organizations?

Mr. Avakian: Objected to. He said he never saw him. He couldn't have had.

The Court: He may answer the question.

A. I never saw him, never spoke to him over the telephone; I don't know what he looks like.

Q. Did you also examine the books and records of the Day-Night Cigar Store?

A. Yes, I believe I did.

Q. Of what did they consist?

A. They are very similar to the 110 Eddy, and they were maintained by Mr. Slater.

Q. I am going to show you plaintiff's exhibits 117 and 117B, purporting to be the records of the Day-Night Cigar Store, and ask you to look at those and state whether or not those records were shown to you in the course of your [1753] examination?

Mr. Avakian: Your Honor, we object to the continual use of "purported" in describing the exhibits. They are in evidence, he has presented them himself.

The Court: Objection will be overruled.

A. I recall seeing this 117B.

Q. The entries therein are at a date later?

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A. Items for 1946 that I examined for that year. I believe this is the record I examined.

Q. You are referring to plaintiff's Exhibit 117?

A. Yes, that is correct.

Mr. Campbell: I will ask to have this group of ledger sheets marked 158 for identification. You stated, Mr. Ezralow, that in connection with your examination of the 186 Club there were made available to you, I believe you stated by Mr. Byrne, certain ledger sheets with respect to that concern, is that correct? A. That is correct.

Q. I will ask you to examine this 158 for identification and state whether or not you recognize that exhibit?

Mr. Avakian: May we look at it?

The Court: Proceed with the identification and then you can look at it.

Mr. Campbell: May I ask preliminary questions first? A. I don't recall seeing these.

Q. You do not recall them? [1754] A. No.

Q. In what form were the records which were shown to you?

A. They were on white sheets wrapped in a rubber band, rolled up.

Q. Were those accounting sheets or poker sheets to which you refer? A. Poker sheets.

Q. I am going to show you series 110 to 110F and ask you if these are the nature of the records which you saw, without referring to the specific items, if those were the type of poker sheets to which you refer? A. Yes.

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(Testimony of Sol Sanford Ezralow.)

Q. I believe there have been marked for identification a couple of cartons of those in the court room. You stated, however, in addition to them, you were shown some record by Mr. Byrne which you state you couldn't make much out of. Do you recall the nature of that record?

A. Well, when I talked to Mr. Byrne he was compiling the record for 1946 and at that time he showed me how he was handling it and I explained to him I did not think that was adequate, did not give sufficient information.

Q. Did you see the records themselves which he was compiling, or did you simply discuss the nature of the records?

A. I think we just discussed them.

Q. Are you familiar with Mr. Byrne's handwriting? [1755]

A. No, I am not. I think I only saw him on one occasion.

Q. Can you then or not state whether or not the group of yellow sheets which I showed you were in Mr. Byrne's handwriting?

A. I could not state.

Q. Now other than the poker sheets then, were you shown any ledger or books of account pertaining to the 186 Club for the years for which you were examining?

A. I believe I saw a summary of these poker sheets.

Q. Do you recall in what form that was?

A. It was in a book form.

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(Testimony of Sol Sanford Ezralow.)

Q. And where did you see that?

A. I think Mr. Maundrell—in regard to these poker sheets, I had most of my discussions with Mr. Maundrell. Now I don't know whether he gave those to me or whether I saw them and left them there.

Q. You haven't a definite recollection one way or another in that regard?

A. No, I have no recollection as to whether I took this summary or whether I left that with him.

Q. Do you recall whether or not you made a summary from the record which you saw?

A. I don't recall that.

Q. During the evening recess couldn't you examine your work sheets which are here when court adjourns? I know you are [1756] anxious to get back to Los Angeles, but you won't be able to do so.

A. I will be happy to occupy my time with the records.

Mr. Campbell: May it please the Court, I have concluded my direct examination with the exception of further pursurance in line which he will have to examine the papers which he left at the time he left the service. I think it would be preferable if we could complete our direct examination.

(Jury and alternate jurors admonished and recess taken at 3:50 p.m.) [1757]

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Tuesday, January 8, 1952, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. EZRALOW

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

(Last question read.)

Q. Did you examine your work sheets for the purpose of determining that?

A. I didn't hear the question.

Q. You testified you had seen, in relation to the 186 Club, a book in which there was purported a summary of the poker sheets, which I believe you testified you saw in the possession of Mr. Maundrell. I asked you if you had made a summary of that book? You were to examine your work sheets during the recess. Do you now recall whether or not you made a summary?

A. I do not recall that I made a summary at that time. I might have, but it escapes me at the moment.

Q. Did your work sheets that you examined disclose any such summary? A. No.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. I take it, Mr. Ezralow, that over night you examined some files somewhere to look for any

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(Testimony of Sol Sanford Ezralow.)

possible summaries that might have been in your work sheets, is that correct? [1758]

A. Well, I just looked at them very hastily.

Q. And where was that?

A. In Mr. Campbell's office.

Q. That is upstairs in this building?

A. That is correct.

Q. Were there a lot of records pertaining to this case?

Mr. Campbell: Objected to—that calls for his conclusion. I will stipulate there are a lot of records.

The Court: You may answer.

A. I saw a lot of books and records but I didn't look through those.

Q. You looked over certain portions of them, is that it?

A. No, I just looked through certain files. There were about three files of work papers. I just glanced through them to see which contained my writing.

Q. I believe you said you were first assigned to this case in 1945? A. That is correct.

Q. And you actually started work on it some time in 1946, is that correct?

A. Either the latter part of '45 or early '46.

Q. And then you left the Internal Revenue at the end of '46?

A. My last working day was in December of 1946.

Q. And at that time, of course, the returns for

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(Testimony of Sol Sanford Ezralow.)

the year 1946 had not yet been filed, [1759] had they?

A. I don't know whether they had or not. The 1946 returns were not required to be filed at that time that I left the Bureau.

Q. With the exception of the 186 Club, the various businesses that you were investigating were on a calendar year basis, were they not?

A. I don't recall that.

Q. In any event, the year 1946 was not assigned to you for investigation, is that correct?

A. That is correct.

Q. The last year that was assigned to you is 1945, is that right? A. That is correct.

Q. And when you stated in your direct examination that you had not seen certain books which Mr. Campbell showed you, for example Exhibits 111A and 112A, those particular books related to the year 1946, isn't that correct?

A. He showed me four books——

Mr. Campbell: I submit the books speak for themselves.

Mr. Avakian: Yes, if he is in doubt, I will show him the books.

Q. One of the books which Mr. Campbell showed you, which you stated you had not seen during your investigation is prosecution's Exhibit 112A, which is entitled "110 Eddy Street" and on the first page there is designated "1946," is there not? [1760] That is one of the books you did not see, is that correct?

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(Testimony of Sol Sanford Ezralow.)

A. Well, I might have seen this book and I made no notes on it.

Q. And that is because you were not interested in the year 1946? A. That is correct.

Q. And you did not mean to imply, when you said you had not seen some of these books Mr. Campbell showed you, that those books had been withheld, did you? A. No.

Q. As a matter of fact, I believe you said your relationship with Mr. Kyne and Mr. Maundrell was a friendly one? A. That is correct.

Q. And they turned over to you all the records which you asked for, did they not?

A. To the extent that they had them they did.

Q. They withheld no records from you, isn't that correct?

Mr. Campbell: Objected to as calling for his conclusion.

The Court: Objection sustained.

Q. As far as you know, all the records which they had were turned over to you?

A. Well, I don't know what all records they had.

Q. To the extent that you know, that is all you can say? A. Right, to the extent that I know.

Q. Now in the course of your examination during the period that you were working on this case, I believe you said you had [1761] a number of conversations with Mr. Kyne?

A. That is correct.

Q. And you also had a number of conversations

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(Testimony of Sol Sanford Ezralow.)

with Mr. Maundrell? A. That is correct?

Q. And as a matter of fact you had a conversation about this case with Mr. Kyne on the very first day that he was at work after his return from his service in the army, did you not?

A. I didn't know that that was his first day.

Q. Didn't you have a conversation about that?

A. I talked about his being in the service. I didn't make any point as to when he was released. I don't recall that.

Q. After that first occasion, did you have numerous conversations with Mr. Kyne about this case? A. Yes.

Q. Were you investigating the year 1942 as a part of your work? A. I believe so.

Q. And 1943, '44 and '45, is that correct?

A. I believe so.

Q. You examined the B. & R. Smoke Shoppe for those years, did you not? A. Yes.

Q. And 110 Eddy Street?

A. Yes, to the extent that 110 Eddy Street was in existence. When I say yes, I mean as long as they were in operation.

Q. In other words, from the time Mr. Remmer was connected with [1762] 110 Eddy Street to and including the year 1945, is that correct?

A. That's right.

Q. And with respect to the Day-Night Cigar Store, do you remember what years you investigated?

A. I can't exactly recall the years, but if any

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years fell in between 1942, '43, '44 and '45, then I made a record to investigate whatever records were available.

Q. There has been testimony in this record to refresh your recollection that 1943 was the first year in which Mr. Remmer and his associates became interested in the Day-Night Cigar Store and if I am correct in that statement, would you say that it was 1943 through 1945 that you investigated the Day-Night Cigar Store? A. Yes.

Q. And then would that also be true with respect to the 186 Club? A. Yes.

Q. You recall, do you not, that the 186 Club was a corporation?

A. Well, I recall corporation returns were filed, but I never felt it was proper filing of returns. I did not feel actually it was a corporation, in my opinion.

Q. Do you recall the first return filed by the 186 Club was a partnership return in the year 1943?

A. To my recollection it was a corporation return.

Q. I believe you testified in connection with your examination [1763] of the 186 Club you also talked to Mr. Mooser, is that correct?

A. Yes.

Q. And Mr. Mooser was deputy collector of the Bureau of Internal Revenue in San Francisco?

A. That is correct.

Q. And you learned, did you not, that Mr.

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(Testimony of Sol Sanford Ezralow.)

Mooser had been of the opinion that the 186 Club should file corporation returns rather than partnership?

A. At the time I talked to him he wasn't certain just what to do. I don't know what he did with it, in view of the fact that he couldn't classify his own thinking on it.

Q. In other words, Mr. Mooser thought it should be a corporation and your own personal opinion was it should be a partnership?

A. That's correct.

Q. I call your attention to defendant's Exhibit "P" in this case, which is partnership return of income for the year 1943 for the 186 Club, and ask you whether that is one of the returns that was assigned to you in connection with this investigation?

A. Yes. I had this return in my file at the time I was an agent. I discussed this return with Mr. Slater——

Mr. Campbell: There is no question pending. You will have to wait for the question.

Q. I also show you defendant's Exhibit "J" in this case, which is a corporation income and declared value excess profits tax [1764] return of the 186 Club for the fiscal year ending June 30, 1943, and ask you whether that is a return which was shown to you in connection with your investigation?

A. This return looks familiar to me.

Q. I show you defendant's Exhibit "Q," which is a corporation excess profits tax return for the

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(Testimony of Sol Sanford Ezralow.)

year ending June 30, 1943, of the 186 Club, and ask you whether that return was assigned to you in connection with your investigation?

A. I believe it was.

Q. And then I show you prosecution's Exhibit 87A, which is the corporation income and declared value excess profits tax return of the 186 Club for the fiscal year beginning July 1, 1943, and ending June 30, 1944, and ask you if that also was a return that was assigned to you during the course of your investigation? A. I believe it was.

Q. I call your attention to the statement which is a part of Exhibit 87A, the return for the period ending June 30, 1944, reading in part as follows:

"During the month of June, 1944, Louis H. Mooser, Jr., Deputy Collector from the office of the Collector of Internal Revenue at San Francisco, California, called at the office of the above-stated corporation and examined its books and records for the fiscal period ending June 30, 1943, and required said corporation [1765] to file Forms 1120, 1121 and 707 for said period."

Did you notice that particular language in this return? A. Yes, I believe I did.

Q. You were aware then, were you not, that the 186 Club had filed a partnership return for the calendar year 1943? A. Yes.

Q. You were aware of that during the time you were making this investigation?

A. That is correct.

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(Testimony of Sol Sanford Ezralow.)

Q. And during the time of that investigation you were also aware, were you not, that for the very same period, that is, for the year 1943, at the insistence of Mr. Mooser, corporation returns had been filed covering exactly that same period?

Mr. Campbell: Objected to as calling for his conclusion as to the insistence of Mr. Mooser.

The Court: Objection sustained.

Q. Well, you were aware of the fact, were you not, that for exactly that same period, namely the year 1943, corporation returns were filed?

Mr. Campbell: Objected to as assuming a fact not in evidence. I think counsel has inadvertently stated it wrong because it was on a fiscal year basis.

The Court: He may answer the question if he can.

A. The corporation return covered a period that overlapped the calendar year partnership [1766] return.

Q. One corporation return covered a portion of 1943 up to June 30, 1943, did it not, that is one of those periods? A. That is right.

Q. And then the corporation return for the next fiscal year included, did it not, the last six months of 1943? That is prosecution's Exhibit 87A which is for the period beginning July 1, 1943, and ending June 30, 1944, is it not? A. That is correct.

Q. So the last six months of 1943 were included in Exhibit 87A?

A. That is correct. It would appear that way.

Q. Let me ask you then, during the course of

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(Testimony of Sol Sanford Ezralow.)

your examination were you aware of the fact that the income of the 186 Club for the year 1943 had been reported on a partnership return and also subsequently had been reported in corporation tax returns? A. Yes.

Q. Now in your capacity as a revenue agent, and also in view of your position as a certified public accountant, were you then aware of the fact that the income of the 186 Club for the year 1943 had been taxed on a corporation basis and also been taxed on a partnership basis?

Mr. Campbell: Objected to as assuming a fact not in evidence. Partnership return is non-taxable return and so shows on its face. I suggest the question is misleading and also assuming a fact not in evidence.

The Court: Let me have the question. [1767]

(Question read.)

The Court: He may answer the question.

A. The answer is I was aware that there were two returns filed but there wasn't double taxation because a partnership is not a taxable entity.

Q. But the partners paid taxes on their share of profits in their individual income returns?

A. I didn't ascertain that.

Q. Were the returns of the individual partners of the 186 Club also assigned to you for investigation? A. Some were, not all of them.

Q. And didn't you find in some of those returns

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(Testimony of Sol Sanford Ezralow.)

any reference to the partnership income for the 186 Club?

Mr. Campbell: Objected to on the grounds the returns themselves are the best evidence.

The Court: Objection sustained.

Q. Did you inform anybody connected with the 186 Club, during the course of your investigation, that the income of the 186 Club should be taxed on either a partnership or a corporation basis but not on both? A. Yes.

Q. Who did you inform of that?

A. I spoke to Mr. Kyne about it. I spoke to Mr. Slater about it extensively. He gave me an explanation how it came about.

Q. Mr. Slater was the accountant for the 186 Club? [1768]

A. Yes, he filed the partnership return and he felt that the corporation return was in error.

Q. And he told you, did he not, that Mr. Mooser had insisted that they file corporate returns?

A. He did not say that.

Q. Didn't he tell you it was on Mr. Mooser's advice that they did it?

A. That is what he said.

Q. You confirmed that with Mr. Mooser, did you not? A. Yes.

Q. Did you, in any report which you filed to the Bureau, recommend that the corporate tax be refunded on the theory that this should be treated as a partnership rather than a corporation?

A. I didn't complete my case, didn't make rec-

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(Testimony of Sol Sanford Ezralow.)

ommendation as to the tax liability or overestimate.

Q. Did you make any statement in any of the reports which you left at the time you severed your connection with the Bureau, calling attention to that fact or that matter?

A. I have to review my papers before I could state.

Q. You don't recall having done it, is that right?

Mr. Campbell: I submit, if the Court please, the papers are the best evidence.

Q. Are they here?

A. Well, I think it is prosecution's Exhibits 155 and 156. [1769]

Q. I am handing you prosecution's Exhibit 155 for identification and would you refer to that and see whether it refreshes your recollection as to whether or not you made any recommendation that the corporate income tax be refunded?

Mr. Campbell: I submit that wasn't the question, if the Court please.

The Court: I don't think we ought to have a witness give an instrument not in evidence.

Mr. Avakian: I asked him whether it would refresh his recollection, your Honor, that is all I am asking.

A. At the time I wrote this report, at the time I worked on this case, I had a statement here that shows——

Mr. Avakian: Just a moment. Don't read from the statement. Just state whether or not it re-

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(Testimony of Sol Sanford Ezralow.)

freshes your recollection? A. Yes, it does.

Q. Will you tell us what your recollection is?

A. What is the question?

The Court: Read the question.

(Question read.)

Q. During the course of your investigation, or at the time you left the Bureau, did you make any report or any recommendation to the effect in substance that the corporate tax paid by the 186 Club should be refunded for the reason it was not a corporation?

A. I pointed out the duplication and also pointed out that [1770] some adjustment should be made because the duplication does exist in great detail. I have a whole paragraph on that.

Q. And do you know whether or not any such adjustment was ever made? A. No, I do not.

Q. Did you talk to any accountant other than Mr. Slater regarding the 186 Club?

A. I believe I talked to Mr. Byrne.

Q. And he was also a public accountant?

A. I think so.

Q. Both Mr. Slater and Mr. Byrne were what is referred to as outside accountants, isn't that correct, people in public accounting business?

A. I assume that they were.

Q. And they were public accountants who had been retained by the 186 Club in connection with the preparation of their tax returns and records?

A. I do not think Mr. Byrne prepared any tax return.

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(Testimony of Sol Sanford Ezralow.)

Q. He had just come into the case?

A. I think that is right.

Q. And he was the accountant who worked on the return for the next year?

A. That is the impression I had.

Q. But Mr. Slater had been retained in connection with returns that had been filed in the past? [1771] A. Right.

Q. You know, do you not, that Mr. Slater is now deceased?

A. I was told that yesterday, yes.

Q. Did you talk to any other public accountants in connection with the 186 Club?

A. Well, at the time I was working on the case there was an accountant that said he was considering handling it for the taxpayer and I talked to him for about 15 or 20 minutes. Never heard from him again; outside of that, I don't recall any other accountant.

Q. Is that Mr. Ayton?

A. No—I don't recall—Menckoff, I think he is with Arthur Anderson. I don't think he ever actually undertook the job, but he said he was considering it and he wanted to talk to me about the case. I didn't give him any information. I said when he showed me power of attorney, I would be happy to discuss it.

Q. And you heard nothing further?

A. Right.

Q. Still in connection with the 186 Club, I call

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(Testimony of Sol Sanford Ezralow.)

your attention to the following language on a sheet which is pasted to the corporation return for the year ending June 30, 1944, namely, prosecution's Exhibit 87A, reading as follows: "Mr. Mooser determined from an examination that he made of daily tally sheets that the daily average net take was $70. Mr. Mooser believes that this determination would cover the entire period up to [1772] June, 1944." Did that particular language come to your attention during the course of your examination? A. Yes.

Q. And did you discuss that matter with Mr. Mooser? A. I believe I did.

Q. And you learned, did you not, that Mr. Mooser had spent approximately a month in his examination of the 186 Club?

A. I wasn't aware at the time but I recall parts of the conversation.

Q. But you do recall that he spent quite a bit of time, do you not?

A. Yes, he said he spent some time just investigating how much attendance there was.

Q. And did he confirm to you the correctness of this statement that he had determined the daily average on the take of $70?

A. That was strictly an estimate on his part.

Q. But he confirmed to you that it was his estimate, did he not? A. That is right.

Q. So this statement in the return, so far as you are able to determine, was a correct statement,

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(Testimony of Sol Sanford Ezralow.)

that Mr. Mooser was the one who had made that determination of $70?

A. Yes, Mr. Mooser made that determination.

Q. Do you know whether Mr. Mooser is still employed by the Bureau of Internal Revenue?

A. No. [1773]

Q. What was your answer?

A. I do not know.

Q. Have you not learned in conversations with the prosecution's staff, while you have been here in Carson City, that he is still a deputy collector in San Francisco?

A. I never discussed it.

Q. Now with respect to the Day-Night Cigar Store, can you tell us with whom you discussed the affairs and records of that business during the course of your examination, with what particular individuals?

A. I spoke to Mr. Slater, I spoke to Mr. Kyne, and I spoke to Mr. Maundrell.

Q. Mr. Slater is the same Mr. Slater that you mentioned a moment ago, the public accountant?

A. Yes.

Q. And Mr. Slater had prepared the income tax returns of that business which you were examining, is that correct?

A. I do not recall whether or not he prepared it.

Q. I call your attention to prosecution's Exhibit No. 84, which is the partnership return of the Day-Night Cigar Store for the year 1944, and ask you

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(Testimony of Sol Sanford Ezralow.)

whether that was a return which was assigned to you in the course of your investigation?

A. Yes, this was assigned to me.

Q. And on the back page of that return it says, does it not, that Mr. Slater was the man who prepared it? [1774] A. Yes.

Q. Does that refresh your recollection on that point? A. Yes.

Q. And you had your discussions regarding that business with Mr. Slater, Mr. Maundrell and Mr. Kyne only? A. Yes.

Q. And did they show you any records in connection with that business? A. Yes.

Q. I show you prosecution's Exhibit 117, which is a ledger of the Day-Night Cigar Store, and ask you whether that is one of the records that was showed to you in connection with your investigation? A. Yes, I believe I got this book.

Q. And that covers the period up to the end of 1945, does it not? A. Appears to be.

Q. And you examined that book in connection with your work? A. Yes.

Q. Would you turn to the page which I have marked with a small slip of paper, setting forth the capital account of Sylvan Lando. Have you found that? A. Yes.

Q. And do you find there that Mr. Lando's share of the profits for the years 1943 and 1944 was credited to his account? [1775] A. Yes.

Q. Mr. Ezralow, in reporting income from a partnership, is it proper for the individual partner

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to report on his individual tax return his share of the partnership profit or the amount of money that he actually happens to draw out during the year of the partnership?

A. His share of the partnership profits.

Q. The amount he draws is immaterial in determining the amount of money that he should put into his individual return as income from that partnership, is that correct? A. Correct.

Q. Now when a partner is a member of a partnership, which has a particular amount of profit for the year, is it proper accounting to credit the amount of his share of the profits to his capital account? A. Yes.

Q. And is it also proper accounting to charge his account or subtract from his account any withdrawals that he happens to make during the year?

A. Yes.

Q. And does the balance which remains in his account after he has been given credit for his share of the profit and after the amount of his withdrawals have been subtracted represent his equity in the business? A. Yes. [1776]

Q. And so then, if a partner does not withdraw his full share of the profits from the business, then the amount that he does not withdraw represents an increase in his equity in the business?

A. His profit and increase since the beginning of the year, due to the profit and no withdrawals, is the amount it is increased.

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(Testimony of Sol Sanford Ezralow.)

Q. The amount of profits he has not withdrawn represents equity in the business?

A. In the partnership, yes, sir.

Q. If a partner happens to withdraw in a particular year more than his share of the profits, the excess that he withdraws over and above his share of the profit for that year represents a decrease of his equity in the business, does it not?

A. Yes.

Mr. Campbell: Objected to as assuming facts not in evidence. Most of these matters are matters of law.

The Court: Well, he can answer this question.

A. Yes.

Q. In your private accounting practice, since you left the Bureau of Internal Revenue, have you had accounts dealing with partnerships?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Let me ask you this—is it proper accounting to credit a [1777] partner in his capital account with the amount of investment which he originally makes to the business?

Mr. Campbell: Objected to as incompetent, calling for opinion and conclusion of the witness.

The Court: I would ordinarily sustain such an objection but it seems to me we have had so much of it here without objection, the objection is overruled. You may answer the question.

A. Yes.

Q. And, Mr. Ezralow, if one of the partners

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(Testimony of Sol Sanford Ezralow.)

makes a larger investment in the business than another partner does, is it not frequently and commonly the case that the partners will, through the years, balance their capital accounts by the one who made the larger investment making heavier withdrawals until their capital accounts reach the desired proportion?

Mr. Campbell: Objected to as assuming facts not in evidence; incomprehensive and incompetent.

The Court: Objection sustained.

Mr. Avakian: On the grounds assuming facts not in evidence.

The Court: On the grounds it is asking for opinion and conclusion of this witness on matters of law.

Mr. Avakian: This is a matter of accounting practice, your Honor, and this man is also here as a former revenue agent and certified public accountant, and the question relates directly [1778] to one of the issues in this case. They are charging fraud and wouldn't it be proper to show that the practice they charge is fraudulent is common accounting practice?

The Court: I am not answering your questions, but I am going to let the ruling stand.

Q. Now among the businesses which I believe you stated you inquired into in the course of your examination is the 110 Eddy Street, is that correct?

A. Yes.

Q. And in connection with that examination you were shown certain records, were you not?

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(Testimony of Sol Sanford Ezralow.)

A. Yes.

Q. I show you prosecution's Exhibit 112, which is a ledger of the business known as 110 Eddy for the period up to the end of 1945, and ask you if that is one of the books which you were shown?

A. I believe it is.

Q. I call your attention to a particular sheet in this exhibit entitled "Frank Cavani," and I will ask you to examine that. Can you tell us whether or not you examined that particular page in connection with your examination?

A. It is pretty hard to recall the specific sheet out of 200 sheets.

Q. That is the capital account of Mr. Cavani, is it not? A. Yes. [1779]

Q. What is your best recollection as to whether or not you examined the capital accounts of the partners? A. I believe I saw this.

Q. And on that page there are entered, are there not, Mr. Cavani's shares of the partnership profit for the years indicated in the book?

Mr. Campbell: Objected to calling for his conclusion as to the fact that they were shares of Mr. Cavani's profit.

The Court: Let me have the question.

(Question read.)

The Court: Objection overruled. Answer the question.

A. There are entries here marked one-fourth net profit.

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(Testimony of Sol Sanford Ezralow.)

Q. And those amounts are the same as the amount of profit allocated to Mr. Cavani on the income tax return for the same year for 110 Eddy, is that correct? A. I would have to see the return.

Q. Now I will read to you from prosecution's Exhibit 81, the 110 Eddy Street partnership return of income for the year 1944, the data in Schedule I shows as a distributive share of F. Cavani $3,-170.30. Is that amount entered in the book before you as a credit to his capital account?

A. Yes.

Q. And Mr. Ezralow, if the figure which I read to you from the partnership return is correct, then was that the proper amount to enter in the capital account? [1780]

Mr. Campbell: Objected to as calling for his conclusion. The records speak for themselves.

The Court: Objection sustained.

Q. I believe you already testified, did you not, that the share of a partner's income in a partnership should be credited to his account in the books of the partnership?

Mr. Campbell: Objected to on the grounds the record speaks for itself.

The Court: He may answer this question.

A. Yes.

Q. Now is there an entry in that book as reflecting the share of the profit for the year 1945?

Mr. Campbell: Objected to as calling for his conclusion as to what it reflects. The entry speaks for itself.

POOR COPY

(Testimony of Sol Sanford Ezralow.)

The Court: Well, the objection will be overruled.

Q. Or is that in the next book?

A. Answering your question, no.

Q. It is not in the book, is that right?

A. It is not on this page.

(Jurors and alternate jurors admonished and short recess taken at 11:00 o'clock.)

11:05 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. EZRALOW

resumes the witness stand on further [1781]

Cross-Examination

By Mr. Avakian:

Q. I believe you stated in the 1945 book you did not find any entry relating to the crediting of the share of the 1945 profit? A. Yes.

Q. I hand you prosecution's Exhibit 82, which is the 110 Eddy Street partnership return of income for the year 1945, and first of all would you find in Schedule I the amount of the partnership profit which is allocated to Frank Cavani. Let me know when you have found that. A. Yes.

Q. Now from prosecution's Exhibit 112A, which is the 1946 return for the 110 Eddy Street, I am going to read to you the entry dated January 1,

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(Testimony of Sol Sanford Ezralow.)

1946, reading as follows: "Frank Cavani Balance 1945, $3582.18, one-fourth credit $5532.50." Is that the same amount that is entered on the 1945 partnership return as to Mr. Cavani's share of the profit for that year? A. Yes.

Q. And is it frequently the case that in partnership capital accounts the share of a partner's profit for a particular year is not entered in the books until the early part of the next year?

A. Yes.

Q. Referring again to the exhibit before you, which I believe is 82, is it? A. Yes. [1782]

Q. The 1945 partnership return of income. Will you state who is shown on that return as the person who prepared it? A. Harold Maundrell.

Q. And did you discuss the affairs of the 110 Eddy Club with Mr. Maundrell? A. Yes.

Q. As well as with the other gentlemen?

A. Yes.

Q. And so far as you know, did Mr. Maundrell and Mr. Slater and any one else whom you talked to in connection with the 110 Eddy turn over to you all of the records of the businesses?

A. Turned over the journals and the general ledger.

Q. Were there other records there of the businesses? A. That is all I asked for.

Q. Were there bank statements?

A. I do not know.

Q. Did you ask for bank statements?

A. No.

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(Testimony of Sol Sanford Ezralow.)

Q. Were there cancelled checks?

A. I do not know.

Q. You didn't ask for them? A. No.

Q. The things you asked for you got, is that right? A. Right.

Q. Now in connection with the B. & R. Smoke Shoppe, I believe [1783] you testified that Mr. Kyne showed you a list of cashier's checks, which is in evidence here. I show you prosecution's Exhibit 116, which contains a number of pages, listing cashier's checks. You testified, did you not, that Mr. Kyne turned that over to you? A. Yes.

Q. And it is a fact, is it not, Mr. Ezralow, that Mr. Kyne had that list of cashier's checks prepared for him by the bank at your request?

A. I don't know that to be a fact.

Q. Well, let me reframe the question. It is a fact, is it not, that after you asked him for a list of cashier's checks, he then had a list prepared and turned it over to you?

A. He turned this list over to me. I don't know if he had it prepared.

Q. Did he turn it over to you on the very same day you asked for it or at some later time?

A. No, at a later date, about a week later.

Q. And he didn't make any objection, did he, to obtaining that list of cashier's checks for you?

A. No.

Q. Now in connection with the B. & R. Smoke Shoppe, you investigated the years 1942 through 1945, is that correct?

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(Testimony of Sol Sanford Ezralow.)

A. I believe that is correct.

Q. We do not have in evidence here any return for the year 1945 [1784] for the B. & R. Smoke Shoppe and I believe the testimony is that no return was found for that year and no return has been offered for the year 1942 either, but we do have in evidence prosecution's Exhibit 77, B. & R. partnership return for the year 1943 and Exhibit 78 for the year 1944. Were those two returns assigned to you for examination in connection with this matter? A. Yes.

Q. And you were shown diaries for the years 1943 and 1944, were you not? A. Yes.

Q. Mr. Kyne gave those to you? A. Yes.

Q. Diaries containing the amount of winnings or losses on a daily basis? A. Yes.

Q. And you were shown a similar diary for the year 1942, is that correct? A. I believe so.

Q. You heard the testimony yesterday, did you not, that some time after you left the Bureau the other people who were working on this case misplaced or lost the 1944 diary?

Mr. Campbell: Objected to. The record speaks for itself.

The Court: Objection overruled. He may answer.

Q. You heard that testimony, did you not? [1785] A. Yes.

Q. I will you show you prosecution's Exhibit 111, the diary for 1942 and 111A, which is the diary

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(Testimony of Sol Sanford Ezralow.)

for 1943, and ask you whether those were the two diaries that were showed to you?

A. I believe they were.

Q. And did you, in the course of your investigation, total the receipts shown in those two books and compare them with the amount of income shown on the partnership returns for those two years? A. I believe I did.

Q. Would you refer to the 1943 return, which is before you—I believe it is Exhibit 77—have you found that? A. Yes.

Q. Exhibit 77, the 1943 return shows a net income for the partnership of 8 thousand dollars even, does it not? A. Yes.

Q. And in totalling the receipts shown in the 1943 diary you found, did you not, that the total of the receipts shown was an amount in dollars and cents slightly below eight thousand, isn't that correct? A. I don't recall the totals now.

Q. Don't you recall that the total of the receipts in 1943, that is, total of net wins shown in the 1943 diary, was the amount of $7,796.15; or did you have any work papers to which you could refer to give us the answer to that? [1786]

A. I don't think I have any work papers on it. I don't recall. I believe I totalled it at the time. As to whether or not they were substantially the same as on the return or a great difference, I don't recall.

Q. Let me see if this refreshes your recollection. Do you recall, Mr. Ezralow, that the returns of the

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(Testimony of Sol Sanford Ezralow.)

B. & R. Smoke Shoppe for each of the years that you investigated contained as net income a figure in a larger amount rather than exact dollars and cents figure? A. Right.

Q. And do you recall also that, with the exception of the diary for the year 1944, the net wins and losses shown in the diary came to a total figure slightly under the round amount shown in the return?

A. Well, I do recall one year of discrepancy which you mentioned, 1944. As to the other years, I have no recollection.

Q. In comparing the diary with the returns, you found nothing to question as to the other years in question, is that what you are saying?

A. I don't know. I don't recall any large discrepancy for every year.

Q. Did you find in the papers upstairs in Mr. Campbell's office work sheets or summaries to which you can refer over the noon recess to refresh your recollection?

A. There is nothing contained in my papers regarding that. [1787]

Q. I believe that you stated that after you found that total of wins and losses in the 1944 diary was in excess of the amount shown on the 1944 return, you discussed that matter with Mr. Kyne?

A. Yes, I did.

Q. Didn't Mr. Kyne tell you at that time that the B. & R. Smoke Shoppe returns had been prepared on the basis of rounding off the total of net

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(Testimony of Sol Sanford Ezralow.)

wins and losses upward to the next round figure in preparing the returns? A. I don't recall that.

Q. You testified, I believe, that the net wins and losses shown in the 1944 diary came to within $10 of the figure obtained by Mr. Harkness, $11,834.85? A. Right.

Q. Actually, an eight dollar difference between you and Mr. Harkness?

A. Within ten dollars.

Q. I show you prosecution's Exhibit 157, which Mr. Harkness testified was the summary that he made of the 1944 diary before it was lost, showing total net wins and losses of $11,834.85. I call your attention to the B. & R. Smoke Shoppe amended return for the year 1944, showing net income in round amount of 12 thousand dollars. Does that refresh your recollection that the practice of the B. & R. Smoke Shoppe for the years you were investigating was to put on the returns a round figure slightly [1788] in excess of the actual figure shown in the diary?

A. This return was filed after I left and at that time I do not recall any recollection about rounded figures. The return was filed a year after I left.

Q. Isn't it your recollection the 1942 return likewise contained a rounded-off figure?

A. A 1942 return was not filed, as I recall.

Q. Do you have records which would show that?

A. My recollection is I never saw a 1942 return.

Q. Were you investigating 1942?

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(Testimony of Sol Sanford Ezralow.)

A. Yes, I was. The first return I have, I believe, for the B. & R. Smoke shoppe was 1943.

Q. Now let us see if this will refresh your recollection. You stated after going through these diaries for 1942, 1943 and 1944, the only diary you recall as raising any question in your mind was the 1944 diary?

Mr. Campbell: I do not believe that is the testimony.

The Court: I do not recollect it.

Mr. Avakian: My question is whether he found any discrepancies in other returns.

A. My recollection——

Mr. Campbell: The question is as to what raised any question in his mind. It is entirely different as to testimony as to discrepancies between income tax return and the diary.

The Court: I will sustain the objection. [1789]

Q. Well, in your examination of the diaries for the years 1942, 1943 and 1944, was the diary for 1944 the only one in which you found some reason to question a return that had been filed?

A. When I compared the return—if it was available—with the diary and there was a discrepancy, I called Mr. Kyne's attention to it. In the case of 1942, there was no return so I can not if there was a discrepancy.

Mr. Campbell: I do not think he answered the question. May the question be read to the witness again?

The Court: Let us have the question.

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(Testimony of Sol Sanford Ezralow.)

(Question read.)

A. No.

Q. Did you discuss with Mr. Kyne the matter of whether or not a 1942 return had been filed?

A. I believe I did.

Q. Would your work sheets show that a 1942 return had not been filed, if that were the case?

A. Probably not.

Q. You mean to say if you found no return had been filed, you would make no reference to that in your work sheets?

A. My work sheets were not on a completed case and although I covered many things, I did not make a special point mentioning returns I did not have. At the time I left the case, I did not feel as though I had done all the field work and therefore did not attempt to mention all the things that were not [1790]

Q. The failure to file a return, in an investigation, is an important matter, is it not?

A. It certainly is.

Q. Wouldn't you then have made a comment if that was the case?

Mr. Campbell: Objected to as argumentative.

The Court: It is argumentative.

Q. Are you prepared to say now that there was no return filed for 1942?

Mr. Campbell: Objected to as argumentative and incompetent as to what he is prepared to say and not prepared to say.

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(Testimony of Sol Sanford Ezralow.)

The Court: Objection sustained.

Mr. Avakian: I will change the form of the question.

Q. Is it your testimony now that the B. & R. Smoke Shoppe did not file a 1942 return?

A. I don't know.

Q. Do you have before you the original 1944 return of the B. &. R. Smoke Shoppe?

A. Yes.

Q. And what is that exhibit number?

A. Plaintiff's 78.

Q. Now whereas the amended return showed a net income of 12 thousand dollars, that one shows a net income of 12 hundred, does it not?

A. The one filed in 1947?

Q. The amended return shows 12 thousand, does it not? A. It appears to be that. [1791]

Q. Any doubt of it?

The Court: What is the exhibit number of that amended return?

Mr. Avakian: Defendant's "O."

Q. You have no difficulty reading the figures, have you? A. No.

Q. Twelve thousand, is it not? A. Yes.

Q. The original return was 12 hundred, is it not?

A. Yes.

Q. When you discussed with Mr. Kyne the fact that the 1944 original return showed an income of 1200, whereas the totalling in the diaries showed $11,834.85, did he make any statement to you as to how that might have occurred?

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(Testimony of Sol Sanford Ezralow.)

Mr. Campbell: Objected to as calling for hearsay.

The Court: Objection sustained.

Q. You did discuss the matter with Mr. Kyne, did you not? A. Yes.

Q. Did Mr. Kyne tell you that the 1944 original return——

Mr. Campbell: Just a minute—I am going to object.

The Court: I have already sustained the objection on the rule of hearsay and this question can call for nothing but hearsay.

Mr. Avakian: Well, you haven't heard the question.

The Court: I have heard enough of it. [1792]

Q. The original 1944 return, which is plaintiff's Exhibit 78, that is before you, is it not?

A. Yes.

Q. And that is signed by William E. Kyne?

A. Yes.

Q. And the signature of the person that prepared the return is A. B. Slater? A. Yes.

Q. And what is the date shown after Mr. Kyne's signature? A. 2-10-45.

Q. And what is the date on the face of the return as the filing date?

A. February 14, 1945.

Q. And you knew, did you not, that Mr. Kyne had entered the service on February 14, 1945?

A. I didn't know that.

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(Testimony of Sol Sanford Ezralow.)

Q. Do you know that this return had been prepared just before Mr. Kyne went into service?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question.

A. I didn't know that.

Q. Did you learn that at any later time?

A. No.

Q. Mr. Ezralow, do you recall the occasion on which Mr. Kyne turned over to you the diaries of 1942, 1943, and 1944? [1793]

A. You mean the date?

Q. No, I do not mean the date. I mean do you recall the occasion on which he did turn them over to you? Did he turn them all over to you at the same time? A. I do not recall.

Q. You do not recall one way or another?

A. No, I have no exact recollection whether I got them all at once or separately.

Q. Do you recall whether you had any difficulty in getting any of those diaries?

A. No, I recall that I did not have difficulty in obtaining them.

Q. He turned all three of them over to you when you asked for them, is that correct?

A. Well, I don't recall whether all at once or separately.

Q. But when you did ask for them, whether on one occasion or more, you received them?

A. That is correct.

Q. And that applies to the 1944 diary as well as to the others? A. Yes.

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(Testimony of Sol Sanford Ezralow.)

Mr. Avakian: Your Honor, we would like to present to your Honor our belief that the law permits hearsay on cross-examination on a point that has been covered on direct and we would be glad to go into that and explain that to you and submit authorities, if you want, and for that purpose I would request [1794] an opportunity to be heard on the matter before this witness is excused.

The Court: Well, the ruling will stand on hearsay.

Mr. Avakian: Even though it is cross-examination covered on direct?

The Court: Unless the conversation was opened up on direct. If it was, you could pursue it on cross and vice versa, if you opened up conversation on cross they may pursue it on redirect, but under no other circumstances.

Mr. Avakian: We believe when a witness——

The Court (Interceding): I will not change that ruling. I am not going to take time to hear argument.

Mr. Avakian: You won't take time to hear argument?

The Court: No.

Mr. Avakian: I think that is all of this witness.

Redirect Examination

By Mr. Campbell:

Q. Mr. Ezralow, counsel asked you during cross-examination if you had, at the time that you ter-

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(Testimony of Sol Sanford Ezralow.)

minated your service, prepared a partial report and inquired of you as to certain contents of that report, particularly with relation to the 186 Club.

Mr. Avakian: Your Honor, that is not true.

The Court: Let us have the question.

(Question read.) [1795]

Mr. Avakian: He simply refreshed his recollection by looking at it.

The Court: Answer the question.

A. Is that a question?

Q. I call your attention to the testimony. I am showing you plaintiff's Exhibit 155 for identification, and ask you if that is the report to which you referred? A. Yes.

Q. And is that the report which you examined for the purpose of answering Mr. Avakian's question with relation to what you reported for the 186 Club and filing of both partnership and corporation returns? A. Yes.

Mr. Campbell: I offer this in evidence.

Mr. Avakian: May I ask on voir dire?

The Court: Yes.

Q. (By Mr. Avakian): You simply referred to that for the purpose of refreshing your recollection?

Mr. Campbell: Objected to—it speaks for itself.

Mr. Avakian: Let us have the record read.

The Court: We will not take the time.

Q. Was this report ever delivered to Mr. Remmer? A. No.

Q. Was it delivered to any representative of any

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(Testimony of Sol Sanford Ezralow.)

of the businesses which you investigated? [1796]

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

A. No.

Q. That was simply a report for your own superiors in the Bureau, isn't that right?

A. Yes.

Mr. Avakian: No proper basis, your Honor, for receiving that in evidence.

The Court: The exhibit will not be admitted.

Mr. Campbell: May I suggest one point, your Honor; that is counsel asked him specifically what he had reported to his superiors and if he had reported in a written form with relation to the 186 Club. He then said he would have to refresh his recollection and submitted his document and I submit the document is the best evidence.

The Court: The ruling will stand. The exhibit will not be admitted.

Q. (By Mr. Campbell): Now counsel asked you that question in substance as follows—that in your examination of the B. & R. Smoke Shoppe of the diaries for the years 1942, 1943 and 1944 and such partnership returns as you saw, namely, those of 1943 and 1944, if the year 1944 was the only year you questioned and your answer was no.

Mr. Avakian: May we have that read?

Q. I will ask you, Mr. Ezralow, if you questioned other years [1797] than 1944?

Mr. Avakian: May I have the entire statement and question read?

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(Testimony of Sol Sanford Ezralow.)

(Question read.)

Mr. Avakian: The question I asked him was rather in comparison of his diaries——

The Court: Have you an objection?

Mr. Avakian: My objection is based on the ground the statement is not correct.

The Court: Objection overruled.

Mr. Avakian: May we have the record read on that question?

The Court: No, let us get along.

A. Yes.

Q. What other years did you question?

A. Questioned all the years.

Q. You were asked whether or not you had discussions with Mr. Kyne during your examination of the B. &. R. Smoke Shoppe. Did those discussions embrace the question of all of the years you had under investigation for the B. &. R. Smoke Shoppe? A. Yes.

Q. Will you state first over what period of time those discussions took place?

A. The period of time that they related to, or the time that they took place? [1798]

Q. The time that the discussions took place?

A. Took place during the year 1946 before I left the Bureau.

Q. And was there more than one such discussion? A. Yes, there were several.

Q. That was after Mr. Kyne's return from the the service? A. Yes.

POOR COPY

(Testimony of Sol Sanford Ezralow.)

Q. Where did they take place?

A. 50 Mason Street.

Q. Who else, if any one, was present in addition to yourself and Mr. Kyne?

A. Mr. Maundrell.

Q. Now will you relate the discussions you had with reference to the B. & R. Smoke Shoppe returns for the years which you had under investigation?

Mr. Avakian: Objected to as hearsay. Mr. Campbell objected to my asking——

The Court: Objection sustained.

(Jury and alternate jurors admonished and noon recess taken at 11:50 a.m.)

January 8, 1952, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. EZRALOW

resumed the witness stand on further

Redirect Examination

By Mr. Campbell: [1799]

Q. Now, Mr. Ezralow, on cross-examination you were shown plaintiff's Exhibit 112, a ledger of the 110 Eddy Street, and were referred specifically to a page thereof which has a heading, "Frank Ca-

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(Testimony of Sol Sanford Ezralow.)

vani," and which you identified, or was identified, as being the capital account of Frank Cavani?

A. Correct.

Q. Now you were also asked by Mr. Avakian relative to the accounting procedure, proper accounting procedures, in a partnership of crediting to a capital account the profits for any particular year. Do you recall that? A. Yes.

Q. Now, Mr. Ezralow, were you in the court room when Mr. Cavani testified concerning his arrangement with Mr. Remmer, wherein the value of the interest to be acquired by him, the price was placed at $15,000, which amount was to be received by Mr. Remmer out of the profits before he obtained his partnership? Do you recall that testimony? A. Yes.

Q. Now if those facts as testified by Mr. Cavani are the correct facts, what would then be the proper accounting procedure with reference to that account to which your attention has been directed?

A. Well, if Mr. Remmer was to get 15 thousand dollars before Mr. Cavani was to participate in the profit, there should be no——

Mr. Avakian: Just a moment—he has changed the facts of [1800] hypothetical question and Mr. Cavani's testimony, which was he was to get a quarter interest for 15 thousand dollars, to be paid for out of the share of profits, and I do not believe Mr. Ezralow either correctly understood the testimony or the question.

The Court: Let me hear the question.

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(Testimony of Sol Sanford Ezralow.)

(Last two questions read.)

The Court: Strike out the answer so far given and begin the answer again.

A. Well, if 15 thousand dollars—my understanding of the testimony was that the price was 15 thousand dollars Mr. Cavani was supposed to pay—then there should be a credit to begin with, Mr. Cavani's account of 15 thousand dollars, showing that this is his equity in the partnership. On the other hand, if I understand another interpretation that occurs to me, and if this second interpretation is that Mr. Cavani is supposed to start participating in the profits when Mr. Remmer gets 15 thousand dollars, then there should be no entry in the capital account, to my knowledge of accounting, until such time as that contingency is met.

Q. By contingency do you refer to the receipt by Mr. Remmer of the 15 thousand dollars for that interest?

A. Yes. In either case, it seems to me, that this ledger account is incorrect.

Mr. Campbell: I think that is all. [1801]

Recross-Examination

By Mr. Avakian:

Q. Mr. Ezralow, if the arrangement between Mr. Remmer and Mr. Cavani were that Mr. Cavani was to receive immediately a 25 per cent working interest in the profits and that he was going to leave his share of the profits in the business until it

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(Testimony of Sol Sanford Ezralow.)

accumulated—that is, the accumulated profits—reached the figure of 15 thousand dollars, at which time he was to become a one-fourth owner of the assets of the business, what would be the proper accounting entries to make with respect to Mr. Cavani's share of the profits?

A. Well, it seems to me if he has a one-fourth interest which is to be paid for out of the profits that accumulate in his account, it seems to me the record should indicate that at such time as there is an understanding that he has a liability for 15 thousand dollars, that an entry should be made indicating that he has a 15 thousand dollar capital account. Now the payment of this, adjustment should be made as the payment is made for it and I do not see any figure in here indicating the 15 thousand dollars interest that he has. Whether or not it is paid for, I do not think should be a part of the partnership records, but the fact he has a 15 thousand dollar interest should appear on the partnership records. The accumulation of profits, it seems to me, relates only to the terms of payment and not to what his equity is or what his interest is.

Q. If the arrangement were as I stated in my question—do you [1802] recall that or would you like to have me repeat it? A. Repeat it.

Q. If the arrangement were that Mr. Cavani was to have immediately a 25 per cent interest in the profits and that he was going to use those profits to purchase or to pay for his one-fourth interest in the business, would it not then be proper ac-

POOR COPY

(Testimony of Sol Sanford Ezralow.)

counting to credit his account on the partnership books with his share of the profits for each year?

A. Yes.

Q. And that is what was done in the book that you have before you, is that not right? Answer that yes or no. Do you find the entry, or would you like to have me point it out to you?

A. I see the entry.

Q. You see the entry. Your answer was yes then?

The Court: He hasn't answered yet.

A. This account does not reflect my understanding. This account indicates that one-fourth of the profits were credited to the Frank Cavani account.

Q. That was my question—the account shows that, does it not?

A. Yes, it shows that one-fourth of the profits were credited.

Q. Mr. Campbell asked you about what the proper accounting procedure would be—let me ask you, in your experience as a certified public accountant, have you had any contact with partnership businesses in which one partner put up a larger proportion of the capital investment than his share of the profits? [1803]

Mr. Campbell: Objected to as immaterial.

Mr. Avakian: Your Honor, it goes directly to the redirect examination.

The Court: Objection overruled. You may answer the question.

A. Yes.

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(Testimony of Sol Sanford Ezralow.)

Q. And then the other partner correspondingly had initially put up less an investment of his proportionate interest, to complete the picture?

A. I have seen that happen.

Q. Have you come in contact with situations of that nature, where through the amounts of their withdrawals the partners balanced their capital accounts?

A. I have seen that happen sometimes.

Q. Now isn't that done, Mr. Ezralow, through this means—the partner who put up more than his share of the investment draws more than his share of the profits, whereas the partner who put up less than his share of the investment draws less than his share of the profits, until their capital accounts, which were initially disproportionate, had balanced?

Mr. Campbell: Objected to as immaterial, because it is not the situation in evidence here.

The Court: Objection overruled. Answer the question.

A. You asked me with relation to these records?

Q. I am asking you about situations you have run into in your [1804] experiences. Would you like to have the question read? A. Yes.

Mr. Avakian: May we have Mr. Campbell's remark on the situation stricken?

The Court: It was just an objection. It will stand. It was overruled.

(Question read.)

A. Yes.

Q. And that is not an unsual situation, is it?

POOR COPY

(Testimony of Sol Sanford Ezralow.)

A. No.

Q. Now this morning, Mr. Ezralow, I asked you if you recalled whether, in your examination of the B. & R. Smoke Shoppe diary for the year 1943, you found that the net wins and losses shown in that diary was slightly under the 8 thousand dollar figure shown in the return, do you recall my asking you that? A. Yes.

Q. And you stated that you did not remember. After coming off the stand at the noon recess, did you call to my attention that in the 1943 diary, which is in evidence here, which is prosecution's Exhibit 111A, that there was an adding machine tape? Do you call that to my attention?

A. Yes.

Q. Now I will hand you this exhibit, which contains that tape, and you recall that I asked you if the net wins and losses in this diary added up to the figure of $7,796.15. Would you read [1805] to me the total on that adding machine paper?

Mr. Campbell: I am going to object until the foundation is laid for the tape and offered in evidence.

Mr. Avakian: The tape is in evidence as part of the exhibit.

Mr. Campbell: I understand it was something found in the book.

Mr. Avakian: The book is in evidence.

Mr. Campbell: May I question on voir dire?

The Court: Yes.

BLEED THROUGH

(Testimony of Sol Sanford Ezralow.)

Q. (By Mr. Campbell): Is that permanently affixed to that record? A. The paper?

Q. There are other slips of paper, I notice, in there? A. Yes.

Q. I think your attention was called in examining the records of 110 Eddy Street by counsel to a slip of paper he had put in there, marking the account.

Mr. Avakian: Does counsel imply I inserted this?

Mr. Campbell: I am not implying anything.

The Court: Just a moment.

Q. Have you ever seen that adding machine tape before you were on the stand? A. No.

Mr. Campbell: I make my objection, the proper foundation [1806] be laid for the tape.

Mr. Avakian: I am only asking him to read the figure.

The Court: I don't understand the tape is in evidence.

Mr. Avakian: It is out of the book Mr. Campbell offered.

Mr. Gillen: Part of an exhibit of the prosecution's.

The Court: I do not understand that was part of the exhibit.

Mr. Campbell: If counsel states he has compared it with the record, I have no objection. I have no recollection of the adding machine tape.

Mr. Avakian: I will state Mr. Semenza totalled the receipts in the book and it is the same figure.

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(Testimony of Sol Sanford Ezralow.)

Mr. Campbell: I will accept that statement without asking the witness.

Q. Would you read that figure?

Mr. Campbell: I thought we had stipulated? The tape sets forth the same figure in the book?

Mr. Avakian: That is right.

Mr. Campbell: I have no objection, if you state that is the figure.

Q. What is that figure? A. $7,796.15.

Mr. Avakian: No further questions. [1807]

Redirect Examination

By Mr. Campbell:

Q. Mr. Ezralow, you were asked on recross-examination relative to the Cavani account in the books of 110 Eddy Street, Exhibit 112, which is before you, and Mr. Avakian asked you a hypothetical question. I will state it as best I can—assuming that Mr. Cavani was to pay for a one-fourth interest the amount of 15 thousand dollars out of the accumulated profits, he asked you if it was proper then to credit those to Mr. Cavani's account. Do you recall that? A. Yes, sir.

Q. Now would additional entries then—if such were the situation—would additional accounts be necessary to reflect any such situation in the books?

A. Yes.

Q. And what would they consist of?

A. They have to show actual transfer from the Cavani account to the Remmer account.

Q. In other words, as I take it, there would

BLEED THROUGH

(Testimony of Sol Sanford Ezralow.)

have to be something set up in the books to show that Mr. Remmer, or whoever was to receive it, was to receive 15 thousand dollars of that amount, is that correct? A. Yes.

Q. Did you find any such entry in those books?

A. I don't recall any.

Q. You don't recall seeing them? [1808]

A. No.

Mr. Campbell: That is all.

Recross-Examination

By Mr. Avakian:

Q. When you say additional accounts and entries should have been set up, you mean, do you not, that from the viewpoint of setting up a complete set of records that would satisfy a certified public accountant, those additional accounts should be set up, isn't that correct?

A. No. I mean it from the viewpoint of basic bookkeeping. This does not tell the complete story.

Q. Would the setting up of those additional entries, which you say are not in that book, make any difference in the amount of income which each partner should report?

Mr. Campbell: Objected to as calling for conclusion.

Mr. Avakian: That is calling for his answer as an expert accountant. I think it is proper.

The Court: Let us have the previous answer. I do not think he completed his answer.

POOR COPY

(Testimony of Sol Sanford Ezralow.)

(Answer read.)

The Court: Did you complete your answer?

A. Yes.

The Court: You may answer the question.

A. Yes.

Q. In what way?

A. My understanding of the agreement, to be properly reflected [1809] on these records—it may be my understanding is incorrect——

Mr. Avakian: Let me restate——

The Court: I don't know how we are going to get along if you keep interrupting the witness.

Mr. Avakian: He is stating his own understanding.

The Court: Let us have the question.

(Question read.)

A. Yes.

Q. In what way?

A. Frank Cavani should not report any income.

Q. Even though he is a partner?

A. He is not a partner until such time as Mr. Remmer gets his 15 thousand dollars.

Q. Let me restate again the basis for this question. If Mr. Cavani's arrangement with Mr. Remmer is that Mr. Cavani is to become immediately a partner, sharing in the profits of the business, and that in view of the fact that Mr. Remmer has put up the investment and Mr. Cavani has not put up any investment, Mr. Cavani is to pay for his interest

BLEED THROUGH

(Testimony of Sol Sanford Ezralow.)

in the business out of his profits, by leaving them in the business, would it make any difference on the amount of profit that each partner should report in his tax return, whether the 15 thousand dollar indebtedness from Mr. Cavani to Mr. Remmer is set up in the books or not?

Mr. Campbell: Objected to as assuming facts not in evidence. [1810]

(Question read.)

The Court: I don't understand that is the situation here.

Mr. Avakian: That is Mr. Cavani's testimony. He became a partner in the business and he was to pay for his one-fourth interest out of the profits at a figure of 15 thousand dollars.

The Court: Objection sustained.

Mr. Avakian: May we read Mr. Cavani's testimony to your Honor then? That is his testimony.

The Court: De we have to stop and read that record now?

Mr. Avakian: I think we can find it in just a moment.

The Court: My recollection of it is that he was to get a one-fourth interest for 15 thousand dollars.

Mr. Avakian: He was to become immediately the owner of a working interest in the profits and he was to acquire interest in the assets of the business for 15 thousand dollars when he built that up out of his profits. It is the same sort of arrangement as the agreement that is in writing with Mr.

POOR COPY

(Testimony of Sol Sanford Ezralow.)

Kyne, same sort of arrangement, your Honor. From page 1658 from the transcript, which is part of Mr. Campbell's direct examination of Mr. Cavani, there is this testimony. The question is relating to 110 Eddy:

"Q. After you took over the active management of [1811] the place, what arrangement did you have for compensation?

"A. Well, Mr. Remmer gave me the same compensation he was giving me at the 21 Club in El Cerrito.

"Q. What was the proposition he gave you?

"A. I was to get 25 per cent of the business.

"Q. You say you were to get?

"A. Yes, sir.

"Q. Will you explain what you mean by that?

"A. Well, that is what he told me, I was going to get 25 per cent of the business.

"Q. When were you given that?

"A. As soon as I went to work, as soon as I took charge of 110 Eddy, right around May of that year.

"Q. Did you have any written agreement of any kind? A. No, not at all.

"Q. Will you state whether or not that was to be 25 per cent of the profits or 25 per cent of the assets of the business?

"A. The whole thing."

Now I submit that this is testimony that he had a 25 per cent in the profits of this business from the time he went in in 1943.

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(Testimony of Sol Sanford Ezralow.)

The Court: You mean to say that he was to share the profits regardless of whether or not the 15 thousand [1812] had been paid?

Mr. Avakian: The whole agreement was that he was to pay 15 thousand dollars and he was to become immediately a partner; in other words, he was given credit for the 15 thousand dollars which he was going to pay later on, but his testimony is he immediately became a partner in the place. Now my question to this witness is that if he immediately became a partner to the extent of 25 per cent interest, then would it make any difference in taxing the profits of that partnership whether his 15 thousand dollar liability was set up in the books or not. That is my question.

The Court: But the evidence is he wouldn't be a partner until the 15 thousand dollars was paid.

Mr. Avakian: I just read it, your Honor. He said he was to get it immediately—"As soon as I went to work, as soon as I took charge of 110 Eddy, right around May of that year."

Mr. Campbell: May I see the transcript?

The Court: Yes.

Mr. Campbell: Now, if the Court please, the portion read is on its face the proposition made to Mr. Cavani. He testified the proposition was made to him by Mr. Remmer. Further along in his testimony as to what actually took place, reading from page 1666:

"Q. Mr. Cavani, did you pay anything, inci-

POOR COPY

(Testimony of Sol Sanford Ezralow.)

dentally, with regard to acquiring your 25 per cent interest [1813] in the 110 Eddy Club?

"A. No, not a cent.

"Q. Will you state whether or not you had any arrangements with any one whereby your share of profits was accumulated for that purpose?

"A. That is right.

"Q. With whom did you have that arrangement?

"A. Mr. Remmer.

"Q. What was the amount of interest that was to be accumulated for your 25 per cent interest?

"A. My part of the payment was fifteen thousand.

"Q. For the 25 per cent interest?

"A. Yes, sir.

"Q. And what were your arrangements as to how that fifteen thousand was to be paid?

"A. Well, took it out of the profits as we go along.

"Q. Now do you know how much of that had accumulated by the end of the year 1946?

"A. Their record should be in the book.

"Q. What is your recollection?

"A. I don't know. I couldn't answer that because the bookkeeper took care of all the financial end."

Now this from page 1668 and recess was taken at that time until Monday morning:

"Q. Mr. Cavani, before the recess on Thursday you [1814] were testifying concerning the 110 Eddy Street bar and I believe you stated that you had

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(Testimony of Sol Sanford Ezralow.)

some interest in that establishment, is that correct?

"A. That is correct.

"Q. What was the extent of your interest?

"A. Twenty-five per cent.

"Q. And when did, or when were you to receive that 25 per cent interest?

"A. Well, when my part was paid.

"Q. How much was to be paid for your part?

"A. Fifteen thousand dollars."

Mr. Avakian: That is exactly it, your Honor.

Mr. Campbell: Now the first part of the testimony which Mr. Avakian read was relative to the proposition that was made to him. The questions and answers which I have read is with reference to what the arrangement actually was, which was that was to be acquired by payment of the 15 thousand dollars, that he was to get his 25 per cent interest when it was paid, and I submit the record, your Honor.

Mr. Avakian: Now, your Honor, the first statement that Mr. Campbell read was a direct statement by Mr. Cavani that he was to pay the 15 thousand dollars out of his share of the profits. Now we have here the same agreement that we had in the Menlo Club that your Honor ruled on before, a partner who puts up investment has arrangement with a partner who does not [1815 put up an investment to share the profits immediately, and the new partner would use his share of the profits to pay for the interest in the assets which he is acquiring.

POOR COPY

(Testimony of Sol Sanford Ezralow.)

We have here an interest in the profits immediately to be paid as they go along for interest in the assets of the business. Now Mr. Cavani's statement that I read and Mr. Cavani's statement that Mr. Campbell read in the first portion of the testimony both show that the arrangement was that Mr. Cavani immediately got one-fourth interest in the profits, that one-fourth interest was entered in the books as they went along. Now my question to this witness is that if that is the arrangement between the parties, there is to be an immediate sharing of profits to the extent of 25 per cent, did Mr. Cavani, with that 25 per cent immediately, to be used as a means of paying for his interest in the business, does it make any difference in the amount of income that is reported by each partner, whether the obligation to pay for the interest is actually set up in the books or not. That is my question to this witness.

The Court: He may answer the question.

Q. Do you understand the question, Mr. Ezralow?

A. I understand the question, yes. There is one part you said that I can't agree from what I heard Mr. Cavani say. You said many things and finally asked the question the last part of your whole statement.

Q. Would you like to have me reframe the facts upon which I [1816] wish you to base your answer?

A. I would like to have you state the part of the question.

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(Testimony of Sol Sanford Ezralow.)

Mr. Avakian: I will reframe it.

Q. Mr. Ezralow, if the agreement between Mr. Remmer and Mr. Cavani were that Mr. Cavani was to receive immediately a 25 per cent interest in the profits of the business and that he was going to use his share of the profits as the means of paying off the 15 thousand dollar price for the interest in the business, would it make any difference in the amount of income to be reported by the partners, Mr. Remmer and Mr. Cavani, whether or not Mr. Cavani's 15 thousand dollar obligation was set up in the books? A. No.

Q. But in order to have the full facts of the arrangement set forth in the books, proper accounting would call for setting up an account which would show the 15 thousand dollar obligation, is that correct? A. Yes.

Q. And isn't that what you meant when you stated there should be additional entries if that is the arrangement?

A. If that is the arrangement, yes.

Q. Now these books were kept by a Mr. Slater, who is the accountant, I take it, in connection with 110 Eddy? A. Yes, sir. [1817]

Q. And he kept the books, did he not?

A. I assume he did.

Q. Mr. Slater is a public accountant?

A. Yes.

Q. Is there a distinction between a public accountant and certified accountant under the laws of California? A. Yes.

POOR COPY

(Testimony of Sol Sanford Ezralow.)

Q. A certified public accountant is a higher level in the profession, is that right? A. Yes.

Q. Have you not found, both in your experience as a revenue agent and in your experience as a certified public accountant in private practice, that quite frequently public accountants set up books with which you, as a certified public account, are not satisfied as a full and adequate set of books?

Mr. Campbell: Objected to as incompetent and immaterial and certainly not within the scope of any direct.

The Court: Objection sustained.

Mr. Avakian: That is all.

(Witness excused.)

JAMES C. McKAY,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. James C. McKay. [1818]

Q. Where do you reside, Mr. McKay?

A. Washoe Valley.

Q. What is your business or occupation?

A. I have been in real estate, gambling business. I am a rancher.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, I am.

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(Testimony of James C. McKay.)

Q. For how long a period of time have you known him? A. Since 1920.

Q. Now have you since that time been associated with him in any business? A. Yes, I have.

Q. And in what business or businesses?

A. Cal-Neva Lodge.

Q. Is that the only business venture in which you were ever associated with Mr. Remmer?

A. Yes, it was.

Q. You are a partner, are you not, of Mr. William Graham? A. Yes, sir, I am.

Q. Were you in court the other day when Mr. Graham testified concerning the details of the organization of the Cal-Neva Lodge?

A. No, I was not.

Q. Do you recall when you and Mr. Graham took over Cal-Neva Lodge?

A. '29, I think it was. [1819]

Mr. Gillen: The defense is willing to stipulate that Mr. McKay's testimony would be primarily the same as Mr. Graham's, if counsel wishes to accept, in the interest of time.

Mr. Campbell: Yes, that is his testimony with relation to the original acquisition and conduct and final sale of his interest to Mr. Remmer would be the same substantially as that given by Mr. Graham.

Mr. Gillen: Yes, everything that Mr. Graham has testified to, in the interest of time, we are willing to stipulate that Mr. McKay's testimony would be the same.

Mr. Campbell: So stipulated.

POOR COPY

(Testimony of James C. McKay.)

Q. Now, Mr. McKay, the testimony indicated that you and Mr. Graham sold out your two-thirds interest in Cal-Neva to Mr. Remmer in 1946, do you recall that? A. Yes, sir.

Q. Now up until that time, up until the time that you and Mr. Graham sold your interests and from the time of the inception of the business, you say 1929, were any dividends declared?

A. I just don't recollect that.

Q. Do you recall whether or not a dividend had been declared with relation to the year 1934?

A. No. There may have been, but I don't remember.

Q. Do you recall any dividend ever having been declared?

A. It seems like there was something sometime or other, ten thousand or something, I am not sure. [1820]

Q. Do you recall for what year that was declared? A. No, I don't.

Q. Approximately what year?

A. I have no recollection. I do not remember the exact date of it.

Q. Mr. Graham testified a dividend was declared with relation to the year 1934, would you say that would be correct?

A. I would say it was if he testified to it.

Q. Now during the period of time that you and Mr. Graham were still interested in Cal-Neva Lodge together with Mr. Remmer, will you state whether

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(Testimony of James C. McKay.)

or not any salary was paid to Mr. Remmer, if you know? A. Not that I know of.

Q. Now do you recall an occasion in about the month of May, 1937, when a revenue agent by the name of A. V. Brady made an examination of the books and records of the Cal-Neva? Do you recall the instance?

A. I believe I do remember Mr. Brady.

Q. You are acquainted with Mr. Brady, are you?

A. Yes, I am.

Q. Was that the occasion of your first becoming acquainted with him? A. It could have been.

Q. You recognize Mr. Brady here in the court room? A. Yes, I do. [1821]

Q. Do you recall, with respect to that examination, whether or not an individual income tax return for the year 1934 was secured by Mr. Brady from Mr. Remmer? A. I do not remember it.

Mr. Gillen: May I suggest—that exhibit is in evidence counsel just asked about. We will stipulate it is. We tried to stipulate to all testimony to save time and it was accepted and we are still going on.

Mr. Campbell: If the stipulation covers this matter and the time of that examination that the return was picked up——

Mr. Gillen: My stipulation was intended to cover both direct and cross-examination and any redirect or recross, that Mr. McKay would testify substan-

POOR COPY

(Testimony of James C. McKay.)

tially the same as to the subject matters within Mr. Graham's knowledge.

Mr. Campbell: Very well, I will accept that stipulation and I will have no further questions of Mr. McKay.

Mr. Gillen: No cross-examination.

(Witness excused.)

Mr. Campbell: At this time I would like to recall Mr. Mooney, if the Court please.

The Court: Yes.

Mr. Gillen: For the record, Mr. Mooney is being recalled for further direct or redirect or what?

Mr. Campbell: If the Court please, I wish to recall him at this time for further identification with reference to defendant's [1822] Exhibit E for identification.

Mr. Gillen: In the nature of redirect?

Mr. Campbell: It would be redirect examination, concerning which there is an exhibit offered in evidence.

MR. MOONEY,

having been previously sworn, testified as follows:

Redirect Examination

By Mr. Campbell:

Q. Mr. Mooney, I am going to show you a document which has been marked defendant's "E" for identification and which purports to be a 1944 amended return for Helen Remmer, and which I believe you identified when you previously appeared

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(Testimony of Patrick Mooney.)

here. Will you look at it and see if you recognize it, Mr. Mooney? A. Yes, Mr. Campbell.

Q. Is that your handwriting, Mr. Mooney?

A. Yes, Mr. Campbell.

Q. And do you recall when you prepared that?

A. I believe it was in either the last of '45 or '46.

Q. Now did you at the same time prepare a similar document with the name of Elmer Remmer on it? A. Yes, sir.

Q. Now, will you state whether or not either of those documents, that is to say, copies of those documents, originals of those documents, were filed with the Collector of Internal Revenue?

A. I can't say. The money was paid.

Q. Do you recall whether or not the returns were filed? [1823]

A. I don't know. I don't believe I ever could get Mr. Remmer to get his signature on it.

Mr. Campbell: At this time I will ask to have this document, purporting to be an affidavit, marked for identification as 159 for identification.

Q. Now, Mr. Mooney, after you prepared this document, "E" for identification, and you say a similar document with regard to Elmer Remmer, for the year 1944, did you advise Mr. Remmer as to whether or not such amended return should be filed?

A. No, I didn't advise Mr. Remmer of that. Willie Kyne gave me the figures. He said the B. & R. Smoke Shoppe——

Q. I didn't ask you for conversation, Mr.

POOR COPY

(Testimony of Patrick Mooney.)

Mooney. I asked you if you had ever informed Mr. Remmer that you had prepared these amended returns and they should be filed?

A. As far as I know, yes.

Q. You did?

A. I wouldn't say positively.

Q. Were these matters more freshly in your mind in 1948 than they are today?

Mr. Gillen: Objected to as calling for opinion, conclusion and speculation.

The Court: Objection will be sustained.

Q. Mr. Mooney I am going to show you a document which has been marked 159 for identification, and I will ask you to read this and after you have examined it, I will then ask you some [1824] questions.

May I suggest a recess while we do this?

(Jury and alternate jurors admonished and recess taken at 2:30.)

2:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MOONEY

resumed the witness stand on further

Redirect Examination

By Mr. Campbell:

Q. Mr. Mooney, is that your signature on that document? A. Yes, sir.

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(Testimony of Patrick Mooney.)

Q. And will you state whether or not this document was signed and sworn to by you on the 13th day of April, 1948, as shown hereon?

A. I signed it on April 13, 1948.

Q. Now does this document refresh your recollection as to whether or not as of April 13, 1948, the amended returns for the year 1944 which you prepared had been filed?

Mr. Gillen: I would like the Court to look at that document. There is nothing in the document that calls for refreshing any recollection, because there is no departure from the answer that the witness has previously given from his own recollection.

The Court: What number is that exhibit?

Mr. Campbell: The return is Exhibit "E" for identification. [1825] The document which he has identified, the affidavit which I have asked him to refresh his recollection, is 159 for identification.

The Court: He may answer the question.

Q. Do you have the question in mind, Mr. Mooney? A. Will you repeat the question?

Q. Does that refresh your recollection as to whether or not about the 13th day of April, 1948, the amended return for 1944, exhibit "E" for identification, had been filed?

Mr. Gillen: Just a moment. I think perhaps I didn't make myself clear, your Honor. I want your Honor to look at the affidavit, not Exhibit E.

The Court: I don't see any necessity. He can answer this question without any necessity of me reading the document.

POOR COPY

(Testimony of Patrick Mooney.)

Q. Will you answer the question?

A. As far as I know the returns or the posting slips were filed.

Q. Were they filed or not?

A. As far as I remember. I do not know whether they were filed or not except the posting slips for the money. I have forgotten whether the returns were ever presented.

Q. Were the facts with relation to the filing of those returns, amended returns, fresh in your mind when you made this statement which you have read, plaintiff's Exhibit 159 for [1826] identification?

Mr. Gillen: Just a moment. May it please the Court, you have already ruled on that same question. It is calling for his opinion, conclusion, guess and speculation as to refreshes his memory.

The Court: I think this objection is sustained.

Q. Mr. Mooney, based upon your examination of this affidavit, 159 for identification, which is dated April 13, 1948, did this affidavit speak the truth as you then knew it at the time you made the affidavit? A. As far as I know, yes.

Mr. Gillen: Pardon me just a moment—we make the same objection.

The Court: The answer may stand.

Mr. Campbell: I am going to offer this in evidence as plaintiff's Exhibit 159.

Mr. Gillen: Now I would like your Honor to see it. It is no departure from the man's testimony on the stand, your Honor. Before your

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(Testimony of Patrick Mooney.)

Honor rules, I would like to make a further observation to your Honor and offer a further ground.

The Court: Now, Mr. Gillen?

Mr. Gillen: My further objection, your Honor, is that it is hearsay as to the defendant Remmer and it is not a departure or contradiction of the witness' testimony given here in court, both on this occasion and on the occasion of his [1827] earlier appearance. It is merely a summarization of the same testimony, not a departure or contradiction. That could only be used as an exception to the hearsay rule if the document contradicted the testimony of the witness and counsel could have this witness declared a hostile witness and call upon your Honor to release him of the obligation of being bound by his own witness' testimony.

The Court: From what I have heard here now, as you call my attention to the fact ruling was reserved on the exhibit "E" the other day, at the request of Mr. Campbell, and as I understand the situation here now, there is no recollection on the part of Mr. Mooney whether or not that Exhibit "E" was ever filed.

Mr. Gillen: That is correct, except he did testify the posting in the collector's office showed the money was paid.

The Court: Therefore Exhibit "E" is not admitted in evidence.

Mr. Campbell: I have no further questions of this witness. I will withdraw the offer of Exhibit 159.

POOR COPY

(Testimony of Patrick Mooney.)

Recross-Examination

By Mr. Gillen:

Q. Mr. Mooney, in answering a question by Mr. Campbell a few moments ago, you stated that you had no present recollection of whether the amended return for Helen Remmer, which is defendant's Exhibit E for identification, or an identical one for [1828] Elmer Remmer, prepared by yourself, had ever actually been filed.

A. I do not know whether it has. I have forgotten. It may have been filed and got lost. Once in a while a return gets lost.

Q. Now you did state, however, that the posting showed that they had been filed?

Mr. Campbell: I object to that. That wasn't the testimony.

Mr. Gillen: Let's get the record. I think I can reframe the question.

Q. Mr. Mooney, I think what you stated was—and correct me if I am wrong—that you had no recollection of whether the amended returns that you prepared for Elmer Remmer and Helen Remmer were filed or were not filed, but that the posting slips showed the money was paid, is that correct? A. Correct.

Q. Now what are the posting slips, will you advise us on that?

A. The posting slip goes into the office as a credit or debit, as the case might be.

Q. And there has to be money to balance that posting slip?

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(Testimony of Patrick Mooney.)

A. There must be money. That money goes in to the cashier.

Q. So the posting slip showed that the additional money called for on the amended returns had been paid?

Mr. Campbell: Objected to as assuming a fact not in [1829] evidence.

The Court: It seems to me that was the evidence.

Mr. Campbell: No, there is here in evidence, as Exhibits 13 and 14, records of all of the posting and payments, if the Court please, has already been put into evidence here.

The Court: He is talking about Mr. Mooney's testimony.

Mr. Gillen: Yes, I was summarizing his testimony.

The Court: Read the question.

(Question read.)

Mr. Campbell: I object on the ground it is not the best evidence.

The Court: Objection will be overruled.

Q. Do you have the question in mind, Mr. Mooney? Would you rather have me repeat it?

A. I would rather have you repeat it.

Q. All right, sir. My question is, your testimony is that the posting slips showed that the additional money called for in those amended returns for Elmer Remmer and Helen Remmer had been paid? A. Yes.

POOR COPY

(Testimony of Patrick Mooney.)

Q. Mr. Mooney, do you recall what additional amount was called for on the amended return to be paid or to have been paid by Elmer Remmer and Helen Remmer?

A. Six thousand dollars, three thousand dollars each.

Q. And is that the amount shown in defendant's Exhibit "E" for [1830] identification?

A. That is the amount called for.

Q. Three thousand dollars from Helen Remmer and three thousand dollars from Elmer Remmer, or six thousand dollars?

A. Six thousand dollars total; three thousand from each.

Q. Each spouse? A. Yes, additional.

Q. Mr. Mooney, was that six thousand additional that you told us about six thousand tax due or income? It was six thousand additional income, was it not, reported?

A. Six thousand additional income from the B. & R. Smoke Shoppe, 50 Mason Street.

Q. In other words, the three thousand apiece that you mention was not three thousand additional tax, but three thousand dollars additional income report for each spouse? A. Income, yes.

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Mooney, I am going to show you plaintiff's Exhibits 13 and 14, the certificate of assess-

BLEED THROUGH

(Testimony of Patrick Mooney.)

ments and payments of Elmer F. Remmer and Helen L. Remmer, and ask you if you are familiar with these forms, Mr. Mooney?

Mr. Gillen: Just a moment. It is my recollection, your Honor, that they were introduced during the testimony of Mr. Forrester, the deputy collector for this district, of Nevada, [1831] and it is my recollection—and I would like to have the opportunity to find it—that Mr. Forrester had something to say about either the inaccuracy or incompleteness of those two documents. I think we can find it, your Honor, immediately.

The Court: Well, he may answer the question.

Mr. Campbell: He stated he was not familiar with these documents, which probably answers the question, Mr. Gillen.

Mr. Gillen: You mean Mr. Mooney stated he was not familiar with those documents?

Q. Do you know what this type of document is?

A. No, sir.

Q. You never had anything to do with this type of document? A. Not that I know of.

Mr. Campbell: At this time I am going to offer in evidence the affidavit, plaintiff's Exhibit 159, in the Court pleas, based upon the testimony and cross-examination that he has no present recollection of the filing, and I offer on the basis of past recollection recorded.

Mr. Gillen: Your Honor has already ruled on that matter. Your Honor said that this matter was inquired into for the purpose of determining what

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(Testimony of Patrick Mooney.)

should be presented to your Honor on defendant's Exhibit E. Your Honor has found that defendant's Exhibit E should not be admitted in evidence and ruled on that. The 159 was withdrawn as a moot matter because your Honor ruled against the admission of "E." [1832]

The Court: Objection to the exhibit will be sustained.

Mr. Campbell: That is all.

Mr. Gillen: No further questions.

(Witness excused.)

Mr. Campbell: If the Court please, Mr. William Kyne, who has previously been on the stand, has made request of Mr. Gillen and myself, I believe, that he be permitted to take the stand to correct a portion of his testimony, and I will ask that he be called at this time.

Mr. Gillen: We will either do that or be willing to stipulate.

Mr. Campbell: I think Mr. Kyne desired that he voice it in the record.

MR. KYNE

having been previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Mr. Kyne, you have been previously sworn?

A. Yes, sir.

Q. I believe you stated to Mr. Gillen and my-

BLEED THROUGH

(Testimony of William E. Kyne.)

self yesterday and again today that you desired to correct certain of your testimony with relation to the matter of powers of attorney given to Mr. Remmer, is that correct? A. Yes, sir.

Q. Will you state what it is that you have in mind in that connection? [1833]

A. I have a letter here from my attorney. I had him look into the files and see what powers of attorney were given to Mr. Remmer and aside from the power of attorney given to Mr. Remmer while I was in the service, there appears to be no other.

Q. Do you have a copy of that power?

A. No, I have not.

Q. And you refer to the power of attorney that was produced and put in evidence here?

A. Yes, sir.

Q. And that is the only power of attorney which you have given Mr. Remmer? A. Yes, sir.

Q. Now in that connection, what powers of attorney did you have from Mr. Remmer?

A. I believe there is one power of attorney from Mr. Remmer to me.

Q. Do you have that power of attorney?

A. I believe there is a record of it in the Bank of America.

Q. That is the same power of attorney which was introduced here, giving you power of attorney to sign checks? A. I believe that is it.

Q. And so far as you know, there was no other

POOR COPY

(Testimony of William E. Kyne.)

power of attorney from you to Mr. Remmer or from Mr. Remmer to you?

A. That's correct.

Mr. Campbell: Do you have any question in this connection? [1834]

Mr. Gillen: Yes.

Cross-Examination

By Mr. Gillen:

Q. Mr. Kyne, what bothered you and what you were trying to straighten out in that testimony was that you were asked by me on cross-examination if it was your recollection, prior to the power of attorney you gave Mr. Remmer at the time you entered the service, if there was not in existence an earlier power of attorney and you recall me asking you that question on cross-examination?

A. Yes.

Q. And on cross-examination you answered you believed there was in existence an earlier power of attorney, earlier than the one than the time that you were in the service?

A. That was why I had the files searched.

Q. So you searched the papers and found no other written power of attorney other than the power of attorney that you gave in writing as prepared by Mr. Haughey at the time you were about to go in the service? A. That is correct.

Q. You did not want to leave for the service without giving power of attorney? A. No.

Q. It is true you and Mr. Remmer did have an

BLEED THROUGH

(Testimony of William E. Kyne.)

oral understanding that you would sign checks for each other, is that correct?

A. Yes, sir. [1835]

Mr. Gillen: That is all.

Mr. Campbell: While Mr. Kyne is on the stand, if the Court please, I wish to recall him as to redirect as to one matter.

The Court: Very well.

Redirect Examination

By Mr. Campbell:

Q. Mr. Kyne, I am going to show you plaintiff's Exhibit 153 for identification and ask you if you will examine that. A. Yes, sir.

Q. Is that your signature? A. Yes, sir.

Q. And was this document subscribed and sworn to by you on or about the 15th of November, 1945?

A. Yes, sir.

Mr. Gillen: May I see that document?

Mr. Campbell: Yes.

Q. Mr. Kyne, with relation to the 110 Eddy Street, as of the month of November, 1945, will you state what the interests were in that concern?

A. Well, the money put into the place was supposed to be met with and then we would be partners.

Q. Now as of that date, as of the month of November, 1945, who owned the business?

Mr. Gillen: Just a moment—that is calling for opinion and it is cross-examination. We have ex-

POOR COPY

(Testimony of William E. Kyne.)

hibits introduced by the [1836] government. Now he is asking Mr. Kyne to enter an opinion.

The Court: He may answer the question.

A. The books would show that.

Q. Would you answer my question? I am asking you? A. I say the books would show that.

Mr. Gillen: Mr. Kyne has testified the books reflect the partnership of that enterprise at that time and the books are the best evidence. That is the same objection we have heard constantly from the prosecution, and properly so.

The Court: He may answer the question.

A. That is the only answer I have, that the books would show it.

Q. What was your interest at that time?

A. The books would show that.

Q. What is your recollection of your interest?

A. I forget.

Q. You do not recall what your interest was then? A. No, I don't.

Q. Did you know at that time what it was?

A. No, I don't.

Q. Did you at that time in November of 1945?

Mr. Gillen: What was the question?

Q. Did he know in November of 1945 what his interest was.

Mr. Gillen: I submit, if he knew in 1945 and remembered he would remember now what his interest was. He has explained [1837] to Mr. Campbell as best he can whatever his interest was is reflected in the books.

BLEED THROUGH

(Testimony of William E. Kyne.)

Mr. Campbell: Well, I will withdraw that.

Q. Does this Exhibit 153, for identification, which you identified as being your signature, refresh your recollection in that regard?

Mr. Gillen: I am not fearful of responses, but I do not quite follow counsel. This is a government witness, counsel's own witness. He called him as a witness and Mr. Kyne was on the stand some four days and related to his best recollection, refreshing his recollection from books and stated what the status was. It appears he is attempting to impeach his own witness in further direct examination. I think your Honor has in mind Mr. Kyne was pretty well informed witness, when he had the books in front of him, he recalled what transpired in regard to various businesses. This appears to be an attempt to impeach his own witness on something that the witness has already testified to with the assistance of books that were kept at the time.

The Court: He merely stated he did not remember. If there was a document here which might refresh his memory, I do not see any reason why it could not be used. It isn't a question of contradicting any of his testimony.

Mr. Gillen: No, but he already testified to the status [1838] and refreshed his recollection from books kept as the thing went along. Now he is showing him an affidavit—that would be hearsay—taken from him in North Carolina or South Caro-

POOR COPY

(Testimony of William E. Kyne.)

lina while he was in the army, when he did not have the books in front of him.

Mr. Gillen: I respectfully suggest he be shown the exhibits which were introduced through his testimony, which were books of various enterprises, as the best evidence to refresh his recollection, because they were accounts that were kept at the time. Here is hearsay affidavit made in South Carolina.

The Court: I do not want to put myself in the position of directing counsel how to conduct his examination.

Mr. Gillen: But your Honor is the arbiter of rules of evidence.

The Court: I can't see any harm in answering this question. Objection is overruled.

A. It does not refresh my memory.

Q. Mr. Kyne, will you examine this document. Will you read it through——

A. I have read it through.

Q. ——and state whether or not it sets forth the truth as you understood it at the time you made that affidavit? A. Yes.

Mr. Gillen: We submit the witness already stated it does not refresh his recollection as to the facts stated thereon or [1839] existing facts. We have exhibits introduced by the prosecution. Those were exhibits he used on direct examination and shown on direct examination to refresh his recollection as to various transactions and enterprises over the years.

BLEED THROUGH

(Testimony of William E. Kyne.)

The Court: He has already answered the question.

Mr. Gillen: If he has answered the question, I ask that the answer be stricken and I be allowed to make an objection.

The Court: It may go out. The objection is overruled. He may answer the question.

(Question read.)

The Court: The answer is stricken. Now what is your answer?

A. You say the answer was stricken?

The Court: Yes, the question is put to you afresh.

(Question read.)

A. It does.

Q. Now will you state at this time your understanding as to the ownership of the business known as 110 Eddy in 1945?

Mr. Gillen: Just a moment, may it please the court. We object as to cross-examination of his own witness and improper redirect or direct. It is already asked and answered. The witness has said that the books would refresh his recollection as to the status. Those books were introduced, not by the defense, but by the prosecution, in support of testimony of this witness and I submit the matter is already before the jury and [1840] already in the record.

Mr. Campbell: I will withdraw the last question and offer the document in evidence on the basis

POOR COPY

(Testimony of William E. Kyne.)

of the witness' testimony that he does not recollect at this time but that this document states the truth as he knew it at that time, and submit the document to the Court.

Mr. Gillen: I ask your Honor to reserve ruling until we have an opportunity, without taking up the time of the jury or the Court, to show to your Honor how this witness testified on direct and cross-examination with the aid of the books that he participated in keeping, as reflecting the true status. Counsel is doing a very peculiar thing here to me—and I have been trying cases for 25 years almost. He has introduced some records kept in the ordinary course of business of the man who kept them personally, was shown those records, identified them and from them and with the aid of them testified to the status of things. Now he is producing an affidavit made in 1945 when the man is in the service somewhere in North or South Carolina. We have evidence as to the books that were kept in the ordinary course of business which were introduced at the time. I believe, your Honor, that the ruling should be reserved. May we be afforded an opportunity to present to your Honor particular portions of the transcript that reflects that testimony of Mr. Kyne.

Mr. Campbell: I would like to be heard on that matter. [1841] I would also like the Court to examine this particular document and I believe its competency and materiality will be apparent.

Mr. Gillen: May I ask counsel, through your

BLEED THROUGH

(Testimony of William E. Kyne.)

Honor, is he trying to impeach his own witness, who was on the stand for some four days? If he is, I am going to have another form of objection.

The Court: The theory on which this was offered was that it would call the witness' attention to a fact that he appeared at this time to have no recollection.

Mr. Gillen: The witness at the very outset of his testimony said he would have to rely on the books that were kept at the time in the ordinary course of business and he also said it didn't refresh his recollection and in answer to the question whether or not that was true as he recalled it——

The Court: What is your theory in offering this exhibit, Mr. Campbell?

Mr. Campbell: My theory is this—past recollection recalled as of the time that the document speaks about. Now so far as the books and records are concerned, it is true they were identified.

The Court: I will hear you. I would like to have some authorities on that question supporting that theory.

Mr. Campbell: May we defer this matter until tomorrow [1842] morning and go on with some other witness in the meanwhile?

The Court: Yes.

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ARTHUR PRATT

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Arthur Pratt.

Q. Where do you live?

A. Fresno, California.

Q. What is your present business or occupation?

A. I have a cigar store, restaurant and beer tavern.

Q. Are you acquainted with the defendant, Elmer Remmer? A. I am.

Q. How long have you known him?

A. Since about approximately 1936.

Q. And I will ask you whether or not you were acquainted with one Clarence Bent?

A. I was.

Q. Mr. Bent is now deceased, is that correct?

A. Yes.

Q. Do you recall when he died?

A. No, I don't recall the date of his death, but I was at his funeral. I imagine it was in——

Q. You do not recall the date?

A. No, other than I think it was the early part of 1943. [1843]

Q. Now were you at any time associated with Mr. Remmer in any business enterprise?

A. In 110 Eddy.

Q. Is that the only business enterprise in which

BLEED THROUGH

(Testimony of Arthur Pratt.)

you have ever been associated with Mr. Remmer?

A. Yes.

Q. Now prior to your association with Mr. Remmer in that business, did you have any association or any contemplated association with Mr. Bent in that business at 110 Eddy Street? A. Yes.

Mr. Gillen: Just a moment. I think that question was rather confusing question and the answer does not tell us which it was, whether an actual interest or contemplated interest. Both were asked.

Mr. Campbell: I am just coming to that.

A. Well, it was a contemplated interest.

Q. Now was any actual interest acquired by you prior to the time you became associated with Mr. Remmer in the business? A. No.

Q. Incidentally, prior to your entry into that association with Mr. Remmer at 110 Eddy Street, what was the name of the establishment at 110 Eddy Street?

A. It was known as 110 Eddy then.

Q. Was it also known as the Crystal Bar?

A. If it was, I never heard it mentioned that way. [1844]

Q. Or the Crystal Tavern?

A. Not to my knowledge. It was always known, my knowledge of the place would go back probably five or six years to that date, and always known as 110 Eddy Bar, as I knew. It could have been licensed under another name, but it was generally known as 110 Eddy.

Q. Now at the time of your association in 110

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(Testimony of Arthur Pratt.)

Eddy Street with Mr. Remmer, did you invest any money in the enterprise? A. I did.

Q. Do you recall the date of that investment?

A. No.

Q. Do you have any records which would indicate that?

A. No, I have no records, but I imagine the date would be possibly the latter part of July or August, 1942, I think is approximately the date.

Q. What was the amount of your investment?

A. $3400.

Q. And to whom did you pay that amount?

A. Well, now that I can't recall, but I gave it either to Mr. Kyne, and that was who I think I gave it to, or left it with Mr. Syl Lando for Mr. Kyne.

Q. Who did you have your negotiations with as to your acquiring that interest?

A. Mr. Remmer.

Q. Were those entirely with Mr. [1845] Remmer? A. Yes.

Q. And how did it happen that you gave money to Mr. Kyne or left money for Mr. Kyne?

A. Well, Mr. Remmer wasn't always there. He was out of town quite a lot and it was understood that I was to leave the money.

Q. Who told you to leave it with Mr. Kyne?

A. Nobody.

Q. How did you happen to leave it with him?

A. Well, because he was more or less acting for Mr. Remmer.

Q. What were you to acquire for your $3400?

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(Testimony of Arthur Pratt.)

A. I was to acquire one-third. In other words, it wasn't set at $3400. I invested $3400 but the total amount was to be—the figure was never arrived at—but $3400 is what I did invest.

Q. Was the amount of your investment contingent upon some event? A. No.

Q. How was the amount arrived at?

A. Well, the amount arrived at was that is how much up to that point I had go toward the investment of a one-third and I could never find out what the one-third actually called for.

Q. What did you understand that you received for your $3400?

A. One-third interest in the business, bar at 110 Eddy.

Q. Did you at any time have an agreement or an understanding with Mr. Remmer, or any one else, as to how much you were to pay in total for the one-third interest?

A. Well, no, because I could never get a statement given to me [1846] whether I owed or not.

Q. Now after you paid that money in later 1942, did you take any active part in the business?

A. None whatsoever.

Q. Did you conduct any of the operations there?

A. No, sir.

Q. Did you exercise any supervision over the management of the business?

A. No.

Q. What was your understanding, Mr. Pratt,

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(Testimony of Arthur Pratt.)

as to whether or not that was a partnership or what type of business?

Mr. Gillen: I think the term "understanding" is calling for speculation.

Mr. Campbell: I will reframe the question.

Q. Was there any written agreement?

A. No.

Q. There was an oral agreement, was there?

A. Just an oral agreement.

Q. With whom did you have that oral agreement? A. Mr. Remmer.

Q. Now, will you state what that oral agreement was?

A. Well, we were to give Clarence Bent, who possessed the license and the physical business as of the day we took it, as one representing one-third. Mr. Remmer and myself were to supply the remodelling, refurnishing and credit Clarence [1847] Bent with one-third and regardless of what we put in, that we would have two-thirds of it.

Q. As I understood you, you were to have of that two-thirds, one of the two-thirds, is that correct? A. That is right.

Q. And it was in connection with that arrangement that you advanced the sum of $3400?

A. That is right.

Q. Now, do you know, or will you state, who was in active management of the business?

Mr. Gillen: At that time, your Honor?

Mr. Campbell: At the time you advanced this $3400?

BLEED THROUGH– POOR COPY

(Testimony of Arthur Pratt.)

A. Until Clarence Bent's death he was the manager.

Q. And do you know who succeeded him as manager? A. No, I do not.

Q. During that period of time were you ever consulted with reference to the operation of the business? A. No.

Q. Now, some time after making that investment you left San Francisco, did you not, Mr. Pratt? A. I did.

Q. And went to the City of Portland, Oregon, I believe, is that correct? A. Yes.

Q. Where you became engaged in [1848] business? A. That is right.

Q. Now, when was it that you left San Francisco?

A. I wasn't a resident of San Francisco. I lived in Vallejo.

Q. When was it that you left the Bay area?

A. In May, 1943.

Q. Now, did you, Mr. Pratt, subsequently dispose of or sell your one-third interest, or whatever interest you acquired by your investment, to any one?

Mr. Gillen: Just a moment. I move that the portion, "whatever interest you acquired from your investment" be stricken. This is Mr. Campbell's witness. He testified he purchased one-third interest.

Q. Did you subsequently sell your interest to any one?

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(Testimony of Arthur Pratt.)

A. The only time I sold my interest was to Mr. Remmer in 1944.

Q. You say the only time——

A. Well, you put the question up to I couldn't quite understand, you said at any time.

Q. Well, you did sell in 1944, is that correct?

A. All my interest, which was one-third.

Q. Just prior to selling your interest, did you have negotiations with Mr. Remmer relative to the selling? A. I did.

Q. And how and where were those negotiations carried on?

A. Over the long distance telephone between Portland and San Francisco. [1849]

Q. And over what period of time did those negotiations take place?

A. Well, I would say possibly over a period of at least two months.

Q. And will you state whether or not those negotiations were personally with Mr. Remmer over the telephone?

A. They were only with Mr. Remmer on the telephone.

Q. Now, as a result of those negotiations you sold your interest, is that correct

A. That's right.

Q. And at the time that you sold your interest, did you execute a bill of sale? Did you sign a bill of sale?

A. I signed a bill of sale after the sale was made.

BLEED THROUGH– POOR COPY

(Testimony of Arthur Pratt.)

Q. You mean after you agreed to the sale?

A. After I agreed to the sale.

Q. Do you recall the date of the sale?

A. It was after March 15, 1944, I am quite certain.

Q. Now, have you produced with you here your copy of the bill of sale, together with correspondence which you had or received forwarding the bill of sale to you and forwarding your payment in return for such bill of sale? A. Yes.

Q. Will you produce it?

A. Well, the government has it—I haven't the original, but that is a copy of it from the original. I lost the originals. [1850]

Q. You no longer have the originals of those documents?

A. I think my wife threw them away when we moved from Portland back to California this spring.

Q. However, will you state whether or not prior to the time that they were thrown away by your wife——

Mr. Gillen: Just a moment—we don't know whether they were thrown away or not, neither does Mr. Pratt. He says he believes his wife threw them away.

Mr. Campbell: All right.

Q. Do you have them now?

A. To my knowledge I have not and during the recess, the few days down there, I tried to find them and couldn't.

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(Testimony of Arthur Pratt.)

Q. You made a search for them at my request, did you not? A. Yes.

Q. I will ask you whether or not in 1947 copies of those documents which were then in your possession, were made by agents of the government?

A. That is right.

Mr. Campbell: I am going to ask to have these three documents which are stapled together, marked 160 for identification.

Q. Will you examine these, Mr. Pratt, and state whether or not, to your best recollection, those are exact copies of the documents which were in your possession which you state you can no longer locate? [1851] A. Yes.

Mr. Gillen: We will stipulate they may be offered in evidence.

Mr. Campbell: Will you stipulate they may be received in evidence? We will offer them.

Mr. Gillen: The wrong term. Everybody makes mistakes.

The Court: They will be admitted in evidence.

Mr. Campbell: At this time I will read into evidence plaintiff's Exhibit 160. Each of these are marked "Copy." (Reads Exhibit 160.) Signed John G. Taffe.

Q. Now, Mr. Pratt, subsequent to the investment by you of $3,400, and prior to March 21, 1944, the receipt of this letter, had you received from William E. Kyne the sum of two thousand dollars?

A. Yes.

Q. Do you recall when it was received?

BLEED THROUGH– POOR COPY

(Testimony of Arthur Pratt.)

A. No, I do not. It was possibly some time in the latter part of '43 when I was in San Francisco and I borrowed money, or it could have been that he sent me part of it and I borrowed part of it.

Q. What is your best recollection?

A. Well, my best recollection is that I got a thousand in San Francisco and he sent me the other thousand.

Q. With whom did you have any negotiations relative to your receipt of these two thousand dollars? [1852]

Mr. Gillen: Objected to as asked and answered. He said he borrowed the money from Mr. Kyne.

The Court: Objection overruled.

A. Well, I never had a receipt. He never required any.

Q. Who did you talk to about getting this money? A. Just asked Willie for it.

Q. And subsequently you got it, is that correct?

A. Yes.

Q. And you say no written memorandum of any kind was entered into? A. No.

Q. Were any arrangements made as to any charges to be made on the books of 110 Eddy Street relative to these monies?

A. Well, not to my knowledge. I have never seen any papers for that place.

Q. Have you ever seen any books of account for 110 Eddy? A. Of no kind at any time.

Q. Now, reading from plaintiff's Exhibit 160, document entitled "Bill of Sale": (Reads.)

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(Testimony of Arthur Pratt.)

Q. Now, did you execute the original of this bill of sale, Mr. Pratt?

A. That is the one he asked me to take to the notary.

Q. Is this the same bill of sale referred to in his letter of March 21st? A. Yes. [1853]

Q. Did you execute it before a notary?

A. Yes.

Q. And calling your attention to the fact that the letter to you enclosing a bill of sale is dated March 21, 1944, does that assist you in fixing the date on which you executed the bill of sale?

A. Well, whatever the notary would be is the date that I mailed the bill of sale back.

Q. Did you mail it back promptly upon receipt of Mr. Taffe's letter?

A. It would be a matter of five or six days.

Q. Reading the final document in plaintiff's Exhibit 160, a letter on the letterhead of John J. Taffe, dated March 28, 1944, marked "Special delivery." (Reads.) Signed "John J. Taffe." Now, with that letter did you receive the cashier's check in the sum of $4,800? A. I did.

Q. Now, Mr. Pratt, subsequent to the time that you invested the $3,400 in 1942 and up until the time that you sold your interest by bill of sale, apparently dated March 25, 1944, did you know who else, if any one, was interested in the business known as 110 Eddy?

Mr. Gillen: Objected to as asked and answered, may it please the Court.

BLEED THROUGH– POOR COPY

(Testimony of Arthur Pratt.)

The Court: Objection will be overruled. You may answer [1854] the question.

A. Well, the only time that I knew was that when Clarence Bent was alive he was one-third partner, Mr. Remmer was one-third and I was one-third.

Q. And up until the time of his death, were those the only persons you knew that were interested in the business? A. That is right.

Q. After Mr. Bent's death, did you know who, if any one, was interested in the business in addition to yourself? A. I did not.

Q. Now, from the time you made your investment and up until the time of the date that you executed this bill of sale and other than the two thousand dollars which you stated that you borrowed, did you receive any sums of money on account of the profits of the operation of the business?

A. I did not.

Q. And during that same period of time did you at any time receive any reports as to the profit or loss at which the business was operated?

A. I received one letter from Mr. Slater, who was the bookkeeper and auditor.

Q. Do you recall when that was?

A. Well, it was some time after I had left and was in Oregon.

Q. And was that prior to the time you sold out your interest?

A. No, it was in the meantime. It was in '43 I received this [1855] letter.

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(Testimony of Arthur Pratt.)

Q. Do you still have that letter?

A. No, I tore that up immediately. It was just a letter saying that they were going to do some remodelling to a certain extent and there had been a certain amount of leakage in the place and they were going to try to get rid of it.

Q. Did you receive any financial statement or operation statement setting forth profits or losses?

A. I have never received at any time, from the first I went in until after I got out, I had never received one.

Q. Did you, during that period of time, call for or inquire about receiving a statement of profit or loss? Just answer that yes or no.

A. Yes. In 1944, right after the first of the year, I requested a statement, but never received it.

Q. And of whom did you make that request?

A. Mr. Remmer.

Q. Did you at any other time, during the period of time that you had invested in this business, other than after the first of 1944, make inquiry of Mr. Remmer, or anybody else, at other times for a financial statement?

Mr. Gillen: Objected to as asked and answered. He said one instance.

Mr. Campbell: I will reframe the question.

Q. Was that the only instance were you asked for a financial [1856] statement?

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled.

A. Well, when you phrase it as statement, I

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(Testimony of Arthur Pratt.)

didn't exactly have to have a statement in the sense——

Q. Did you inquire as to the progress——

Mr. Gillen: The witness hasn't finished his answer.

Q. Finish your answer.

A. You refer to a statement, that I think you mean it would have to be typewritten. I asked for a statement, that could be oral. I had an investment and I wanted to know how the business was doing and whether there was a profit, so that in my mind was a statement that I requested, but never received it.

Q. On how many occasions did you make a request for a statement?

Mr. Gillen: Objected to as asked and answered.

The Court: Objection overruled.

A. Well, I can't name it in numbers, but after January, 1944, I was telephoning Mr. Remmer and talking to him on the phone quite a number of times and he always came back the place wasn't making any money, but they were stealing money out of there and there just wasn't any money there and he couldn't make a statement.

Q. Did you ever receive money purporting to represent profits in the business? [1857]

A. No.

(Jury and alternate jurors admonished and recess taken at 4:04 p.m.) [1858]

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January 9, 1952, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. PRATT

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Pratt, you testified yesterday concerning your investment of $3,400 in 110 Eddy Street and concerning the ultimate sale of your interest in March of 1944 for $6,800, of which you received $4,800 by way of cashier's check and two thousand dollars credit on money which you had previously received by way of loan, is that correct?

A. Correct.

Q. Now, at the time that you sold your interest in 110 Eddy Street, as evidence by the bill of sale which is here in evidence, who set the price of $6,800?

A. Well, that was the price that was agreed upon and——

Q. Agreed upon by whom?

A. Mr. Remmer and myself; and I wasn't there to manage there or he wasn't there to manage it and I was so far away from the picture I thought, well, it is better to take that and get out.

Q. Who made the price of $6,800, or what concern?

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(Testimony of Arthur Pratt.)

A. Well, there was no price agreed upon until we arrived at that figure. I was offered that and I took it.

Q. You say you were offered that, by whom were you offered that? [1859] A. Mr. Remmer.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Mr. Pratt, at the time the 110 Eddy enterprise was taken over by Mr. Remmer and by yourself, were you acquainted with the fact that Mr. Clarence Bent was indebted to Mr. Remmer?

A. Well, I didn't know how much. I understood through Mr. Bent that he owed Mr. Remmer some money. How much it was, I don't know.

Q. It is a fact, is it not, that Mr. Bent had told Mr. Remmer that he could not pay him and offered Mr. Remmer an interest in 110 Eddy?

Mr. Campbell: Objected as calling for hearsay.

The Court: Objection sustained.

Q. Well, do you know that Mr. Bent was unable to pay Mr. Remmer and offered him an interest? Do you know that Mr. Bent was unable to pay the money he owed him and offered him an interest in the place in lieu of the money he owed?

Mr. Campbell: Objected to as hearsay.

The Court: Same ruling.

Q. You did, however, know that Mr. Bent did owe some money to Mr. Remmer when you went into the enterprise?

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(Testimony of Arthur Pratt.)

A. But how much I don't know.

Q. I am not asking you that. You did know there was some money owed by Bent to [1860] Remmer?

Q. That was in July or August of 1942, I believe you said, is that correct? A. That is right.

Q. Now, at the time you and Mr. Remmer went into the place with Mr. Bent, it is true, is it not, that the place was considerably run down and inadequate? A. Yes, that's right.

Q. And at the time you and Mr. Remmer became interested in the place it was the contemplated plan that the place should be remodelled, modernized, redecorated and re-equipped, isn't that so? A. Yes.

Q. And in keeping with that plan it was understood that your initial $3,400 investment that you made at the time would not be all of the investment that you would put into the place, isn't that so?

A. Yes, but I was never told how much a one-third was.

Q. All right. Isn't it true that there was first of all the question of determining how much renovating was to be done and how much the renovating would cost, isn't that so? A. Yes.

Q. And you anticipated, did you not, when you put down the $3400 that you would have to put in additional money depending how extensive the place would be renovated and modernized? A. Yes.

Q. Now, it was also undetermined at the time whether or not that [1861] additional money that

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(Testimony of Arthur Pratt.)

you would invest would come out of your pocket or come out of the profit, if the place made a profit?

A. Well, I expected at that time to put more money in than I had.

Q. Out of your pocket?

A. Out of my pocket, but I was never told how much one-third was.

Q. I understand that. I am asking what was the contemplated plan at the time. Now, as a matter of fact, the place was enlarged, was it not?

A. Yes.

Q. In other words, one of the things that was done to enlarge the place was to rent a store or a ground floor loft immediately laterally adjoining the bar, isn't that so? A. Yes.

Q. And also the wall between the bar and that new store, that newly acquired store, was torn out, isn't that so? A. Yes.

Q. And also there was a large circular bar put in, taking in part of the old tavern and part of the new store that was acquired?

A. That's right.

Q. And as a result of that the enterprise incurred additional rent, isn't that so, taking over the new store?

A. It was more than what was originally charged. I don't [1862] know, but I think it was double, I am not positive.

Q. In other words, when you took over an additional equal space in the form of the new store,

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(Testimony of Arthur Pratt.)

the rent was practically doubled, if not doubled, isn't that correct? A. Yes.

Q. Now, also there was, in addition to enlarging the place and in addition to the installation of the circular bar, there was also extensive redecorating the place?

A. Well, it was remodelled from what it used to be into a more or less modern place.

Q. And that included painting and decorating and everything else? A. Yes.

Q. Now, at the time you invested your $3400, with the expectation of being called upon to invest even additional money, you were residing at Vallejo at that time? A. That is right.

Q. Will you tell us, particularly for the benefit of the jurors who reside in other states than California, the distance between Vallejo and San Francisco, approximately?

A. Around 35 or 36 miles.

Q. At the time you invested in the place, it was not your intention to be present there and actually operate the place? A. No.

Q. You invested in the place because you considered it a good [1863] investment, is that correct?

A. I thought it would be, yes.

Q. Now as I recall your testimony, your initial entry into this organization was in July or August of 1942? A. That's right.

Q. Now, Mr. Bent died around Easter time, did he not, in 1943?

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(Testimony of Arthur Pratt.)

A. Some time in '43. I wouldn't know definitely when it was.

Q. Mr. Cavani testified that Mr. Bent died about Easter time, which would be not earlier than some time in March or later than some time in April. Would that about fix it in your mind?

A. That is about the time.

Q. And then I understood you to have testified yesterday in May of 1943 you moved your place of residence from Vallejo to Portland, Oregon, is that correct? A. Right.

Q. And of course that removed you farther away from your investment at the 110 Eddy Club, isn't that correct? A. Yes.

Q. For the benefit of the jury again, can you give us the approximate distance of Portland, Oregon, from San Francisco, California?

A. Around seven hundred miles, I think.

Q. I thought it was closer to 900 miles. It is an overnight trip on the train, is it not?

A. It is overnight. It takes about 18 hours by train, I think. Now it doesn't take that long, but it did in those days. [1864]

Q. Did you ever make an inquiry as to the financial status of the place of Mr. Slater, the man who was keeping the books of the 110 Eddy Club, as to the condition?

A. To my memory I received only one letter from him.

Q. My question is, did you ever personally make an inquiry directly from Mr. Slater? A. No.

Q. You did say, however, that you did talk on

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(Testimony of Arthur Pratt.)

several occasions to Mr. Remmer and asked him what were the conditions and with regard to whether the place was making or losing money or the financial status of the place, is that correct?

A. Yes.

Q. And I understood you to say that your inquiry was not in the form of a demand for a financial statement, but rather merely a casual inquiry as to the conditions?

A. Well, what I tried to find out, if I had anything coming. I wanted to get some money out of it but I didn't make that inquiry until around December or January, latter part of 1943 or early part of '44. Up to that time it was merely hearsay, that other people said the place was doing good, that is, people I met in Portland. Another man would say it is doing no good, so when I did finally get in touch with Mr. Remmer, while I didn't get any figures, I got what I said in my testimony, that he said the place wasn't making any money and that he wasn't there himself and they were stealing him blind. That [1865] is all I ever got in regard to the figures.

Q. In the year 1943 you didn't expect any money because you knew there was a large investment in the matter of modernization, is that correct?

A. Well, it wasn't that. I figured when the time came when I had some money coming, it would be sent to me.

Q. That is not responsive to my question. My

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(Testimony of Arthur Pratt.)

question was in 1943 you did expect that they were going to spend money on the property and there wouldn't be any money coming?

A. I won't put in that way. I would put it that the initial investment was probably large enough at the time it was put in, the money it did earn would be enough to pay that investment off.

Q. But you did expect to get more money out of it to cover your investment?

A. Yes, when I first put the money in. Not at the time we are talking about, which was later in '43.

Q. I am talking about what you expected in 1943. You knew there was a great initial investment in 1943 or in 1942 because of this remodelling, isn't that so? A. Yes.

Q. Now, you say that you never personally inquired of Mr. Slater regarding conditions?

A. No.

Q. Do you recall when you received the letter from Mr. Slater, [1866] the one letter that you received from Mr. Slater, the bookkeeper?

A. I imagine it was after Clarence died and I went to Portland, possibly in the middle of '43.

The Court: When you say "Clarence"?

A. Clarence Bent had died and this was a letter —I had been in Portland possibly three or four months by that time.

Q. You went to Portland in May?

A. That's right.

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(Testimony of Arthur Pratt.)

Q. So it might have been September or October that you received the letter?

A. Well, along in August, we will say. I can't say the exact date.

Q. Isn't it a fact that on some of the occasions, however many there may have been, when you talked to Mr. Remmer and inquired as to the financial condition of the place, that Mr. Remmer told you that he was unfamiliar with the exact financial condition of the place, but that you should get in touch with Mr. Slater, the bookkeeper, or he would put Mr. Slater in touch with you, isn't that so?

A. Well, he told me in this way—words that I would substitute—that he wasn't the bookkeeper, he didn't know what it was doing but to write to Slater and Slater would send me some kind of a statement, that he didn't know anything about it and he was too busy doing other things. However, I never wrote and I never [1867] received a statement.

Q. You never wrote to Mr. Slater following Mr. Remmer's suggestion, but you did receive from Mr. Slater a letter giving you some sort of report?

A. Well, the report——

Q. First of all—without having written to Mr. Slater, you did receive from Mr. Slater in the latter part of 1943 a letter giving you some sort of report? A. Well, I received that one letter.

Q. Obviously, since you did not request anything of Mr. Slater, somebody else must have told Mr. Slater to write to you, isn't that so?

A. No, Mr. Slater wrote to me and I was to

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(Testimony of Arthur Pratt.)

sign some paper that was in that letter, accompanied the letter and in the statement, that you regard as a statement, he said that 110 Eddy they had eliminated the amusement because the cost was excessive——

Q. What do you mean by amusement—do you mean entertainment?

A. Entertainment, that was dropped at this particular time, so the letter stated, and that they hoped that after this expense was cut out that the place would start to make money. Now, that is the only statement I ever got out of 110 Eddy.

Q. Mr. Slater also told you in his letter that extensive investment had been made in the remodelling, that it cost considerable money, isn't [1868] that so?

A. This is the remodeling that was done when the place was originally opened. The place was closed three or four months, we paid the rent and Mr. Slater was drawing a salary, before the place was ever remodelled, and all the remodelling to my knowledge, unless it was remodelled after that, was done before the place was opened.

Q. My question is, isn't it a fact that Mr. Slater mentioned in his letter to you that considerable money had been put into the initial investment?

A. That I don't exactly recall, but I know there was considerable money put in other than I put in.

Q. Do you recall just when 110 Eddy Club did open?

A. As to the date, I could not, but I think it was the latter part of October, 1942.

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(Testimony of Arthur Pratt.)

Q. You invested in it in July or August?

A. That is when I contracted to go in as a third partner and I put some of the money up at that time and within the next 60 days I put the balance up.

Q. And then in the latter part of 1943, as I recall your testimony, you borrowed back two thousand dollars? A. From Mr. Kyne.

Q. And one thousand of that you believe you received in person and the other thousand you believe might have been sent to you in Portland, is that correct? A. I think so. [1869]

Q. So actually then at that time you only had a $1400 investment?

A. Well, I don't figure it that way. I had actually $1400 in the company at that time, but my investment hasn't changed because when I borrowed this money, I thought I was borrowing it from Kyne personally and not from the business.

Q. Now, do you recall that you asked Mr. Remmer for money first and Mr. Remmer told you that Willie Kyne would take care of the matter for you?

A. Well, that I don't recall. It could have been possible.

Q. Do you know whether it was Mr. Remmer's money or Mr. Kyne's money that you got?

A. That I couldn't tell.

Q. Do you remember any occasion when you and Mr. Kyne and Mr. Remmer were together and Mr. Remmer said to Mr. Kyne, "If I am not

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(Testimony of Arthur Pratt.)

available, anything that Arthur Pratt wants he is to have"? A. That I wouldn't know.

Q. You say that on one occasion at least, when you talked to Mr. Remmer on the phone and asked him, not for a statement, but regarding the financial condition of the 110 Eddy Club, what it was doing, that he told you that they were stealing or some other such expression?

A. Well, he said that he couldn't be there to watch it and the reason it wasn't making the money that it possibly should have made was because in some manner bartenders or somebody were [1870] helping themselves; in other words, they were taking money that should have been put in the cash register and never got in there.

Q. Did Mr. Remmer tell you, or did it come to your attention, that there had been several changes of bartenders and managers?

A. Well, now that was all beyond my knowledge. My only knowledge would be people that came to Portland from San Francisco that I knew, and the report was——

Q. Well, you didn't get it from Mr. Remmer?

A. No.

Q. When Mr. Remmer told you the place was being robbed and he wasn't there to watch it, is it not a fact that he recited to you an incident of where he went into 110 Eddy establishment one night with several friends and he ordered a drink from a strange bartender and he saw the strange bartender take the money and ring up a no sale on

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(Testimony of Arthur Pratt.)

the cash register and put the money in his pocket and he watched the bartender do that in three different instances?

A. I didn't hear that from him but from Mr. Kyne.

Q. Did you hear Mr. Remmer say that he said to the bartender what was the matter with not ringing up the money and the bartender said, "Who do you think you are?" and he said, "I am only one of the owners; take your apron off and get out." Isn't that so?

Mr. Campbell: I move that be stricken and the previous [1871] question and answer be stricken.

The Court: The objection will be sustained to this question and the previous answer will stand. I didn't hear an objection to it.

Mr. Campbell: I didn't have a chance.

The Court: Then the answer will go out. Objection sustained.

Q. Did Mr. Remmer ever give you details as to how the place was being imposed upon by the help?

A. Well, the only conversation I can really recall by Mr. Remmer and myself was when I was trying to sell out and we must have talked for half an hour on the telephone and the only thing I could gather that was concrete that as far as the place was concerned, the place hadn't made any money, due to the fact that it was mismanaged and that funds that should have been received were being stolen.

Q. Did he tell you anything about the bartender incident I have just related?

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Testimony of Arthur Pratt.)

A. To my knowledge no, but I did, as I stated, hear that from Mr. Kyne since I have been here.

The Court: The latter part will go out.

Q. Did Mr. Remmer say to you in that conversation, or any other conversation, that he witnessed a bartender stealing money right before his eyes?

A. No. [1872]

Q. Now, do you know, Mr. Pratt, how much money was invested in the 110 Eddy Club?

A. I have no knowledge at all, only as to my own investment.

Q. Now, Mr. Pratt, I am going to show you prosecution's Exhibit 86, the 1943 partnership return of the 110 Eddy Club, and with particular reference to the distributive share of the profits. I will ask you to look at the whole document first and ask you if you ever saw that before?

A. I think Johnnie Taffe sent me a copy or Mr. Maundrell sent me a copy of this, after I completed the sale of 110 Eddy.

Q. That shows, does it not, a credit to your account of $3425 from the profits, is that correct?

A. Well, that was what I received in the profit for this sale.

Q. I am asking you if that isn't what the document shows?

Mr. Campbell: Objected to — the document speaks for itself.

The Court: I don't see much difference whether the attorney or the witness reads the document which is in evidence.

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(Testimony of Arthur Pratt.)

A. Well, I received three thousand——

Q. I am asking you what the document shows?

A. Well, now in what respect?

Q. Right here, $3425.24, is that correct?

A. Yes.

Q. Now, you initially, and your only investment in actual cash [1873] out of your pocket was $3400, is that correct? A. That is right.

Q. And you received, and agreed to accept, for your interest just twice the amount you invested; in other words, $6800? A. That is right.

Q. Now, I understood your testimony to be this morning that, having moved to Portland, being unable to be close enough to keep an eye on the investment or in any way look after its management, that you determined that you would rather be out, is that correct? A. That's right.

Mr. Gillen: I think that is all.

Mr. Campbell: That is all.

(Witness excused.)

Mr. Campbell: If the Court please, I wonder if I could be heard at this time on the matter of admissibility of that exhibit?

The Court: Yes.

(Jury and alternate jurors admonished and excused at 10:30.)

(In the Absence of the Jury.)

(NB 333—P. 3-19.)

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11:35 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [1874]

WILLIAM E. KYNE

having been previously sworn, was recalled on behalf of the plaintiff and testifed as follows:

Direct Examination

By Mr. Campbell:

Mr. Campbell: The record will show, I believe, that Mr. Kyne was on the stand yesterday under direct examination, at which time the government offered in evidence plaintiff's Exhibit 153 for identification and further proceedings were suspended at that time in view of the contemplated argument by counsel on the admissibility of the document and was deferred until this morning, in order that we could put another witness on the stand. At this time I wish to renew the offer into evidence of government's Exhibit 153 for identification, on all the grounds heretofore stated.

Mr. Gillen: At this time, may it please the Court, we object upon all the grounds stated in the absence of the jury in the argument to your Honor, and we ask at this time that we be permitted to examine Mr. Kyne on his voir dire in relation to that, which will assist your Honor in making your ruling.

The Court: You May.

Q. (By Mr. Gillen): Mr. Kyne, when Mr.

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(Testimony of William E. Kyne.)

Campbell asked you yesterday this question: "Mr. Kyne, with relation to the 110 Eddy Street as of the month of November, 1945, will you state what the interests were in that concern," let me ask you whether or not you understood Mr. Campbell to mean what were the percentage of each partner, or what were the interests that had been built [1875] up in dollars and cents by each partner on the books of the enterprise?

Mr. Campbell: Objected to as not proper voir dire, and is not the question to which this document related.

The Court: Objection sustained.

Q. Well, when Mr. Campbell asked you this question, "Mr. Kyne, with relation to the 110 Eddy Street as of the month of November, 1945, will you state what the interests were in that concern," what did you understand his question to mean?

Mr. Campbell: That is objected to as improper voir dire and not the question to which this document was offered in evidence.

The Court: Objection sustained.

Q. Let me ask you this, Mr. Kyne, what did you mean when you told Mr. Campbell that in November of 1945 the interests in the 110 Eddy concern were best reflected in the books, that the books would tell, what did you mean by that?

Mr. Campbell: Objected to as not proper voir dire, not the matter to which this exhibit is directed. Further, the record speaks for itself.

The Court: Objection sustained.

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(Testimony of William E. Kyne.)

Mr. Gillen: I thought, your Honor, the purpose of voir dire of this witness at this time was to determine what the witness was answering.

The Court: I think it was; that is why I sustain the [1876] objection.

Q. Let me ask you this—in November of 1945, Mr. Kyne, did you know what percentage each partner had in 110 Eddy Street?

Mr. Campbell: Objected to as not proper voir dire.

The Court: Objection sustained.

Q. In November of 1945 did you know what amount of interest each partner had credited to him on the books?

Mr. Campbell: Objected to as not proper voir dire.

The Court: Objection sustained.

Q. So you know now what was your interest in 110 Eddy Street, that is, what percentage of the partnership of 110 Eddy Street you had?

Mr. Campbell: Objected to as not proper voir dire. It is a matter for cross-examination and not the question to which this document was offered.

The Court: Objection sustained.

Mr. Gillen: Of course, the question is plain here. He said, "Will you state what your interests were in that concern as of November, 1945."

The Court: That is not the question before the Court.

Mr. Gillen: Then I am uninformed.

The Court: The ruling will stand.

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(Testimony of William E. Kyne.)

Mr. Gillen: Will your Honor call my attention to what is the question?

The Court: If I can look at the transcript again I can [1877] point it out to you.

Mr. Gillen: Yes, sir. If your Honor will enlighten me as to what you have in mind.

The Court: The question is: "Now as of that date, as of November, 1945, who owned the business?"

Mr. Gillen: I don't think that question can be read separately. I think the three questions should be read.

The Court: That is my view of it.

Q. In November, 1945, did you know who owned the business, Mr. Kyne, as to percentage, and did you know who owned the business as to interests built up on the books?

Mr. Campbell: Objected to as not proper voir dire.

The Court: Objection sustained.

Q. Well, what did you think Mr. Campbell meant when he asked you as of November, 1945, who owned the business?

Mr. Campbell: Objected to as not proper voir dire; incompetent.

The Court: Objection sustained.

Mr. Gillen: Well, your Honor pointed out to me the question that we were concerned with was who owned the business. Now I am asking this gentleman if he knows what Mr. Campbell meant when he asked that, because there are two types of

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(Testimony of William E. Kyne.)

interest here, a one-fourth partnership interest and interest that built up the equity in the business, and that is what is a little confusing on this. [1878]

The Court: The ruling will stand.

Q. Mr. Kyne, what did you mean by your answer that the books would reflect the situation as it stood in November of 1945?

Mr. Campbell: The Court has already ruled on this question. It is not proper voir dire.

Mr. Gillen: I don't think I ever asked that question before.

The Court: Objection will be sustained.

Q. What did you think was being asked of you, Mr. Kyne, in that question that was put by counsel yesterday, who owned the business of 110 Eddy Street in November of 1945?

Mr. Campbell: That is objected to, not proper voir dire.

The Court: Objection sustained.

Q. I show you prosecution's Exhibit 153 for identification and I will ask you first—you did not make that yourself, did you?

A. What is the last question?

Q. First of all, you did not make that yourself, did you?

Mr. Campbell: Objected to. The witness has identified the signature and that is his affidavit.

The Court: You may answer the question.

A. A government man made this document.

Q. A government from the Alcohol Tax Unit, isn't that correct?

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(Testimony of William E. Kyne.)

A. I thought it was an FBI man, I am not sure.

Q. You had been in the army at that time how long, from February 1945 to November? [1879]

A. To November.

Q. And you had not been back to San Francisco and looking at the books or keeping the books of 110 Eddy, is that correct?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Who did own the 110 Eddy Club in November of 1945, and you may explain, I believe, with the permission of the Court, anything that you may have to explain in connection with the partnership.

Mr. Campbell: Objected to as not proper voir dire.

Mr. Gillen: Certainly a witness can explain.

Mr. Campbell: The question has been asked and answered and it is not proper voir dire.

The Court: Objection sustained.

Mr. Gillen: I am asking the exact question that counsel asked, who did own the 110 Eddy Street, if you know, in November, 1945? I am asking the exact question.

The Court: We have his answer to that question here in the record. Objection sustained.

Q. What did you mean in the account which you gave in this affidavit, which is prosecution's 153 for identification? Were you talking about the ownership of the physical assets of the partnership or were you talking about the interests that had been

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(Testimony of William E. Kyne.)

built up by way of sharing of the profits by the partners? [1880]

Mr. Campbell: Objected to as not proper voir dire and a matter of cross-examination, and I further suggest to the Court that if my objection to this question is sustained that further voir dire should be foreclosed.

The Court: Objection sustained.

Mr. Gillen: Now, your Honor, voir dire is cross-examination to enlighten counsel——

The Court: Well, there is nothing before the Court now. The Court has sustained the objection.

Mr. Gillen: Will the reporter read what the Court said was the proper question?

(Record read.)

Mr. Gillen: Now I will put that question.

Q. Now as of November, 1945, who was the owner of that business, 110 Eddy Street?

Mr. Campbell: To which I object as not proper voir dire. The matter has been asked and answered. My understanding voir dire is only as to test the admissibility of the document.

The Court: Objection sustained.

Mr. Gillen: Of course, we are testing the admissibility.

The Court: The Court has ruled twice on that very question.

Mr. Gillen: But I understood that your Honor read from the transcript and said that the question that you were interested in—— [1881]

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(Testimony of William E. Kyne.)

The Court (Interceding): That was because you were going off on questions that had no relation. The ruling will stand.

Mr. Gillen: May I ask what question your Honor is interested in, because I want to put the proper question.

The Court: You asked to have this witness called for the purpose of voir dire and you may proceed.

Mr. Gillen: Your Honor indicated to me there was one question you were interested in.

The Court: Yes, because you were going off to questions that had no relation; to stop it.

Mr. Gillen: There must be some question your Honor is interested and if you will enlighten me, I will not waste time.

The Court: I am not on cross-examination.

Mr. Gillen: I am asking your Honor's assistance to enlighten me what your Honor feels would assist you in making the correct ruling in this matter on this exhibit and I will address myself only to that subject and nothing else.

The Court: You may proceed.

Mr. Gillen: May I ask respectfully if there is some suggestion on the point of voir dire?

The Court: I have no suggestions to make.

Q. Mr. Kyne, was there ever a time, from the inception of acquiring of the 110 Club that you had any doubt as to the percentages that each partner had acquired? [1882]

Mr. Campbell: Objected to as not proper voir dire.

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(Testimony of William E. Kyne.)

The Court: Objection sustained.

Mr. Gillen: Do I understand now, your Honor, that the purpose of attempting to introduce this affidavit is to refresh the memory of Mr. Kyne on something he said that he did not yesterday recollect? I am now asking him if there was any time that he did not recollect what percentage each partner owned in the 110 Eddy.

The Court: The purpose of introducing the affidavit was gone into on the argument we had in the absence of the jury.

Mr. Gillen: That is true and that is why we ask your Honor to let us examine this man on voir dire, because your Honor asked some questions that indicated to you that there could have been two interpretations.

The Court: I think your voir dire should be confined to this document, 153 for identification.

Mr. Gillen: I asked a question concerning that —let me see if I can get around it without violating the Court's order.

Q. When you signed the affidavit for the government man in November, 1945, and related what you related in that affidavit, Mr. Kyne, were you referring to the percentage of each partner, were you stating percentages, or were you stating interests that had been built up in dollars and cents on the books of the company? [1883]

Mr. Campbell: Objected to as not proper voir dire. The document itself is the best evidence of

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(Testimony of William E. Kyne.)

its contents, which is not yet in evidence. It is offered.

Mr. Gillen: Your Honor told me to address myself to the document concerned. I am asking him what he was answering in that document.

The Court: Objection sustained.

Q. What did you mean by that document?

Mr. Campbell: Objected to as not proper voir dire.

The Court: Objection sustained.

We will take a recess at this time.

(Jury and alternate jurors admonished and recess taken at 11:50 a.m.)

January 9, 1952—1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. KYNE

resumes the witness stand on further

Voir Dire Examination

By Mr. Gillen:

Q. Mr. Kyne, with the Court's permission, I am going to hand you prosecution's Exhibit 153 for identification, and I will ask you to read it over, if you haven't read it or don't recall from your reading if it yesterday, and when you have done so, I am going to ask you a question.

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(Testimony of William E. Kyne.)

A. I understand the document. [1884]

Q. My question is, do you have a recollection at the present time as to matters mentioned in that document, prosecution's 153 for identification?

Mr. Campbell: Objected to as asked and answered.

The Court: Well, he may answer the question.

A. Yes, sir.

Mr. Gillen: Then I submit, your Honor, in view of the fact that the witness has stated that he has a present recollection of the matters contained in this proposed exhibit, then there is no foundation laid for the admission of that exhibit, for the reason that the exhibit was only offered to him for the purpose of refreshing his recollection concerning a matter. I submit it.

The Court: He stated yesterday that he had a recollection of that instrument and that the statement in it was true as I understood it.

Mr. Campbell: That is correct.

Mr. Gillen: That it was true at the time he made it, it was the truth to the best of his recollection.

The Court: But that does not meet the situation we are confronted with here. His answer to that question is another consideration.

Mr. Gillen: He has a present recollection of it and lack of present recollection——

The Court (Interceding): He stated he had no recollection [1885] at this time in answer to this question we are dealing with. That answer was not given in relation to the document, it was given in

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(Testimony of William E. Kyne.)

relation to the question. He didn't know who the owners of the 186 Club were in November, 1945.

Mr. Gillen: But, your Honor, he states, having read this document, he states he has a present recollection of this document.

The Court: Yes, he has a present recollection of the contents of the document and that is what he stated yesterday. He said the document was the truth, but he won't answer this question except by saying he has no recollection as to who the owners of that club happened to be in November, 1945, and that is the matter under consideration.

Mr. Gillen: That is what I endeavored to elicit from him this morning.

The Court: Well, the exhibit will be admitted in evidence, No. 153.

Mr. Gillen: May we be heard further outside the hearing of the jury?

The Court: No, I don't think anything will be gained by any further argument on that.

Mr. Campbell: At this time I wish to read plaintiff's Exhibit 153.

(Reads.) [1886]

Mr. Gillen: May it be stipulated that A. T. U. means Alcohol Tax Unit.

Mr. Campbell: Yes. You may cross-examine.

Cross-Examination

By Mr. Gillen:

Q. Now, Mr. Kyne, is it not a fact that the set-

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(Testimony of William E. Kyne.)

up, insofar as 110 Eddy Street was concerned, was the same as the set-up of every business in which you and Mr. Remmer had an interest in San Francisco; namely, that whatever Mr. Remmer had an interest in, you had an interest or percentage?

A. Working interest, yes, sir.

Q. Now isn't it a fact that in the case of 110 Eddy Street, as in the case of the enterprises that have been probed into here, including the Menlo Club, which interests were reduced to writing, that certain of the partners had a working interest in the profits of the organization, which meant when they met their pro rata of the initial investment would result in their having a partnership in the actual physical assets?

Mr. Campbell: Objected to as calling for his conclusion.

The Court: He may answer the question.

A. That is correct.

Q. And when you made this affidavit for this alcohol tax unit agent, while you were a soldier in North Carolina, to what did you refer with regard to the set-up of the business in San Francisco?

Mr. Campbell: Objected to as incompetent, if the Court [1887] please.

The Court: You may answer the question.

A. It refers to Mr. Remmer's money being drawn out before the partner's share in it.

Q. In other words, that Mr. Remmer's investment would have to be——

A. Returned.

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(Testimony of William E. Kyne.)

Q. Returned or at least equalled before the partners would have actual physical ownership of the assets? A. That is correct.

Mr. Campbell: Just a moment—all right.

Mr. Gillen: Does counsel make an objection?

Mr. Campbell: Well, I was going to object and move to strike the answer, on the ground that the question, which is in the alternative, suggests a fact not in evidence.

The Court: The answer may stand. You may proceed.

Mr. Gillen: Of course, I challenge the statement, it suggests a fact not in evidence.

The Court: The answer stands.

Mr. Gillen: I move counsel's remark——

The Court: The motion is denied and there is nothing before the Court.

Q. Now did you at all times know what percentage of interest each partner had in the 110 Eddy Street? A. Yes, sir. [1888]

Q. And from the time that Cavani and Turner came in there, what was the percentage of interest that each partner had in the business?

A. One-fourth.

Q. And that is what you stated on your direct examination here December 17th, isn't that so?

A. Yes, sir.

Q. Now with regard to what amount in dollars and cents, or what amount in the club each partner had built up in the business as of November, 1945,

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(Testimony of William E. Kyne.)

were you aware of those facts, without consulting the office to see what the books show?

A. Without seeing the books, I wouldn't know.

Q. You didn't even know what equity you had built up yourself as of November, 1945, without seeing the books, did you? A. That is correct.

Q. In November, 1945, you had been away from that business for nine months, serving in the army, had you not? A. Yes, sir.

Q. And you were not acquainted at that time with what the books showed to be your interest in dollars and cents? A. That is correct.

Q. You did know that you had a one-fourth interest in the over-all business, did you not?

A. Yes, sir.

Q. When Mr. Campbell asked you yesterday—I am reading from [1889] page 1836 of the transcript in this case—when Mr. Campbell asked you:

"Q. Mr. Kyne, with relation to the 110 Eddy Street, as of the month of November, 1945, will you state what the interests were in that concern?

"A. Well, the money put into the place was supposed to be met with and then we would be partners."

What did you mean by that, Mr. Kyne?

Mr. Campbell: That is objected to as incompetent, if the Court please. I think he can state what the facts are, but the question calls for conclusions, opinion of the witness. I think it incompetent for that reason.

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(Testimony of William E. Kyne.)

The Court: Objection overruled. You may answer the question.

A. That Mr. Remmer's money should be returned before the partners participated in the profits or the ownership.

Mr. Campbell: I ask that be stricken as not responsive to the question.

The Court: It will stand.

Q. Now when Mr. Campbell asked you:

"Now as of that date, as of the month of November, 1945, who owned the business,"

and you said: "The books would show that," what did you mean by that?

A. The books would show how much each partner had. [1890]

Q. How much each partner had to his credit on the books? A. That's right.

Q. And you were uninformed as of November, 1945, as you were uninformed yesterday, as to what the books showed your interest to be built up in dollars and cents as of November, 1945?

A. I didn't see the books for nine months.

Q. Now, Mr. Kyne, do you remember when this Alcohol Tax Unit man interviewed you? I assume he interviewed you first and then went away and prepared the affidavit and brought it back for you to sign, is that what happened? A. Yes, sir.

Q. When that agent interviewed you at Fayetteville, North Carolina, at the army encampment, did you relate to him the intricacies and details of how these partnerships were set up? A. Yes.

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(Testimony of William E. Kyne.)

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Gillen: I have in mind whether or not all the facts were related to this man, preliminary to asking him another question.

Mr. Campbell: It is immaterial.

The Court: The ruling will stand.

Q. Well, who drew up the affidavit?

A. The agent. I thought he was representing the FBI.

Q. At least he went away with the data you gave him and came [1891] back with this affdavit is that correct?

A. He wanted to know the set-up and I explained it to him.

Q. And when he brought back this affidavit, you signed it? A. Yes, sir.

Q. Did this affidavit contain everything you told this Alcohol Tax man about the partnership setup?

Mr. Campbell: Objected to as incompetent and immaterial.

The Court: Answer the question.

A. Well, we had quite a few conversations relative to the place of business.

Q. More than one conversation? A. Yes.

Q. Does this affidavit contain all of the details of the set-up of the partnership as you related them to him? A. No, sir.

Q. What is missing from that affidavit, as compared with what you told him about the set-up of the partners?

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(Testimony of William E. Kyne.)

Mr. Campbell: Objected to as incompetent and immaterial.

The Court: You may answer the question.

A. I explained to him the working interest of different partners as explained here.

Q. As you have explained here today and on the occasion of your prior appearance on the witness stand in giving testimony?

A. That's right.

Q. And the affidavit was presented to you in the form that it [1892] is and you signed it in that form? A. Yes, sir.

Mr. Gillen: Now as a practical matter, and in the interest of not unduly delaying, your Honor will recall, and I invite your Honor's attention to page 1136 of the transcript, we asked permission of your Honor to recall Mr. Kyne at some future time for further cross-examination on this direct examination if necessary.

The Court: In relation to this exhibit?

Mr. Gillen: No, in relation to his general direct examination. I think both sides reserved the right to recall the witness.

Mr. Campbell: That was a closed subject, but there was one matter I think came up at one time and counsel stated he would like to cross-examine.

The Court: If counsel is not ready to have Mr. Kyne excused——

Mr. Gillen: I will read it to your Honor. The Court said, page 1136, line 21: (Reads from Transcript. I ask if we may still reserve that right?

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(Testimony of William E. Kyne.)

The Court: For further cross-examination?

Mr. Gillen: Yes.

The Court: You may recall him if you want to.

Mr. Gillen: Thank you. [1893]

Redirect Examination

By Mr. Campbell:

Q. Mr. Kyne, at the time you signed this affidavit, did you read it? A. Yes, sir.

Q. Did you make any corrections on it?

A. No, sir.

Q. Were you given that opportunity?

A. Yes, sir.

Q. Mr. Kyne, when it says here that Frank Cavani and Chub Turner did not own any business in the club except working interest, that affidavit spoke the truth, did it? A. That is correct.

Q. Is that the type of interest which you owned in the business at that time?

A. I explained that Mr. Remmer's money had to be received back before the rest of the partners participated in the revenue of the place.

Q. Before they received any of the revenue?

A. That is correct.

Q. And that applied to you as well as to the other individuals? A. Yes, sir.

Q. And that is true as to each of the various businesses? A. Yes, sir.

Q. Do you know whether or not Mr. Remmer

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(Testimony of William E. Kyne.)

received all his money back out of any of these businesses? [1894]

Mr. Gillen: Thit is improper redirect. That has been gone into fully.

The Court: I think so. Objection sustained.

Mr. Campbell: Very well. I think that is all at this time.

Recross-Examination

By Mr. Gillen:

Q. Mr. Kyne, you say before participating in the revenue—as a matter of fact every partner was participating in the profits to the extent of having their interest set up on the books, is that correct?

A. That is correct.

Q. In other words, the profits that were derived from the business were left in by the working partners, instead of being drawn down, to offset the investment that had been made by Mr. Remmer, is that correct? A. That is correct.

Q. And that was the situation with all of these things? A. Yes, sir.

Q. Now you stood in a different position with Mr. Remmer than the other people, did you not, in that you had interest in the physical assets of everything Mr. Remmer owned in San Francisco?

A. I had a working interest, yes.

Q. Well, you were to derive from the sale of any business some portion of the proceeds that were derived from the sale of the business, isn't that correct? [1895] A. Correct.

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(Testimony of William E. Kyne.)

Mr. Gillen: I think that is all.

Redirect Examination

By Mr. Campbell:

Q. Isn't it a fact that Mr. Remmer——

Mr. Gillen (Interrupting): Is counsel going to cross-examine his own witness? This is leading and suggestive.

The Court: I have not heard the question. Let me have the question.

Mr. Campbell: I only had four words out.

Mr. Gillen: Your Honor recognizes a leading question when——

The Court (Interceding): Let me hear the question.

(Question read.)

Mr. Gillen: It is leading.

The Court: There are times when the Court permits leading questions. I do not know until I hear the question.

Mr. Campbell: I will reframe the question.

Q. Mr. Kyne, in response to Mr. Gillen's question as to whether or not you, as distinguished from other individuals, had an interest in the assets, you stated that you had a working interest. What do you mean by that answer?

A. The working interest applied to the fact that when Mr. Remmer received his initial money back we would all participate in the profits. [1896]

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(Testimony of William E. Kyne.)

Q. And was that participation to be only after he had received his money back?

Mr. Gillen: Just a moment. I submit that has been explained many times. In fact, the prosecution offered books in evidence which contained credits to the various partners who had built up out of the profits and drawn down and paid income tax out of the profits that were——

The Court: In view of the recent examination, I will permit the question.

(Question read.)

A. I believe I answered that question.

Q. Will you answer it again?

(Question read.)

A. That is correct.

Q. That was true as to each of the enterprises, as I understand it—none of the partners of those having a working interest were to draw any of the profits until that had been accomplished, is that correct? A. That is right.

Mr. Campbell: I think that is all.

Recross-Examination

By Mr. Gillen:

Q. In other words, when you say they could not draw, you mean by that they could not take the profits out and put it in their pocket; they had to be left in the business to build up their equal responsibility in the investment? [1897]

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(Testimony of William E. Kyne.)

A. That is right.

Q. Then after they had equalled the investment of Mr. Remmer, then they could put it in their pocket? A. Yes.

Q. But in the intervening time they were charged with those credits and they were allowed to draw enough money to pay their taxes?

A. That is right.

Mr. Gillen: That is all.

The Court: Mr. Kyne, you may be excused subject to call.

CHARLES M. MINER,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. What is your name?

A. Charles M. Miner.

Q. Where do you reside, Mr. Miner?

A. In San Francisco, California.

Q. What is your business or occupation?

A. I am special agent for the Bureau of Internal Revenue.

Q. How long have you been a special agent?

A. Two and one-half years.

Q. Are you also an accountant, Mr. Miner?

A. Yes, sir, I am.

Q. Now in connection with your duties as a special agent of the Bureau of Internal Revenue,

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(Testimony of Charles M. Miner.)

you were asked to and did make [1898] certain examinations relative to an account in the Crocker First National Bank of San Francisco under the title of Elmer Remmer and Harold Maundrell?

A. I did.

Q. In connection with that examination, did you examine the ledger sheets of that account as maintained by the bank? A. I did.

Q. I will show you plaintiff's Exhibit 27, consisting of the signature cards and ledger sheets, photostatic copies of ledger sheets, transcript of that account, and ask you if you recognize those as being photostatic copies of the bank account that you examined? A. Yes, this is the account.

Q. Now I will ask you whether or not you examined that account for the purpose of ascertaining year-end balances in that account as adjudged by outstanding checks which had not yet been presented to the bank for payment at the end of the year?

Mr. Gillen: Just a moment.

Mr. Campbell: May I finish?

Mr. Gillen: I think it is leading and suggestive. I think he could ask what he examined the account for and the witness could relate what he examined it for.

Mr. Campbell: It is preliminary.

Mr. Gillen: Preliminary questions shouldn't contain all [1899] the matter——

The Court: See if you can avoid leading questions.

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(Testimony of Charles M. Miner.)

Mr. Gillen: A simple question would be, what you examined the account for.

Q. Will you state the purpose of the examination which you made of this account?

A. To determine the balances in the bank as at the end of the year 1945 and 1946 as they related to the owners' interest therein, and adjusted by outstanding checks and deposits in transit.

Q. Now will you state what you mean by deposits in transit?

A. Deposits in transit are deposits that have been reflected on the books as additions to the bank account, that is, on the books of the depositor, but which deposits have not yet been credited by the bank.

Q. Into the bank account?

A. Into the bank account.

Q. Now in connection with that examination which you made of this account, what other records and documents did you have before you?

A. I had in addition to the bank statements cancelled checks drawn against the account and I had some stubs.

Q. Check stubs? A. Check stubs.

Q. Now in that connection there has been brought into court [1900] a paper box container, containing envelopes of cancelled checks and check stubs——

Mr. Golden: Pardon me—we want to be clear on what this is. Is this carton one of the cartons that we delivered to the clerk last month?

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(Testimony of Charles M. Miner.)

Mr. Campbell: I am just going to identify them.

Mr. Golden: We want to know that first. We want to make objection to it.

Mr. Campbell: I will ask to have an identification number given to this box containing——

Mr. Gillen: All we want to know is that one of the boxes brought in on the Court's order?

Mr. Campbell: No. A box containing a number of envelopes containing cancelled checks and what appears to be check stub books.

The Clerk: No. 161 for identification.

Mr. Gillen: Your Honor understands the reason we interrupted because we wanted to know if we would be required to make that general objection.

The Court: I think Mr. Campbell understands. They were not produced pursuant to court order?

Mr. Campbell: No.

The Court: I think that is clear now.

Q. Now were the contents of that box available to you and used by you during the course of your examination? [1901]

A. Yes, sir, the contents were available.

Q. Now in addition there have heretofore been received in evidence in this case, as government's Exhibits 132 to 136, inclusive, certain check stubs of the Crocker First National Bank, and were these also vailable to you and used by you, if necessary, in the course of the examination which you made for the purposes which you have outlined?

A. Yes, sir, these were available to me and examined by me.

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(Testimony of Charles M. Miner.)

Q. Now I first call your attention to the fact, referring to plaintiff's Exhibit 27, transcript of this account, shows that the account was opened on or about June 21, 1945, and the balance as shown at December 31, 1945, the sum of $5492.69. Did you observe that, Mr. Miner? A. Yes, I did.

Q. Now based upon your examination of the records which you have referred to, will you state—will you answer this yes or no—if you found that certain checks had been drawn against that account but which had not yet been presented to the date prior to the end of December 31, 1945, but which had not been cleared through the records of the bank as of the close of business December 31, 1945?

Mr. Avakian: Just a moment. This question, even though it calls for yes or no, is obviously getting facts in evidence based on records not in evidence. We object to the question because it calls for matter which is not in evidence, and also [1902] I believe—counsel can correct me if I am wrong—I believe the material the witness referred to in making this examination appears to be books and records of the defendant, taken during the course of the investigation, with agreement to return, never returned and never shown prior to this moment, although we requested them, and we object on all these grounds made to the use of any of that in evidence, and in addition object to the use of any evidence which is not before the court, not the best evidence.

The Court: Objection overruled. Answer the question.

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(Testimony of Charles M. Miner.)

A. Yes, sir, I found such checks.

Q. Now in connection with those checks which you have referred to, have you drawn up and do you have in your possession a listing of those checks, giving the dates, the check numbers and the amounts of such checks?

Mr. Avakian: Your Honor, may it be understood our objection goes to the entire line of examination?

The Court: No, we will have to hear objection to each question.

Mr. Avakian: Then unless your Honor wishes me to repeat it, I will state same objection, if that will suffice.

The Court: Same ruling.

A. Yes, sir, I do have a list of such checks by check number, amount and date.

Q. And in relation to December 31, 1945, based upon the examination [1903] of the records to which you refer, did you ascertain whether or not any deposits were in transit as of that date, which had not yet been credited to the account of the bank?

Mr. Avakian: Objected to for the same reasons and the additional ground the records themselves would be the best evidence.

The Court: Objection will be overruled.

Q. Answer yes or no.

A. Yes, sir, there was a deposit made——

Mr. Gillen: He asked for a yes or no answer—he got his answer.

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(Testimony of Charles M. Miner.)

Q. Now did you also draw up a schedule setting forth the same information and from the same sources with relation to the date of December 31, 1946? A. I did.

Q. Now will you produce those schedules? You have handed me two sets of schedules. The first of these refers to the year-end December 31, 1945, is that correct? A. That is correct.

Q. And the other the year-end December 31, 1946? A. That is correct.

Mr. Campbell: I ask that these be marked plaintiff's Exhibit 162 for identification and 162A for identification, that relating to December 31, 1945, bearing the first of the two numbers. [1904]

Mr. Gillen: If counsel happens to have copies, it will save considerable time.

Mr. Campbell: I do not, I regret to say.

Mr. Gillen: These were prepared in March, 1951. They could get photostats much quicker than that.

Mr. Campbell: I do not have copies of them.

The Court: Ladies and gentlemen of the jury, we will take a recess while counsel are examining these documents.

(Jury and alternate jurors admonished and recess taken at 1:50 p.m.)

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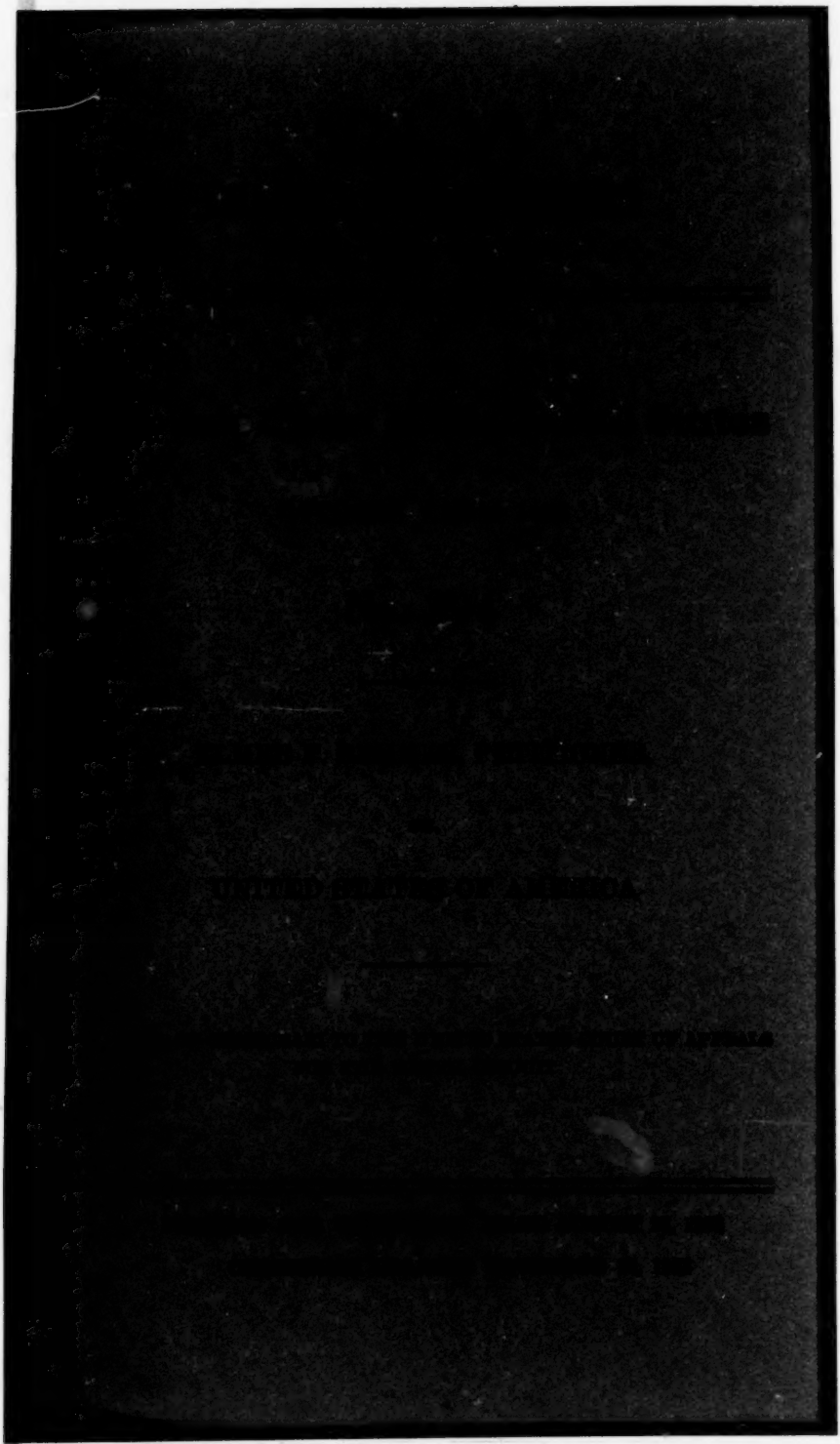

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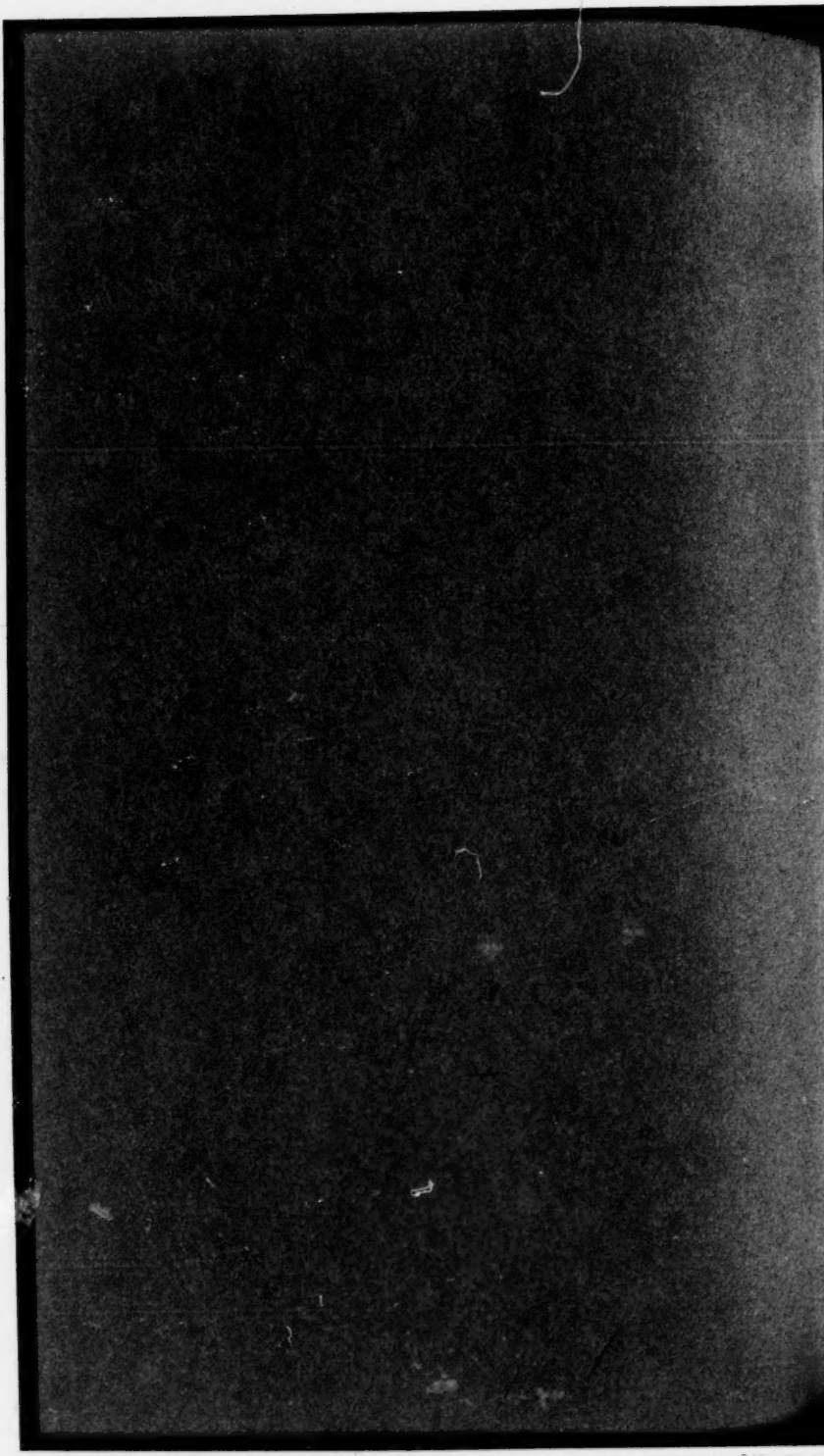

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes
Volume VI
(Pages 2301 to 2748)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MINER

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Miner, referring to plaintiff's Exhibits 162 and 162A for identification, I call your attention to the writing on the upper right-hand corner, where it is Exhibit 27, when was that placed there?

A. That was placed on these work papers in order to identify them, Exhibit 27.

Q. That is the transcript of the bank account?

A. That is correct.

Q. And when was the work done by you in connection with these [1905] documents?

A. The work was done by me during the month of March, 1951.

Mr. Campbell: These will be offered in evidence as government's Exhibits 162 and 162A.

Mr. Avakian: May we examine the witness on his voir dire before they are admitted?

The Court: Yes, sir.

Q. (By Mr. Avakian): Mr. Miner, you said you prepared these in March of 1951. Will you

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(Testimony of Charles M. Miner.)

state when you made the examinations that are reflected in these two proposed exhibits?

A. Also during the month of March, 1951.

Q. All of your work was done during that month?

A. In connection with these papers submitted, yes.

Q. You do not recall over how long a period of time?

A. Not exactly; it was several weeks.

Q. Now you said in preparing those you used various materials which are in a paper carton, which I am showing to you, now entitled Exhibit 161 for identification, is that correct?

A. That is correct.

Q. And you also used Exhibit 27?

A. That is correct.

Q. Did you use any other paper in the preparation of those exhibits? A. Yes, I did.

Q. What other papers? Are they present in court here? Can [1906] you identify them for us?

A. No, I couldn't identify them. I made reference to working papers prepared by the revenue agent, in order to check my work.

Q. And by the revenue agent, whom do you mean? Do you know his name?

A. I do not know his name. The papers were handed to me as being prepared by the revenue agent.

Q. And those work papers are not in evidence here, as far as you know?

A. Not to my knowledge.

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(Testimony of Charles M. Miner.)

Q. Now I notice that in this box that is identified as prosecution's Exhibit 161, there are a number of envelopes containing cancelled checks and bank statements, which are addressed Elmer Remmer or Harold H. Maundreil. Can you tell us where you obtained these records?

A. Those were given to me by my superior.

Q. And who is that? A. Mr. Ray Weaver.

Q. And he is present in the court room, is he?

A. Yes, he is.

Q. Do you know where he obtained them?

A. No, I do not.

Q. Is he the man who also gave you the work sheets that you mentioned, the revenue agent's work sheets? A. Yes. [1907]

Q. Did he hand you or show you any other material which you used in the preparation of Exhibits 162 and 162A for identification?

A. Not that I recall.

Q. Now insofar as you used the records which are in the box marked for identification as Exhibit 161—and incidentally, that includes a number of check stub books in addition to bank statements and cancelled checks, does it not? A. That it does.

Q. In connection with your use of those materials, did you know to what persons or businesses those relate?

A. I was told that they pertained to Tiny's or the Menlo Club operation.

Q. Mr. Weaver told you that?

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(Testimony of Charles M. Miner.)

A. That is correct.

Q. Did Mr. Weaver also tell you that he had those records continuously, either in his possession or the possession of some other agents of the Bureau from the years 1946 and 1947?

Mr. Campbell: Objected to as incompetent and further ask that the jury be instructed to disregard the question and it calls for hearsay.

Mr. Avakian: I am asking him if Mr. Weaver didn't tell him.

The Court: It is hearsay.

Mr. Campbell: And it is immaterial. [1908]

Mr. Avakian: We are inquiring as to the source of materials.

The Court: He told you he got them from Mr. Weaver.

Mr. Avakian: That is right.

The Court: All right.

Mr. Avakian: The objection is sustained, your Honor?

The Court: Yes.

Q. Did Mr. Weaver also tell you that the representatives of Mr. Remmer had been trying to get permission to examine these documents themselves for preparation of the trial?

Mr. Campbell: That has already been sustained and I ask the jury be instructed to disregard it.

The Court: Objection is sustained; calls for hearsay.

Mr. Avakian: Now, your Honor, we object to these two exhibits for all the reasons heretofore set

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(Testimony of Charles M. Miner.)

forth with respect to the use by the prosecution of documents which were taken and as to which we were denied permission to examine in advance of the trial, and we also object as to these two proposed exhibits on the additional grounds that they are based, in part at least, on materials which so far, at least, have not been presented in this court room and are not available for examination by us, and I believe your Honor is well aware of the rule that expert witnesses may present a summary under certain conditions, providing the materials used in preparing his summary are available for examination and inspection by the [1909] other side.

Mr. Campbell: That is not the state of the record. He stated these were materials. He was asked if he had them before him and he said he checked his work against the other agent's work for accuracy.

Mr. Avakian: He used them in preparing the exhibits and he compared them with other materials. We are entitled to have all the materials which entered into the summary he prepared so we may have an opportunity to look at them themselves.

Mr. Campbell: Are these summaries in any part the product of some revenue agent's you looked at?

A. No, sir.

Q. Are they entirely the product of exhibits shown to you or in that box marked for identification? A. That is correct.

Q. (By Mr. Avakian): Before you completed

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(Testimony of Charles M. Miner.)

these and turned them in to whoever you did as correct and complete, did you refer to certain work papers of another agent? A. Yes, I did.

Mr. Avakian: I think that was part of the examination before he completed the exhibits as correct, and I submit we are entitled to see everything he saw or used before he reached the conclusion these were proper.

The Court: I want to know from this witness, Exhibits 162 and 162A are summary of all matters in 161? [1910] They do not purport to be or have anything to do with any other material?

A. That is correct, sir. The information contained came solely from Exhibit 161. I merely referred to revenue agent's work papers as a check against possible error.

The Court: All right. The objection is overruled. The exhibits are admitted in evidence, 162 and 162A.

Mr. Campbell: Reading from government's Exhibit 162: (Reads.) Less O. S. checks.

Q. What is meant by the symbol O/S?

A. It is an abbreviation for oustanding checks.

Mr. Campbell: (Reads from exhibit.)

Q. And you have attached hereto, have you not, a list of the checks which you found to be outstanding as of the conclusion of business December 31, 1945, but which have not yet been passed through the bank, is that correct? A. That is correct.

Q. And in that connection you have separated

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(Testimony of Charles M. Miner.)

those checks into regular checks and pay roll checks, have you not? A. That is correct.

Q. And you have also listed the checks by numbers, by the date appearing on the check, and the amount of the check, is that correct?

A. That is correct.

Q. And it is a fact, is it not, that among those outstanding [1911] checks as shown by this exhibit you have taken into consideration checks which were drawn as early as December 18th.

Mr. Gillen: Counsel is testifying again. He is putting in his question everything he wants the witness to say yes or no to.

The Court: He is just summarizing.

Mr. Campbell: I am reading from the exhibit.

The Court: That might save time rather than reading the entire exhibit.

Mr. Gillen: I want to save time, Your Honor, but to me this is a cross-examination question—"it is a fact, is it not." It is certainly leading and suggestive.

The Court: Objection will be overruled.

Q. Included in the outstanding checks as of December 31, 1945, were checks issued as early as December 18, 1945, is that correct?

A. I believe so.

Q. And you have also followed those checks through to the cashing period by summary appearing on page 3?

Mr. Gillen: Objected to as leading and suggestive.

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(Testimony of Charles M. Miner.)

The Court: Objection overruled.

Q. Is that right.

A. That is right.

Mr. Campbell: Reading from that summary: (Reads.)

Q. Total 9063.84—does that total represent all outstanding [1912] checks that were outstanding as of December 31, 1945?

Mr. Gillen: Objected to as leading and suggestive.

The Court: Objection overruled.

Q. Is that correct?

A. That is the total on outstanding checks.

Mr. Campbell: Reading from plaintiff's Exhibit 162A: (Reads.) To which there is attached a list following page of sheet No. 1 of checks, giving the check number, the date of the check, and the amount and classified as regular and as pay roll checks, totalling $7963.51. The end of the exhibit is a summary of outstanding checks paid January, February, and June, total of $7963.51.

You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Miner, I notice that on Exhibit 162, the lower lefthand corner of each page there is a notation, "Miner 3-19-51." Will you explain the meaning of that?

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(Testimony of Charles M. Miner.)

A. That is the date that I prepared the work sheet.

Q. Did you prepare this particular exhibit?

A. The particular work sheet which is marked there.

Q. When you say work sheet, do you mean Exhibit 162?

A. The date on each page is the date that I compiled the information.

Q. On that particular page?

A. On that particular page. [1913]

Q. In other words, it is the date that you wrote up the page itself?

A. It is the date that I compiled the information on that page.

Q. Well, did you make some entries on one day and some entries on another day?

A. It might be possible.

Q. And in that case the date represents what, the last day that you worked on that?

A. Yes.

Q. And I note that on Exhibit 162A there is in the lower left-hand corner of each page the notation, "Miner 3-20-51." Does that represent the last date on which you made entries on each of these sheets? A. May I see the exhibit, please?

Q. Yes, surely. I will hand them both to you.

A. That date represents the date this information was completed and assembled.

Q. By this information, you mean the data that is entered on the sheets?

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(Testimony of Charles M. Miner.)

Mr. Campbell: Objected to as argumentative.

The Court: He may answer the question. Read the question please.

(Question read.)

Mr. Campbell: I do not understand the question—— [1914]

The Court: I do not see any necessity for the question.

Mr. Avakian: I am trying to find out when he was working on those.

The Court: Let him answer the question.

(Question read.)

Q. Do you understand the question?

Mr. Campbell: I submit it is incompetent.

Mr. Avakian: Let me restate it.

Q. Did you first prepare this material in some other form and then on a later date put it on the sheets that are in evidence here?

A. That may be with respect to one sheet there. The other sheets were made up on or about the dates as indicated.

Q. Each of these exhibits has three sheets in it, does it not? A. That is correct.

Q. And the top sheet is sort of a summary sheet and the other two contain details?

A. That is correct.

Q. And what you mean then, I take it, is you mean you may have prepared the detailed sheets at an earlier time from the date on which you pre-

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(Testimony of Charles M. Miner.)

pared the summary sheet, is that what you are getting at? I am trying to understand.

A. I mean the sheet which you are holding in your hand and which is of a different color than the other sheets, was actually written recently as a transcription of information [1915] which I did compile in March of 1951.

Q. And by sheet of a different color, you mean the first sheet in Exhibit 162A, is that right?

A. That is correct.

Q. If I understand you correctly then, the next two sheets contain details which were prepared on or about March 20, 1951? A. That is correct.

Q. But this top sheet, although it bears the date 3-20-51, was prepared at some later date?

A. The information was prepared on or about March, 1951; however was actually written recently.

Q. This particular page was written later?

A. That is correct.

Q. Is there a similar explanation with respect to summary sheet of 162?

A. No, there is not.

Q. All three of those sheets were written on or about March 20, 1951?

A. That is correct, with the exception noted here before, Exhibit 27, written in the upper right-hand corner.

Q. That was written in recently?

A. That is right.

Q. In preparing these two exhibits, did you examine all of the cancelled checks, bank statements,

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(Testimony of Charles M. Miner.)

check stub books, that are contained in the box which is Exhibit 161 for identificaton [1916]

A. Yes, sir.

Q. And did you spend much time at that? How much time did you spend at it?

A. I can't remember the exact number of days, but it took me quite a while.

Q. Two or three weeks, is that correct?

A. Several weeks.

Q. Working continuously?

A. What do you mean by continuously?

Q. I mean were you working each day on this assignment, or did you take a few days to work on something else? A. I don't recall exactly.

Q. Do you recall whether you spent substantially all that time, two or three weeks' period doing this job?

A. Substantially all of the time.

Q. Now I note that on the second page of prosecution's Exhibit 162-A, which is designated as "Reconciliation" for December 31, 1946, there is a heading, "Checks dated in 1946, paid by bank in 1946." Would you explain what that means?

A. The statement is in error. It means that checks dated in 1946, which were paid by the bank in '47, as indicated by the specific date that they cleared the bank.

Q. So that when you wrote in there, "Paid by bank in 1946," that was a mistake? [1917]

A. That is correct.

Q. You meant to write 1947?

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(Testimony of Charles M. Miner.)

A. That is correct.

Mr. Avakian: May we have the witness correct the exhibit in that respect?

The Court: Very well.

(Witness makes correction.)

Q. Now on the Summary Sheet 162-A there are three entries, the first of which is balance of a Bank Statement 12-3-46, amount of $10,632.87. That, I take it, is the figure which is shown in the bank records as the amount of money in that account at the end of December 31, 1946?

A. That is correct.

Q. And then you have subtracted from that as outstanding checks the sum of $7,963.51. That, I take it, represents the total of checks which were issued prior to the close of 1946, but which were not cleared through the bank until some time in 1947, is that correct? A. That is correct.

Q. And by that subtraction then you have adjusted the bank balance at the end of 1946, from $10,632.87 down to $2,669.36. That represents, then, the amount which you considered as the proper amount of that balance which should be considered in the net worth of a taxpayer whose income is being computed on the net worth basis? [1918]

Mr. Campbell: I object to the question in that form, calling for conclusion of this witness, as to what use may or may not be made of it. He has testified he adjusted the account for outstanding checks, the result representing the depositors' inter-

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(Testimony of Charles M. Miner.)

est in those funds in the bank, and this question calls for his conclusion and is conclusion on legal matters.

The Court: Let me have the question.

(Question read.)

The Court: Objection sustained.

Q. How long have you been a special agent for the Bureau of Internal Revenue?

A. Since July 11, 1949.

Q. And prior to that time were you employed in any other branch of the Bureau?

A. No, I was not.

Q. How long have you been an accountant?

A. I have been doing accounting work since 1939.

Q. And prior to 1949, when you entered the Bureau, were you engaged in accounting work with a private accounting firm? A. No.

Q. For some corporation or business?

A. For the business of public accountant.

Q. In your own business? A. No. [1919]

Q. For a firm that was in public accounting business? A. Yes.

Q. In your work as an employee of a public accounting firm and in your work as special agent for the Bureau of Internal Revenue, have you engaged in computation of the net income of tax papers by what is known as the net worth method?

Mr. Campbell: Objected to as incompetent, not within the scope of direct examination.

The Court: Objection sustained.

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(Testimony of Charles M. Miner.)

Mr. Avakian: May I be heard on that, your Honor?

The Court: No.

Q. Mr. Miner, in adjusting a balance shown on a bank statement by taking into account either checks outstanding or deposits outstanding at the end of the year, what effect does that have with relation to the computation of the dollar value of the bank account to the owner of the account?

Mr. Campbell: Objected to as calling for conclusion, not within the scope of direct examination.

Mr. Avakian: He was examined exactly on that point on direct.

The Court: Objection sustained.

Q. Referring to prosecution's Exhibit 162, which is your schedule as of December 31, 1945, I note that the first entry you have made is bank balance per bank statement of 12-31-45, of $5,492.69. That represents, does it, the amount of that [1920] account shown on the records of the bank as of the close of business on December 31, 1945? A. That is correct.

Q. Now your next entry is entitled "Add Deposit in Transit $4,284.45." Will you explain that item to us?

A. That was a deposit to the account which was credited by the bank on January 2, 1946, and which was presumed to have been on the way to the bank as of December 31, 1945.

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(Testimony of Charles M. Miner.)

Q. You say it was presumed—upon what do you base that assumption?

A. It was presumed because it was not likely, in view of the deposits being made, the money would have been made available as of the first day of January, one day's operations.

Q. You mean the second day of January—I think you testified it was credited on January 2nd?

A. It was deposited on January 2nd. It was credited by the bank on January 2nd.

Q. You say it was not likely to have represented income of January, or something to that effect. Upon what do you base that opinion and conclusion? Was that based on some record that you saw?

A. It was based upon the experience of the deposits in the account.

Q. Did you find some record which showed that that money was on hand on or about December 31, 1945? [1921] A. No, I believe not.

Q. You simply found a record of a deposit made in the bank on January 2, 1946, is that correct?

A. That is correct.

Q. So far as you know, can you tell us where that money came from that was deposited on January 2, 1946?

A. No, I can't say where the money came from.

Q. Can you point to any record or any evidence which will show whether or not that money was on hand at the close of the year 1945?

A. Not definite evidence, no.

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(Testimony of Charles M. Miner.)

Q. Don't limit yourself to definite. Is there any evidence you can point to in the record, or any evidence of any kind you can point to?

A. The only records are, as I explained before, the method of deposits as shown by the bank statement.

Q. Will you find that record for me?

A. May I see Exhibit 27?

Q. Have you found the record?

A. I have found the record, yes.

Q. Which exhibit are you looking at, so the record will be clear? A. Exhibit No. 27.

Q. You are showing me what sheets?

A. The sheets are not numbered, but in the exhibit this is the sheet ending with the date of December 31, 1945, and the sheet [1922] for the first few days in January, 1946.

Q. Now the second sheet that you have shown me begins December 31, 1945, likewise, does it not?

A. It begins carrying balance forward from December 31, 1945.

Q. Now is there any particular entry on those two sheets which is evidence of the fact that the deposit of $4,284.45 made on January 2, 1946, was on hand with the owners of the account prior to the close of 1945?

The Court: Read the question.

(Question read.)

Q. Do you understand the question?

A. There is no evidence but there may be an indication.

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(Testimony of Charles M. Miner.)

Q. What is it that indicates that, please?

A. Deposit made on December 28, 1945, $2,400; deposit made on December 31, 1945, of $3,950, indicating that in what would be presumed to be normal operations, it would take two or three days to accumulate the sum of four thousand dollars to deposit.

Q. Now there was a deposit on December 31st, was there not? A. That is correct.

Q. That is the last day of the year?

A. That is the date it was credited by the bank on the bank account, that is correct.

Q. That would be the date the money was deposited in the bank, is that right?

A. It is the date the bank credited it on its bank statement. [1923]

Q. Haven't you found, in examination of bank records, that the bank credits money in its records on the date it is deposited with the teller?

A. Not necessarily. It may be in the depository box and it would not be credited that day.

Q. You mean if a person deposits with the teller on a particular day the entry in the bank records may not be made on that day?

A. That is not what I mean.

Q. What do you mean?

A. I mean it is possible for money to be placed with the deposit bank in a depository in the bank, a sack dropped down the chute there, it might lay for a day or two until the bank opens up on the subsequent day.

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(Testimony of Charles M. Miner.)

Q. Did you have any reason to believe that this deposit of December 31, 1945, was made in that manner?

A. No, I have no reason to believe so.

Q. Insofar as deposits at teller's cage are concerned, you know, do you not, that the bank credits those deposits on its records as of the day the money is handed to the teller? A. Usually.

Q. This deposit December 31, 1945, $3,950.63, and the next deposit January 2, 1946, $4,284.45, are those the two entries which lead you to believe that the four thousand dollar figure was on hand at the close of business December 31, 1945? [1924]

A. No, those are not the two figures, that led me to believe that.

Q. I thought they were the two you showed me. Are there some other figures which lead you to that conclusion?

A. As I stated before, it was deposit of $2,466.68 on December 28th, coupled with deposit $3,950.63 on December 31, 1945, which led me to believe that in the normal course of business the $4,284.45 credited to the account on January 2, 1946, would have been accumulation over several days, therefore, would have been on hand at December 31, 1945.

Q. Well, you say would have been accumulation over period of several days, do you mean several days immediately prior to its deposit?

A. Several days prior to its deposit, yes.

Q. And January 1, 1946, would be one of those days, would it not?

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(Testimony of Charles M. Miner.)

Mr. Campbell: I object to this as being argument. The subject has been covered and re-covered.

The Court: I think it is just a matter of examining the calendar to answer that question. Objection sustained.

Mr. Avakian: If this witness has simply made an assumption based on records——

The Court: There is nothing before the Court.

Q. Isn't it a fact, Mr. Miner, that your decision to list that January 2nd deposit as having been in transit on December [1925] 31st is based simply on your own opinion and conclusion and is not based on documentary evidence showing that that money was on hand on December 31, 1945?

A. That is correct.

Q. Are there any other entries in these two exhibits which are based on your own opinion and conclusion rather than being based specifically on documentary or other evidence?

A. May I examine the exhibits?

Q. Certainly.

A. The other information is all substantiated by documentary evidence.

Q. Now in addition to making adjustment on account of that $4,284.45 item, you made a further adjustment with respect to checks in transit, did you not? A. No, I do not believe I did.

Q. Then I will show you Exhibit 162, which states, "Amounts outstanding checks $9,063.84."

A. I made adjustment on outstanding checks. It is a different terminology.

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(Testimony of Charles M. Miner.)

Q. In other words, you are objecting to my term "in transit." And with those adjustments you arrived at a credit balance in that particular account for December 31, 1945, did you not?

A. Yes, I did.

Q. Now, Mr. Miner, in computing the income of a taxpayer on net worth basis, is it essential from an accounting point of view, [1926] in order to make a correct determination of the net income, to have a correct figure for the bank account of the depositor whose net income you are determining?

Mr. Campbell: Objected to as calling for conclusion, not within the scope of direct.

The Court: Objection sustained.

Mr. Avakian: I would like to be heard on that because that is the issue in this case. Mr. Pike has stated that they are determining on net worth income.

The Court: No, I won't take the time. The ruling will stand.

Q. Mr. Miner, if you are mistaken in your opinion and conclusion that the January 2, 1946, deposit was actually on hand with the depositor prior to the close of business in the year 1945, would that have an effect in the determination of the net income of the depositor for both the year 1945 and the year 1946?

Mr. Campbell: Objected to, not within the scope of direct examination; calling for his opinion and conclusion as well.

The Court: Objection sustained.

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(Testimony of Charles M. Miner.)

Q. In preparing the two exhibits, 162 and 162A, and in making the examination which you made for that purpose, were you aware of the fact that the Menlo Club, Menlo Bar and Tiny's Restaurant were open 24 hours a day every day of the year?

Mr. Campbell: Objected to as immaterial. [1927]

The Court: He may answer the question.

Q. With the exception of the bar. I will reframe the question. Were you aware of the fact, in making that examination, that Tiny's Restaurant and the Menlo Club were open 24 hours a day, every day of the year, and the Menlo Bar was open every day of the year except between the hours of 2:00 a.m. and 8:00 a.m.?

A. No, I wasn't aware of that.

Q. And when you concluded that a deposit made on January 2nd in a large amount, such as $4,284.45, when you concluded that must represent money on hand prior to the close of business on December 31st, you were assuming, were you not, that these businesses were not open on the holiday of January 1st?

A. No, I wasn't particularly assuming that.

Q. Were you assuming anything either way on that, as to whether they were open or not?

A. No, sir.

Q. You didn't consider it either way; is that right? A. I made no assumption of it.

Q. Did you take into consideration the fact that the business of such places might be abnormally

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(Testimony of Charles M. Miner.)

high on New Year's Eve and on the early hours of January 1st of the year?

A. I didn't consider that.

Q. Now if you are in error in your assumption that this $4,284.45 deposit of January 2nd was on hand on December 31st [1928] would that change the amount of the credit balance on the books of December 31, 1945, which you show on Exhibit 162?

Mr. Campbell: Objected to; the document speaks for itself. The question is argumentative, if the Court please.

The Court: Objection sustained.

Q. So there will be no misunderstanding, Mr. Miner, you arrived at the credit balance figure shown on prosecution's Exhibit 162, of $713.30, on the assumption that the deposit of January 2nd was actually on hand on December 31st; is that correct?

A. That is correct.

Mr. Avakian: No further questions.

Redirect Examination

By Mr. Campbell:

Q. I have one question with relation to this amount which you have shown as deposit in transit, $4,284.45. I wonder if you will make a computation for me from this exhibit. Assuming that that money was not on hand or in transit as of December 31st, what would be the amount of checks drawn and outstanding as of December 31st, for which there were no funds on hand in the bank or in transit?

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(Testimony of Charles M. Miner.)

Give me the round figure—you don't have to figure it to the cent.

Mr. Gillen: If there is a computation made, I think it should be to the cent.

Mr. Campbell: Very well, you can have it to the cent.

A. The bank account would have been overdrawn in the amount of [1929] $3,571.15.

Q. So that if the deposit of January 2nd was not in transit, there would be outstanding as of December 31st, as shown by the schedules of checks drawn for general purposes and pay roll checks to that amount; is that correct?

A. That is correct.

Mr. Campbell: That is all.

Recross-Examination

By Mr. Avakian:

Q. That would be true, Mr. Miner, only if all checks in transit were actually presented to the bank on January 2nd prior to the four thousand dollars; is that true?

A. I do not believe that is.

Q. The bank balance would not be overdrawn until the checks would be presented to the owner, would it?

Mr. Campbell: That was not my question. Object to the question.

The Court: You may answer the question.

Mr. Avakian: He said the account would be overdrawn.

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(Testimony of Charles M. Miner.)

The Court: It is obvious——

Mr. Avakian: He won't admit an obvious thing, that is the point, your Honor.

Mr. Campbell: I object to that.

The Court: Go ahead and answer the question. I do not see any reason why you should ask such a question.

(Question read.) [1930]

A. Yes, the bank account would be overdrawn. The account is considered overdrawn when the checks are issued in excess of the amount of funds to pay those checks, whether or not such checks are presented to the bank for payment.

Q. Actually, Mr. Miner, the checks you have listed as outstanding at the end of the year in total amount of $9063.84, were presented—those particular checks were cleared through this bank account in part during the month of January, 1946—they were all presented at various times during the month of January, 1946; isn't that correct?

Q. I would have to refer to the exhibit, please, before I could answer the question. No, these outstanding checks were not all presented to the Crocker First National Bank for payment in the month of January, 1946.

Q. Are there other months also?

A. Yes, sir; during the months of January, February, March and April of 1946.

Q. So when you say that if that money, $4284.45, had not been on hand on December 31st, the account would have been ovedrawn, you mean

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(Testimony of Charles M. Miner.)

simply, do you not, that the total of checks issued as of December 31, 1945, was greater in amount than the money which was in the bank on December 31, 1945? A. That's right.

Q. So that you would consider that the bank account was overdrawn then; is that correct? [1931]

A. Yes.

Q. And the bank account would have been overdrawn on your theory, whether the four thousand dollars was on hand or not, so long as it had not been put in the bank; isn't that correct?

A. It would not be considered overdrawn if the money were in transit to the bank.

Q. What do you mean by in transit?

A. Had been mailed or placed in the bank to deposit.

Q. But if it were simply in the office or office safe, then you would consider that the account would be overdrawn?

A. Not if it was in the safe of the bank.

Q. Not on the way to the bank but in the office safe?

A. In the office safe, to be deposited in the bank——

Q. Would you answer the question—if the money was simply in the office safe and nobody carried it to the bank and checks are drawn in a total amount more than money in the bank, you, as an accountant, would consider that overdrawn?

A. It would depend upon the circumstances.

Q. Do you know whether these checks which

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(Testimony of Charles M. Miner.)

you have listed as outstanding checks, had been delivered to the payees on December 31st or not?

A. I have no way of knowing that.

Q. In preparing this exhibit you assumed, did you not, that the checks had been delivered to the payees?

A. I assumed that the checks had been [1932] issued.

Q. By issued, you mean handed over to the payee?

A. No, I do not mean necessarily handed in the hand.

Q. What do you mean?

A. The check was written.

Q. It was written?

A. And on its way in some stage or other of going to the payee.

Q. In transit to the payee; is that right?

A. Yes.

Q. And you assumed that the checks were at least in transit to the payee or had been delivered to the payee in preparing this exhibit; is that correct?

A. I assumed that the checks were in transit to the payee.

Q. And if you are incorrect in that assumption, then your exhibit would likewise be in error?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

(Jury and alternate jurors admonished and recess taken at 3:00 o'clock.)

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3:10 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Avakian: No further questions.

(Witness excused.) [1933]

MR. HARKNESS

having been previously sworn, testified as follows, on behalf of the plaintiff:

Direct Examination

By Mr. Campbell:

Q. Mr. Harkness, you have been previously sworn? A. Yes, sir.

Q. Will you state again your occupation?

A. Internal Revenue agent.

Q. How long have you been an Internal Revenue agent? A. Since 1945.

Q. What was your occupation prior to that?

A. I was an accountant with the Navy Department five years prior to that.

Q. And prior to your government employment, were you in accounting work? A. Yes, sir.

Q. And with whom and over what period of time?

A. With a private corporation in southern California.

Q. What is the name of the firm?

A. The Sun, San Bernardino.

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(Testimony of Lynn Harkness.)

Q. What was that company?

A. Newspaper.

Q. You say you have been an Internal Revenue agent since when? A. 1945.

Q. Now in connection with your duties as revenue agent—and I believe you so testified yesterday or the day before—that you [1934] were assigned, together with other agents, to the investigation involving the income tax returns of Elmer Remmer and his wife, Helen Remmer? A. Yes, sir.

Q. Now in that connection did you examine such books and records of the 110 Eddy Street that were made available for your examination?

A. Yes, sir.

Q. And did you also examine the partnership returns as filed by the 110 Eddy Street Club?

A. Yes, sir.

Q. Mr. Harkness, I am going to show you plaintiff's Exhibit 112, consisting of two ledgers of 110 Eddy, and ask you if you examined these records in the course of your investigation?

A. Yes, sir.

Q. And I am also going to show you plaintiff's Exhibits 80, 81, 82 and 83, being partnership returns of income for the 110 Eddy Street, as it is referred to on one of the returns, for the years 1943, 1944, 1945 and 1946, respectively, and ask you if in connection with your examination you also examined those documents? A. Yes, sir.

Q. Now I will ask you as to whether or not, on my instructions, if you have drawn up a schedule

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(Testimony of Lynn Harkness.)

or summary of the assets and liabilities of the 110 Eddy Street for the dates of December 31, [1935] 1943; December 31, 1944; December 31, 1945, and December 31, 1946, based upon the books and the returns which I have shown you? A. Yes, sir.

Q. And I will ask you if, in connection with such summary of assets and liabilities, you have also, pursuant to my instructions, set forth on that schedule the capital accounts as shown by the books as of the same dates? A. Yes, sir.

Mr. Campbell: I will ask to have this schedule, consisting of three pages, marked 163 for identification. For further identification, I would like to ask another question.

Q. Showing you Exhibit 163 for identification, is this the summary of assets and liabilities, together with the capital accounts, as shown by the books, which you prepared and from the sources which I have indicated? A. Yes, sir.

Q. And I call your attention to the schedules annexed, Schedules 1 and 2, and were they prepared from the same sources? A. Yes, sir.

Mr. Gillen: There is no copy of this and it will take some little time to examine and we will meet your Honor's pleasure.

Mr. Campbell: Then may I make this suggestion—I have another similar schedule which I will also submit to counsel.

The Court: Do you want it marked as an exhibit for [1936] identification?

Mr. Avakian: I do not know whether this is a

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(Testimony of Lynn Harkness.)

practical suggestion or not—if Mr. Campbell has other matters he could question the witness on without the use of these various documents, we could examine them perhaps overnight on some mutually satisfactory arrangement.

Mr. Campbell: We have similar schedules on the Day-Night Cigar Store and Menlo Club and I will have them marked for identification at this time so counsel may examine all three, which will expedite the procedure tomorrow morning. I am going to ask to have the statement of two schedules in the case which refers to the Day-Night Cigar Store marked 164 for identification, and those marked Menlo Club, consisting of two pages, be marked 165 for identification. If counsel wishes to withdraw them for photostating and keep them overnight, we have no objection. Let me make this suggestion, that you take a transcript of the first one before you leave this afternoon and the other two you can take overnight and have photostats.

Mr. Gillen: If you are going to trust us with one, why don't you trust us with all?

Mr. Campbell: No, I wish to work with the first one.

The Court: Exhibits 164 and 165, by consent of counsel, may be released to counsel for the defendant.

(Jury and alternate jurors admonished and recess taken at 3:35 p.m.) [1937]

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Thursday, January 10, 1952—10:30 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Avakian: May the record show, your Honor, that I have returned to the clerk this morning Exhibits 164 and 165 for identification?

The Court: Yes, sir.

MR. HARKNESS

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Harkness, yesterday I asked you as to certain exhibits which you had seen with reference to the summary which you stated you prepared and which was marked 163 for identification. You were shown, I believe, Exhibit 112 and also the returns of 110 Eddy Street, being Exhibits 80, 81, 82 and 83, and I will ask you also if, in connection with your preparation of the summary you also used Exhibit 112A, which is a further ledger of 110 Eddy Street?

The Court: When you refer to summary, which exhibit do you refer to?

Mr. Campbell: I refer to 163 for identification.

A. Yes, sir; I did.

Q. Now I hand you 163 for identification, which is the summary you have identified as having prepared in respect to 110 Eddy Street. Now let me

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(Testimony of Lynn Harkness.)

ask you this, Mr. Harkness, with respect [1938] to the ledgers to which I have referred, Exhibits 112 and 112A, will you state whether or not, as you examined them, whether you found if they were posted up to and including the 31st day of December, 1946?

A. No, sir; the general ledger was posted up to and including October 31, 1945. The profit and loss accounts were brought up to date, I imagine to prepare the income tax return.

Q. Now will you state what you found to be the situation with regard to the inventory account in this regard?

A. The inventory account in the ledger was missing until sometime in 1945.

Q. By missing do you mean there were no entries you found in the record?

A. No, there was no sheet in the record until that time.

Q. Will you state whether or not the books are adequate for the purpose of drawing a trial balance? A. No, sir; they were not.

Q. Now as I understand from your testimony, the summary which you drew was drawn from the records which you have indicated; is that correct?

A. In most cases.

Q. Well, what exceptions are there to that?

A. Well, the inventory, the figures are the figures taken from returns.

Q. Are you referring to the returns that were shown to you [1939] and the records?

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(Testimony of Lynn Harkness.)

A. Yes, that is right.

Q. And by returns you are referring to the partnership returns of 110 Eddy Street; is that correct?

A. Yes.

Q. Now in this summary I will ask you if you indicated as to each of the items of assets and liabilities which you have set forth here and as to the capital accounts as shown on the books, the sources from which you drew the figures?

A. Yes, sir.

Q. In that connection I call your attention to the third item on this schedule, in which you list Exhibit 112 and work papers. Will you state to what work papers you have referred?

A. Well, that would be work papers in regard to the cash receipts and disbursements for 1946, in which was shown that no charge was made during the year 1946 in that account.

Q. And the receipts and disbursements account to which you refer is a portion of government's Exhibits 112 and 112A; is that correct?

A. Yes, sir.

Q. And when you refer to work papers, do you refer to any records outside of those to which your attention has been directed; namely, Exhibits 112, 112A, and 80 to 83, inclusive? A. No, sir.

Mr. Campbell: This will be offered in evidence as [1940] government's Exhibit 163.

Mr. Avakian: Your Honor, I am not entirely clear as to just where the work papers are. Are they in evidence here?

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(Testimony of Lynn Harkness.)

Q. Do you have the work papers?

A. I have a summary of the cash receipts and disbursements.

Q. Taken from these records?

A. Taken from Exhibit 112.

Mr. Avakian: May I inquire, your Honor, whether they are his work or somebody else's?

A. They are my work papers.

Q. (By Mr. Avakian): You made up those?

A. Yes.

Q. Were those work papers used by you in preparing Exhibit 163?

A. They were referred to in preparing the exhibit.

Mr. Avakian: Your Honor, I think those likewise should be produced for our examination. I do not believe those are in evidence or marked or presented here. Is that right, counsel?

Q. (By Mr. Campbell): Those work papers purport to be summary of what?

A. Of cash receipts and disbursements for 1946.

Q. Do you have them here in the courtroom?

A. Yes, I think so.

Q. Will you produce them? Are these the work papers which you prepared?

A. Yes, sir. [1941]

Q. You have handed me two sheets, both headed "110 Eddy Street," one of which is headed "Summary of Check Disbursements Year 1946," and the other headed "Analysis of Cash Receipts and Disbursements Year 1946." I will ask you if the figures

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(Testimony of Lynn Harkness.)

hereon were taken from the records here in evidence? A. Yes, sir.

Mr. Campbell: May these be stapled together? May these be marked 163A for identification?

Q. As I understand from your testimony, in compiling 163 for identification you also referred to these summaries which you drew from the book, which summaries were used in finding the net figure as set forth in your summary 163 for identification; is that correct? A. Yes, sir.

Mr. Avakian: I understand from Mr. Campbell, your Honor, that he is simply marking the work sheets for identification and is not going to offer them at this time.

The Court: I am sure I can't tell what his plan is.

Mr. Campbell: I plan to defer the offer of that exhibit until counsel has an opportunity to examine them.

The Court: Very well.

Mr. Campbell: At this time I will renew my offer of 163 for identification.

Mr. Avakian: Now, your Honor, in view of the fact that the rule varies in different jurisdictions regarding the extent [1942] to which an expert witness may make summary, I am going to make an objection to ascertain the rule in this jurisdiction, and in making the objection I want to state frankly to your Honor that I think it is a proper order of procedure, but some courts do not agree with that, so simply for that purpose of getting a

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(Testimony of Lynn Harkness.)

ruling from the Court, I make the objection that a summary of this kind represents the opinion and conclusions of the witness and is hearsay and is not the best evidence. I simply request your Honor's ruling on that point for my guidance.

The Court: The exhibit will be admitted in evidence.

Q. Mr. Harkness, let me ask you, are the figures which you have set forth here drawn exclusively from records to which you have referred, or do any of them represent your opinion or conclusions?

A. They are drawn from the records.

Q. I am going to hand you Exhibit 163 and ask you to state what the records you examined disclosed to be the net worth of 110 Eddy Street as of December 31, 1943? A. $36,074.19.

Q. And what did such records disclose to be the net worth of 110 Eddy Street as of December 31, 1944? A. $39,998.52.

Q. And what was disclosed as the net worth of 110 Eddy Street as of December 31, 1945?

A. $44,321.40. [1943]

Q. And as of December 31, 1946?

A. $33,210.35.

Q. Now you have listed on that summary the assets and liabilities as of each of those year-ending dates, 1943 to 1946, inclusive, have you not?

A. Yes, sir.

Q. Now as to the balance in bank accounts, from what sources did you draw those figures?

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(Testimony of Lynn Harkness.)

A. I used the book figures, the figures in the general ledger.

Q. And to what exhibit do you refer?

A. Exhibit 112.

Q. Now as to the cash fund, from what source did you ascertain those figures?

A. For the years 1943, 1944 and 1945 the book figures. 1946 the same figure was used as for 1945 because it was ascertained there were no changes during the year affecting that balance of receipts and disbursements.

Q. Was there any book figure as of the end of 1946 for the cash balance? A. No, sir.

Q. So I take it that you analyzed cash receipts and disbursements for the purpose of ascertaining if any entries had been made in cash receipts and disbursements which would have affected the balance of that; is that correct?

A. That is correct. [1944]

Q. It was on that basis that you used the same figure at the end of 1946 as at the end of 1945?

A. Yes, sir.

Q. As shown by the books at the end of 1945?

A. Yes, sir.

Q. Now as to prepaid insurance and prepaid taxes, as set forth in the summary, from what records did you draw those figures?

A. Those figures were taken from the books, Exhibit 112.

Q. Now as to the inventory, which is shown as being on hand at the end of each of the calendar

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(Testimony of Lynn Harkness.)

years 1943 to 1946, inclusive, from what source did you obtain that figure?

A. Those figures were obtained from the partnership return of 110 Eddy Street, Exhibits 80 to 83.

Q. In other words, they were figures set forth as partnership return of income of 110 Eddy Street?

A. Yes, sir.

Q. I believe you stated that you found no inventory record among the records which you examined; is that correct?

A. Except for a portion of the year 1945.

Q. And did that include the year-end inventory?

A. I can't recall without seeing the general ledger.

Q. Will you refer to that?

A. The first entry in this account is February 28, 1945. It is carried down through November, 1945, and then there are [1945] pencil figures bringing it down to the end of the year.

Q. And does the pencil figure conincide with the inventory figure as used in the return?

A. No, it is slightly less.

Q. And you used the inventory figure that was set forth in the return? A. Yes, sir.

Q. You say slightly less; it is a matter of just a few dollars?

A. No, it is about $1600 less. I beg your pardon—1945 figure is exactly the same as shown. I was looking at 1946.

Q. Now as to 1946, did you use the figure shown in the return? A. Yes, sir.

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(Testimony of Lynn Harkness.)

Q. Did the figures reflect inventory at the end of 1946? A. No, sir.

Q. Now as to furniture and fixtures as set forth in your summary, from what source did you obtain those figures?

A. 1943 the books and return agree.

Q. And that was the source of the figure?

A. Yes. 1944 the book figures were used in 1944 and also 1945.

Q. Yes?

A. 1946 the figure was used that was shown on the return.

Q. Was any figure shown in the books for 1946?

A. No, sir. [1946]

Q. So you used the figure as established in the return, income tax return of 110 Eddy Street?

A. That is right.

Q. In the absence of any book figure?

A. That's right.

Q. Now as to the liquor license, the final item of assets, what was the source of that figure?

A. 1943, 1944 and 1945 figure was used as shown on the books. 1946 the same amount was used, one thousand dollars. Cash receipts and disbursements showed no change in that figure for the year.

Q. Was there any figure on the books as the end of 1946 for liquor license? A. No, sir.

Q. And the liquor license was carried for the first three years then as shown on the books?

A. Yes, sir.

Q. And there was no change as to any of those

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(Testimony of Lynn Harkness.)

years of the amount of one thousand dollars; is that correct? A. No, sir.

Q. Now as to liabilities of 110 Eddy Street, the first item is accounts payable; from what source did you obtain that?

A. That was obtained from the books, Exhibit 112.

Q. And as to the accrued sales tax?

A. From the same source. [1947]

Q. Pay roll taxes?

A. Also the same source.

Q. And accrued expenses?

A. That was also the same source.

Q. By the same source, do you refer to the books in each instance? A. Yes, Exhibit 112.

Q. An item for reservation for depreciation, from what source did you obtain that?

A. That was taken from the books and also the partnership returns filed for 110 Eddy, Exhibit 112 and also Exhibits 82 and 83.

Q. Did the books and returns coincide on the reserve? A. I will have to check that.

Q. Would you do that? A. 1943——

Q. When you say 1943, you are referring to December 31?

A. That's right; 1943 I used the book figure, $1637.

Q. Is that the same as found on the return?

A. You have to take into consideration what had been claimed prior to 1943 to get the amount of the total reserve.

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(Testimony of Lynn Harkness.)

Q. I understand what you mean; in other words, a smaller figure would be used on the return for the year, but you used the accumulated figure?

A. Up to 1943. 1944 I used the book figure, $2459. End of [1948] 1945 the book figures are used, $3341, and then to arrive at the depreciation reserve for 1946 I added to the $3341 the amount claimed on the 1946 return of $1020.

Q. Did the books disclose any reserve for depreciation set up for 1946? A. No, sir.

Q. Now I had asked you also to set up on this summary what the books disclose—that is, Exhibits 112 and 112A—as capital accounts appearing in the books. Is that the schedule which immediately follows that of "Assets and Liabilities"?

A. Yes, sir.

Q. Now will you refer to the books and state what, if anything, the books disclose as to any capital account of Arthur Pratt?

A. There is a liability account set up on March 1, 1944.

Q. Is that capital account?

A. It is in the section general ledger under "Personal." However, it appears to be more like accounts payable account. It is closed out within the same year; set up March 1, 1944, and closed out December 31, 1944.

Q. What items appear in that account?

A. The original entry March 1, 1944, is entry originating in check disbursements of $3400, showing a debit balance of $3400. Then at the end of

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(Testimony of Lynn Harkness.)

December 31, 1944, there is another entry originating in journal of $3400, with notation "From 1943 profit," closing the account up. [1949]

Q. Now have you examined in the records the entries to which are reference first the debit as of March 1, 1944, debit of $3400, and the reference to check record in 1945? A. I have the first one.

Q. Yes?

A. Which was from check disbursements page 45, check No. 532.

Q. And how is it issued?

A. It is issued to cash and then after the word "Cash" is Mr. A. R. Pratt.

Q. What is the date? A. March 1, 1944.

Q. Yes?

A. And it is carried over charged under general ledger, with no detail, $3400.

Q. Have you also referred to the journal entry, whereby a credit of $3400 is made to the account, credit Artur R. Pratt as of December 31, 1944, capital item 1943 profits, and the journal reference J-17?

A. I do not find the journal entries in either one of these books.

Q. Did you find the journal entries at the time you examined the books? A. I do not recall.

Q. You find no journal entries in these books?

A. Not in these books—pardon me—I find the journal—— [1950]

Q. You do find it?

Mr. Avakian: Your Honor, I understand that was in the front part of the book.

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(Testimony of Lynn Harkness.)

A. I find it. Journal entry December 31, 1944, debit to profit and loss $3400 and credit Arthur R. Pratt $3400.

Q. Did you find anywhere in those books any reference to an initial investment by Mr. Pratt of the sum of $3400?

A. I did not find it in the books.

Q. And did you find, or do you find, anywhere in that book any record of a disbursement to Arthur Pratt of $6800 by way of return of capital or purchase of his interest or distribution of profits, or a combination of any of the three?

A. I believe the $3400 is the only item.

Q. That is the only item you find in there?

A. Yes, sir.

Q. Now in those books, in the distribution of the profits, for the year 1944, distribution of any portion of it, do you find that any portion of the profits were distributed to Arthur R. Pratt?

A. No, sir.

Q. Are the entries with regard to Arthur R. Pratt the only entries which you recall finding wherein he is mentioned? A. Yes, sir.

Q. Now there are attached to this exhibit, plaintiff's 163, two schedules, Schedules 1 and 2. Will you state what they are? [1951]

A. Schedule 1 explains how the book fund in bank account was arrived at at the end of 1945. The books were not posted subsequent to October 31, 1945, so I took the balance showing in the general ledger as of that date and added the deposits

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(Testimony of Lynn Harkness.)

as shown in cash receipts books, Exhibit 112, and deducted the check disbursements for the last two months as shown in the same exhibit, arriving at the bank balance for the books for the year of 1945, which is $6141.46.

Q. For that particular account? A. Yes.

Q. In relation to the other bank accounts, which is Schedule 2, do you have the same information?

A. Yes, the same. Arriving at the book balance the end of 1946.

Q. In other words, one schedule refers to end of 1945 and the other to the end of 1946; is that correct? A. Yes.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. You have Exhibit 163 before you, Mr. Harkness? A. Yes, sir.

Q. I believe you stated in connection with the item, "Furniture and Fixtures," that at the end of 1945 you used the figure $13,496.39 as a figure which you found in the books? A. Yes. [1952]

Q. And then you stated that at the end of 1946 you did not find any entry in the books as of that date for furniture and fixtures account; is that right? A. That is right.

Q. Accordingly you went to the 1946 return, which showed a figure of $10,200; is that correct?

A. That is right.

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(Testimony of Lynn Harkness.)

Q. Do you find in any of these books an entry as of January 1, 1946, for furniture and fixtures?

A. I do not recall that I did.

Q. I call your attention to Exhibit 112A, the page, "Furniture and Fixtures, Equipment and Buildings," and under date January 1, 1946, there is amount of $13,496.39. Had you noted that entry on that particular page of Exhibit 112A?

A. Possibly I did; I don't recall.

Q. Now there are no other entries on that page subsequent to January 1, 1946?

A. That's right; same balance at the end of each.

Q. And that would indicate, would it not, to you as an accountant, that there were no changes in that account during the year?

A. Well, possibly so, with the general ledger set-up of the books.

Q. I refer you to the partnership return of 110 Eddy Street for the year 1946, which I believe is Exhibit 83; do you have [1953] that before you?

A. Yes.

Q. By referring to schedules, the balance sheet, do you note that that likewise shows no change in the account of depreciable assets from the beginning to the end of the year 1946? A. That's right.

Q. Would that likewise indicate to you that there was no change during the year in that account? A. Yes, that's right.

Q. By using the figure of $10,200 at the end of 1946 instead of the figure $13,496.39 that is entered as the only entry on the furniture and equipment

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(Testimony of Lynn Harkness.)

page, Exhibit 112A, you actually reduce the net worth by the difference between those figures, do you not? A. Yes, sir.

Q. To that extent you might say that is in favor of the taxpayer? A. Yes, sir.

Q. But would you not say, Mr. Harkness, that correct accounting, in view of the absence of any further entries in the book during the year 1946, would you say correct accounting would call for the use of the bigger figure of $13,496.39?

A. That is right, if it was determined definitely there were no additions during the year.

Q. So that to that extent on that particular item, Exhibit 163 [1954] may be incorrect?

A. It could be. As I say, as to a double entry system of books——

Q. Exhibit 112A that you have before you in the red cover is not a double entry system of books, is it? A. No, sir.

Q. That is a commercially prepared form known as the Ideal System, is it not? Look at the printing on the pages in the book.

Mr. Campbell: You are referring to the book itstelf and not the entries?

Mr. Avakian: I am referring to the characterization which the publisher gives to it. I do not mean it is an ideal set of books.

Mr. Campbell: What I want to know is whether you are asking whether the entries were made pursuant to an ideal system or ideal set-up of the publisher, or whether that is simply a book which is

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(Testimony of Lynn Harkness.)

denominated "Ideal" book? The question is confusing in that regard.

Mr. Avakian: Let me reframe the question.

Q. You have, Mr. Harkness, in the course of making audits of various taxpayers, you have frequently encountered the use of a book published by some publisher, as the one published there, have you not? A. I do not recall.

Q. Do you note in that book in the printing the name of a [1955] publisher of the book or the name given to the book?

A. There is a notation called the "Ideal System."

Q. That is in printing, is it not? A. Yes.

Q. Not in typewriting, but in printing?

A. Printing in the book.

Q. Now I do not see in Exhibit 163 any item of prepaid rent. Did you find any such item in the books? A. For which year?

Q. Well, for any of these years that you set forth in your summary?

A. I don't recall seeing any in the books.

Q. I call your attention to the prosecution's Exhibit 112 and to the page which is entitled "Prepaid Rent," and I call your attention to the various entries, approximately eight or ten in number, made on that page. Will you look at that and tell us whether you noted that page in your work in the preparation of this exhibit?

A. Yes, I recall that now.

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(Testimony of Lynn Harkness.)

Q. But you did not set it forth in the preparation of Exhibit 163? A. No.

Mr. Campbell: Just a moment—I object to that as misleading. The record speaks for itself. There is no year-end prepaid rent there.

(Question and answer read.) [1956]

The Court: He may answer the question.

Q. What is the answer?

A. I don't have the question exactly in mind.

(Last question read.)

A. No, sir.

Q. I call your attention to the item of liquor license as set forth in Exhibit 163 and the reference to the source as Exhibit 112. Would you turn to the page in Exhibit 112 which shows the amount of that asset as of December 31, 1946?

A. The only entry I find is in the general ledger for liquor license, $1000, as set up on December 31, 1942.

Q. December 31, 1942? A. Yes.

Q. You find no entries for the years ending December 31, 1943, 1944, 1945 and 1946?

A. Same balance, only one entry.

Q. There being no further entries, you then concluded the same amount would be carried forward? A. Yes, that is right.

Q. Now, with respect to the item of "Cash Fund," you have the amount of $1400 at the end of 1946, and then a footnote in Exhibit 163 which

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(Testimony of Lynn Harkness.)

states that the general ledger for 1946 receipts and disbursements show no change affecting this account during 1946. When you say "No general ledger for 1946," you mean there is no entry in the general ledger as to that item? [1957]

A. I mean there is no general ledger as such for 1946. It is single entry.

Q. It is a single entry system of books?

A. Yes.

Q. And in a single entry system no journal ledger is kept? A. That is right.

Q. Did you refer to Exhibit 83, the 1946 tax return, to see whether there was any entry there as to the amount of cash on hand at the end of the year 1946? A. Exhibit 83 shows cash of $100.

Q. And you show $1400 in your Exhibit 163, is that correct?

A. That's right. Of course, cash shown on the balance sheet in the partnership return should also show in the bank account.

Q. Do you know whether it did or not?

A. I do not.

Q. If you had used the figure of $100 instead of the figure of $1400, the net worth at the end of 1946 would be reduced by the difference between those two figures, would it not?

A. That is true, if they were correct.

Q. Now, you said that you determined, through analysis of receipts and disbursements, that there was no change in that cash fund during the year 1946. Is it your understanding that this cash fund

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(Testimony of Lynn Harkness.)

was currency and silver kept on the premises for use from day to day in the business?

A. That's right. [1958]

Q. And it is possible, is it not, that that money could have been distributed in cash to the partners without showing up in cash receipts and disbursements analysis that you made?

A. Not if it was properly handled accounting-wise; it would have to show some place.

Q. You mean if all proper entries were made in the books?

A. That is right, either through journal entry or through cash disbursements.

Q. But you have already determined the bookkeepers keeping the books on these premises frequently did not make all the correct entries which they should make? A. That's right.

Q. I ask you again then, is it possibly the $1400 cash that you show on hand at the beginning of the year may have been a smaller figure at the end of the year, by reason of cash disbursements to the partners or cash disbursements in some other way, which would not be reflected in your receipts and disbursements analysis?

Mr. Campbell: Objected to as argumentative and speculative, if the Court please, not within the scope of direct examination.

The Court: You may answer the question.

A. It should.

Q. If proper entries were made?

A. That's right. [1959]

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(Testimony of Lynn Harkness.)

Q. What I am getting at is this, Mr. Harkness, your receipts and disbursements analysis that you mention, with respect to that particular item, would not disclose whether or not any cash disbursements or distributions had been made out of that cash fund, would it? Your test on that would be some other entry in the book, rather than your cash receipts and disbursements, isn't that right?

A. That's right.

Q. You stated that—correct me if I am wrong—but I understood you to state that there was no record in the books that any portion of the 1943 profit had been distributed to Mr. Pratt, did I understand you correctly on that?

Mr. Campbell: That was not the question. The question was as to 1944 profit.

A. That is right.

Q. Then I misunderstood—there is a showing of distribution to Mr. Pratt with reference to 1943 profits?

A. Yes, the book shows that $3400 was from 1943 profits.

Q. And then you were questioned as to whether there was any record of any distribution to Mr. Pratt over and above $3400 and I believe you said there was no entry in the books?

A. None that I recall.

Q. You did, however, hear the testimony of Mr. Pratt to the effect that he had been paid an additional two thousand dollars by cancellation of an indebtedness? [1960]

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(Testimony of Lynn Harkness.)

Mr. Campbell: I suggest that this is argumentative, if the Court please.

The Court: I think so. Objection sustained.

Q. Did you examine the records in evidence here which set that forth in the documents presented by Mr. Pratt?

Mr. Campbell: Objected to as not within the scope of examination, whether he examined exhibits produced by some other witness.

The Court: I will sustain this objection. I think it is based on testimony of Mr. Pratt.

Mr. Avakian: Based upon the documents in evidence.

The Court: Read the question.

(Question read.)

The Court: I don't understand the question myself.

Q. I call your attention to prosecution's Exhibit 160 and ask you if you have examined the three sheets which are set forth in that document?

Mr. Campbell: Objected to as incompetent and immaterial and not within the scope of direct examination. Those purport to be the bill of sale, your Honor, that Mr. Pratt testified to.

The Court: This witness did not testify that this summary was made from any reference to that exhibit.

Mr. Avakian: But he did testify as to the amount paid to Mr. Pratt.

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(Testimony of Lynn Harkness.)

The Court: But he testified to what he saw in the books [1961] and records.

Mr. Campbell: He did not testify to what he was paid, but he testified to what the books showed.

The Court: Objection sustained.

Q. Were there any other records, entries, in the books with respect to this $3400 payment to Mr. Pratt? A. I found none.

Q. Do you have the other volume of Exhibit 112?

A. The general ledger, yes, sir.

Q. I call your attention to Exhibit 112, record of journal entries, page 21, month of May, 1945, and I will ask you if you find on that page any entry relating to the $3400 payment to Mr. Pratt?

A. There is an adjusting entry of the year 1943, net income, in which Mr. Pratt's name shows up for $3400.

Q. What does that entry show?

A. That is debit to W. E. Kyne Trustee account and credit to Arthur R. Pratt account.

Q. And then I call your attention also to a sheet in the other volume of Exhibit 112, entitled "Account Liability," name W. E. Kyne, Trustee, and I ask you if you find an entry there with respect to the payment of $3400 to Mr. Pratt?

A. That is the other half of this same entry.

Q. So that by entries in the book the $3400 payment to Mr. Pratt was carried forward into a capital account, was it not? [1962]

A. Yes. As I said before, his account showed a credit of $3400.

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(Testimony of Lynn Harkness.)

Q. And that was carried into a capital account?

A. Yes.

Q. I note from examining Exhibit 163 that there is shown as the net worth at the end of 1946, the figure of $33,210.35, and I see that the total which you have set forth for that same date as capital accounts for the books is $39,399.77, a difference of approximately six thousand dollars. Now, first of all, Mr. Harkness, would you state, as an accountant, that the net worth of a partnership business represents the capital accounts of the partners?

Mr. Campbell: Objected to as speculative and argumentative and not within the scope of direct examination.

The Court: Objection overruled.

A. Yes, that is correct.

Q. And with proper and complete entries in a proper set of books, the total of the capital accounts of the partners would be the same figure as the net worth of the partnership, would it not?

A. That's right.

Q. In other words, the capital accounts of the partners represent the portion of the business' net worth which each partner owns?

A. That is right. [1963]

Q. Now, I note that in capital accounts you have set forth at the end of 1946, Wm. E. Kyne, Trustee account, $5985.44. Will you refer to the page in the book which shows that particular entry?

A. Yes, sir, I have it.

Q. You have shown me from the Exhibit 112 ac-

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(Testimony of Lynn Harkness.)

count number "Liability" an entry under what date? A. May 31, 1945.

Q. Is there any entry showing that that was the balance of the account as of December 31, 1946?

A. No, sir.

Q. That is the last entry in the account?

A. That is right.

Q. Then it was your assumption, was it not, that that continued to be the balance in that account?

Mr. Campbell: I object to the question in that form, as to assumption. The book speaks for itself. The last balance, that entry, of course, is the final balance in the account.

Mr. Avakian: I would like to be heard.

The Court: Objection is overruled.

A. That's right——

Q. That was an assumption?

Mr. Campbell: Let him finish his answer.

A. That was the last entry in the book. I found no other entries affecting that account. [1964]

Q. And so you assumed that that continued to be the balance at the end of the year?

A. Yes.

Q. So that when you stated on direct examination that the amounts shown on the particular days of December 31, 1943, 1944, 1945 and 1946 shown in Exhibit 163 were a summary of the amounts shown in the books or any other sources that you referred to for those particular dates and were not based on assumptions, you did not mean to imply that the entries in the books were made exactly on

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(Testimony of Lynn Harkness.)

the dates that you set forth in your summary, did you?

A. I do not exactly understand your question. You mean all the entries made on December 31st of each year?

Q. When you have listed assets in your exhibit 163 and liabilities on that date as of December 31, 1946, you did not mean to imply that in every instance there is an entry in the sources of materials which you used, showing that to be the exact figure on that exact date? A. No.

Q. To a certain extent you relied on assumptions that if no further entries were made, there were no changes?

A. I relied on the books as they appeared when I made the summary.

Q. And in the case of "Furniture and Fixtures," the last entry in the book January, 1946, $13,496.39, in that case you did not [1965] assume that that continued the same throughout the year, did you?

A. I didn't make any assumption. I used the figure on the return.

Q. But in the case of Mr. Kyne's account of $5,985.44, shown as of May 31, 1945, in that case, in view of the fact that there was no further entries on the page, you did assume that that balance continued right down to the end of 1945, and also the end of 1946, is that right?

Mr. Campbell: Object to as being a matter of assumption.

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(Testimony of Lynn Harkness.)

Mr. Avakian: If he did not assume, he can state; if he did assume he can state.

The Court: Objection will be overruled.

A. As I stated, I used the figures that showed on the books.

Q. Now, would you eliminate—and I will give you a sheet of paper if you want to work this out—would you eliminate from Exhibit 163 the item as Wm. E. Kyne, trustee account, $5,985.44, as of December 31, 1946, and tell me what the total of the capital accounts would then be?

Mr. Campbell: To which I object as not proper cross-examination.

The Court: Objection sustained.

Mr. Avakian: Aren't we entitled to see what the result would be if he had not made the assumption he did?

The Court: That is a matter not within the scope of [1966] direct examination. It is a matter of calculation.

Mr. Avakian: It is a matter of testing what the results would be if he had not made the assumption that he made.

The Court: Objection sustained.

Q. Let me recall to you, Mr. Harkness, your testimony that the capital accounts of the partners of the business represent net worth of the business and should be the same figure, and let me ask you this—if you eliminated the $5,985.44 Kyne account, which I mentioned, from your 1946 capital account closing figure, would not the total of the capital

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(Testimony of Lynn Harkness.)

accounts then be within a few dollars of the net worth shown on Exhibit 163?

Mr. Campbell: Objected to as argumentative and not proper cross-examination.

The Court: Objection sustained.

Mr. Avakian: Your Honor, I just can not cross-examine an expert witness under these theories if I am not permitted to ask him what would have happened to his computations if certain adjustments which are supported in the evidence are made. How can I cross-examine if I can't test that, your Honor. My understanding of the rules of cross-examination of experts is that you may probe as to all things which enter into their computations and to the extent that they rely on judgment or assumptions you may question to show what would have happened if they exercised their judgments and assumptions in a different direction, so long as it would likewise be within the scope of the [1967]

The Court: I think the ruling will stand.

Q. Now, under date of December 31, 1946, you have set forth certain amounts as capital accounts in the books of William E. Kyne, Frank Cavani, Thomas C. Turner, and Elmer Remmer. Will you first of all explain the manner in which you arrived at the figures that are shown in that column?

Mr. Campbell: I object to the question in that form, as to having arrived at the figures. I think the source of the figures——

Q. Where did you get them? Do you understand the question, Mr. Harkness?

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(Testimony of Lynn Harkness.)

A. Am I permitted to answer?

Mr. Campbell: I think the question was amended to "Where did you get the figures."

The Court: You may answer.

A. I got the figures from the capital accounts as set forth in Exhibit 112A.

Q. And you are referring to what particular pages? A. To the last page.

Q. And I take it that you used only the last balance figure shown during the year 1946 for each partner?

A. I believe so, but I would like to check it with the exhibit.

Q. I think that is correct, but I will have you check it. A. Yes, that is correct.

Q. Now, you stated in your direct examination that you had been [1968] an Internal Revenue agent since the year 1945, and you have been assigned to the San Francisco office during all that time? A. Yes, sir.

Q. And prior to that you were doing accounting work in the Navy Department about five years?

A. Yes, sir.

Q. And then I believe you stated that you were doing accounting work for a newspaper, the Sun Company of San Bernardino?

A. That is right.

Q. You are, I take it, of course a licensed accountant? A. Yes.

Q. And a certified public accountant?

A. No.

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(Testimony of Lynn Harkness.)

Q. How long have you been licensed as a public accountant?

A. Ever since the law came in, I believe in 1946 or 1947; I am not positive of that date.

Q. And you are licensed in the State of California? A. Yes, sir.

Q. Now, you state you were assigned, with other agents, to the investigation of the returns of Mr. and Mrs. Remmer. Can you tell us the approximate date of that assignment?

A. It was about October 15, 1947.

Q. And since that time you have been working on that matter, I take it, at various times?

A. Not all the time. [1969]

Q. I say various times. You have also been working on other cases during the same period?

A. That's right.

Q. And in connection with your assignment you made an examination of the books and records of the 110 Eddy Street? A. Yes, sir.

Q. And you also made examination of the tax returns of 110 Eddy, is that correct?

A. That is right.

Q. And you analyzed the books in comparison with the returns, I believe you stated, is that correct, or is that correct? A. Yes, that is correct.

Q. In making that analysis did you find that in the year 1946 the partnership return of the year 1946 for 110 Eddy actually showed more profit on the return than the books showed?

Mr. Campbell: Objected to as not being within

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(Testimony of Lynn Harkness.)

the scope of direct examination. If counsel desires to make the witness his own——

The Court: Objection sustained.

Mr. Avakian: He stated on direct examination he examined these returns.

The Court: Objection sustained.

Mr. Avakian: May I be heard on it, your Honor?

The Court: No, sir.

Mr. Avakian: You won't let me be heard on the matter? [1970]

The Court: I said no.

Mr. Avakian: May I make an offer of proof, your Honor?

The Court: Yes.

Mr. Avakian: I offer to show——

The Court: Make it in the absence of the jury.

Mr. Avakian: Whichever your Honor says.

(Jury and alternate jurors admonished and excused until 1:30 p.m.)

(In the absence of the jury.)

(NB 333—pp. 90-94.)

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January 10, 1952—1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. HARKNESS

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Avakian: Your Honor, during the noon recess, in examining Exhibit 163 for identification, which you will recall are work papers Mr. Harkness said he referred to in part in preparing 163, we noted in these work papers there is a reference for a particular item, reads "See 1945 work papers," apparently another set of work papers. We do not want to take time on that now, but we would like to request, but we would like to request the prosecution at some convenient time in the near future to see whether those work papers are likewise available here. I think that can be done at some convenient time [1971] without interrupting the proceedings.

Q. Mr. Harkness, let me hand you again for your use prosecution's Exhibit 163, together with prosecution's Exhibit 112A, and I will again call your attention to the amounts which you have listed as December 31, 1946, in the capital accounts of the partners. Did the amounts which you have listed include in them the respective partners' shares of the 1946 profit or loss of the 110 Eddy Club?

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(Testimony of Lynn Harkness.)

Mr. Campbell: Objected to in that form, as calling for his conclusion, unless the question is stated as shown by the books.

The Court: I think that is what you mean?

Mr. Avakian: Well, that is what I mean.

Q. From your examination of 112A and examination of 163, can you tell us whether or not the amount which you have inserted in the closing capital accounts of 1946 include an allocation of the 1946 profit or loss of partnership?

A. No, they do not.

Q. And in order correctly to set forth the capital account of a partner at the close of a year, it would be necessary, would it not, to credit or charge his account with the profit or loss for that year, as the case may be?

Mr. Campbell: Objected to as calling for conclusion and not within the scope of direct examination.

The Court: Objection overruled. Answer the question. [1972]

A. Yes, that is right.

Q. Now, did you make an analysis of any kind for the purpose of determining the amounts of the 1946 profit or loss of the 110 Eddy Club as shown in the books of that enterprise?

Mr. Campbell: I don't understand the question. May we have the question?

(Question read.)

A. I do not recall right now if I did or not.

Q. The amounts you have set forth in 163 in the

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(Testimony of Lynn Harkness.)

capital accounts of the partners at the end of 1946 should be reduced by the respective partners' share of any loss in the year 1946, in order to correctly reflect the amount of his capital at the end of the year, should it not?

Mr. Campbell: Objected to as calling for his conclusion and not within the scope of direct examination, what the books show.

The Court: Objection sustained.

Q. Well, you testified a moment ago, in order to correctly set forth the amount of the capital of each partner in the business at the end of the year, it would be necessary to either credit his account with his share of the profit for the year, if there was profit, or to charge his account with the amount of his share of any loss for the year, if there was a loss. Is that correct?

Mr. Campbell: Objected to—the books speak for themselves. [1973]

The Court: You may answer the question.

A. That is true, but the figures represent figures in the books.

Q. There are also figures in the books showing 1946 income and expenses, aren't there?

A. Yes.

Q. And isn't it a fact, Mr. Harkness, that you made a determination in your examination of the 1946, 110 Eddy records, that for the year 1946, Mr. Remmer, instead of having his share of gain, $4748, shown on Exhibit 83, 1946 partnership return, actu-

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(Testimony of Lynn Harkness.)

ally had a loss for that year, that is, his share of the loss for that year, $1740.11?

Mr. Campbell: Objected to on the same grounds heretofore stated to the same question, and not within the scope of direct examination.

Mr. Avakian: Your Honor, I would like to be heard on that if I may. This witness has been offered here to present a partial net worth computation, insofar as it is reflected in 110 Eddy Street Club. He has testified in order to correctly set forth the net worth, the figures which he has in his exhibit at the end of 1946 should be adjusted by Mr. Remmer's share of either profit or loss, as the case may be. The whole purpose of this exhibit is to build up step by step, and this is one of the steps, Mr. Remmer's net worth. Now, the witness has testified [1974] in order to do that accurately, you would have to subtract his share of loss, if there was a loss. Having testified to that, my question to him is, didn't he make a determination in which he found for the year 1946, Mr. Remmer's share of the loss was the amount I just read, $1740.11, and if his answer should be yes, then obviously the amount of net worth shown for Mr. Remmer in 163 should be reduced by that sum to correctly set it forth.

The Court: You may answer.

A. As I stated before, I finally determined the net profit of 110 Eddy was considerably different than shown in the return. I do not recall making a determination of the amounts shown on the return.

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(Testimony of Lynn Harkness.)

We would go by the result of our audit for 110 Eddy, our final determination.

Q. Let me ask you this first, without regard to the amount, do you recall that you did, at one time, make a determination to the effect that the 1946 operations of 110 Eddy Club resulted in a loss for Mr. Remmer? A. No, sir.

Q. You did not? A. No, sir.

Q. You are quite sure of that?

A. No, sir, our final figures will show a substantial gain.

Q. Did you at any time make such determination? A. I do not recall it. [1975]

Q. Was any other agent besides yourself assigned to make a determination of the operations of 110 Eddy Club?

A. The examination was done together all the way through by Mr. Morgan and myself.

Q. Do you know whether Mr. Morgan made such a determination? A. I can't say.

Q. Did you determine at any time from your examination of the books of 110 Eddy Club, which are in evidence here, that on the basis of the information in those books, Mr. Remmer's share of the operations for the year 1946 was a loss?

Mr. Campbell: I am going to object to that as not within the scope of direct examination of this witness.

Mr. Avakian: It is in evidence that he examined the books which are the basis for 163.

The Court: You may answer the question.

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(Testimony of Lynn Harkness.)

A. I do not recall that.

Q. Do you recall making any determination as to what the books, which are in evidence here, showed as to whether there was a profit or a loss, insofar as Mr. Remmer's share was concerned, for that year? A. I recall—you are speaking of 1946?

Q. That's right.

A. As I stated before, it was impossible to take off a trial balance with any degree of accuracy from these books. The only thing that was fairly complete was the cash receipts and [1976] disbursements. I couldn't say definitely if actual book profit was determined by that.

Q. You don't know whether you did or not?

A. I don't recall.

Q. Would you be able, after you are off the stand, to determine from an examination of your papers, whether you did at any time make such an analysis of the books of 110 Eddy, for the year 1946?

A. You mean showing Mr. Remmer's distribution as being a loss?

Q. That's right. In other words, are there papers in the building from which you could determine whether or not you did make such a determination?

A. Well, I would have to look at the papers.

Mr. Avakian: Your Honor, I have this suggestion to make with respect to cross-examination. I believe there will be other agents who will make use of the exhibit which this witness has presented in connection with their own compilation, and depend-

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(Testimony of Lynn Harkness.)

ing upon what else it may or may not be necessary to cross-examine Mr. Harkness further, may we terminate our cross-examination with the understanding he will be available for further cross-examination?

Mr. Campbell: He will be available, of course, but I think so far as possible on matters which he has gone into on direct, the cross-examination should be concluded.

The Court: You may have further cross-examination if [1977] it appears necessary.

Mr. Avakian: Thank you. That is all.

Redirect Examination

By Mr. Campbell:

Q. Mr. Harkness, Mr. Avakian asked you with relation to prepaid rent and whether or not as an asset in any of the years you had shown any prepaid rent and directed your attention to a page in the ledger of 110 Eddy Street relative to prepaid rent. Now, you have stated you have seen that page in your examination. As of the end of any of the years 1943, 1944, 1945 and 1946, did there exist any outstanding prepaid rent, as disclosed by those books?

A. The books are not complete. The last entry in the book is November 29, 1945.

Q. The account was closed out at that time, was it not?

A. Well, at that time, there would be a balance of $210.

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(Testimony of Lynn Harkness.)

Q. Did your examination of the cash receipts and disbursements disclose whether that had been used up prior to the end of the year?

A. No, I don't believe it showed that.

Q. So if there was any prepaid rent, it would be in amount of $210?

A. That's right. You would also have to have the complete story before the account started. It started on May 31, 1945.

Q. And the last entry is in November, 1945, is that correct? A. That's right. [1978]

Q. And from May until November, it shows monthly debits of $210, which also represented by checks prepayment of rent, and then a counter-credit entry on the first of each month following, crediting $210, is that correct?

A. That is correct.

Q. That would indicate what in regard to this prepaid rent?

A. Well, at the end of any one month the prepaid rent was set up and then it was closed out the following month when the rent was paid.

Q. Will you examine the dates and state what the account indicates as to the custom of paying the rent for the following month?

Mr. Avakian: If the books do show the custom. If it is going to be a conclusion——

Q. Let us take the first entry. The first entry shows debit on May 31st of $210, does it not?

A. That's right.

Q. And there is a credit on June 1st, $210?

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(Testimony of Lynn Harkness.)

A. That is correct, both from the journal entry.

Q. And the next debit is check issued June 30th for $210, which becomes the proportionate rent on that date? A. Right.

Q. And on July 1st that is credited by journal entry and the account checks out?

A. Correct. [1979]

Q. And the same thing occurs in each month thereafter, does it not? A. That is right.

Q. And payment of rent is made on the last day of the month and shows proportionate rent and then it is credited out as rent paid on the first day of the following month? A. That is correct.

Q. Now, with regard to Exhibit 163, I believe at the time this was marked for identification you pointed out to counsel where by error you had incorrectly carried over the figure of one of the income tax returns, is that correct?

A. That is right, profit figure.

Q. That is profit for 1945 as shown by the return, and that was pointed out to counsel yesterday afternoon? A. Yes.

Q. Will you correct that figure?

A. Could I have Exhibit 82. Do I understand I have permission to change it?

Q. Yes, if you will write that on the face of the exhibit, the figure that was pointed out yesterday. I think there is no objection.

Mr. Avakian: That is agreeable to have him change that.

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Mr. Campbell: Makes just a dollar difference, I think.

Mr. Avakian: $1.02.

Mr. Campbell: That is right. [1980]

Mr. Avakian: I do not know whether I made myself clear. We would like to ask, through the Court, that this witness search his files to see if he did make determination I mentioned to him at any time.

The Court: That is all this witness is required at this time?

Mr. Avakian: At this time.

The Court: You may be excused.

LOUIS H. MOOSER, JR.

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Louis H. Mooser, Jr.

Q. Where do you live, Mr. Mooser?

A. 6815 California Street, San Francisco.

Q. What is your business or occupation, Mr. Mooser?

A. I am Deputy Collector of Internal Revenue for the Northern District of California.

Q. Where is your posted duty?

A. San Francisco.

Q. How long have you been a deputy collector?

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(Testimony of Louis H. Mooser, Jr.)

A. About 15 years.

Q. To what branch or division of the Collector's office are you assigned?

A. As a Deputy Collector to investigate general taxes. [1981]

Q. Are you in what is known as the field division? A. Field division, yes.

Q. And as a deputy collector, your primary duty is that of collecting taxes, is that right?

A. Yes, delinquent taxes.

Q. Now, during the year 1944, did you have occasion, pursuant to your duties and under instruction of your superiors, to be making what is known as a spot check on Eddy Street in San Francisco? A. Yes.

Q. What is meant by spot check?

Mr. Gillen: We offer the objection they are leading and suggestive questions.

Mr. Campbell: It is a preliminary question.

The Court: Objection overruled. Answer the question.

Q. What is meant by a spot check?

A. Spot check means taking every taxpayer and making inquiry regarding all federal taxes, as to whether the proper returns have been filed and proper taxes paid upon them.

Q. In 1944 were you assigned to make such a check of some portion of Eddy Street in San Francisco? A. Yes.

Q. Generally speaking, what was the area in which you made such a check?

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(Testimony of Louis H. Mooser, Jr.)

A. Between Mason, four square blocks, around Mason and Eddy [1982] Streets.

Q. And did that include the block in which is located the address known as 186 Eddy Street?

A. Yes, it did.

Q. In what month or months were you making this so-called spot check, where you were checking each taxpayer within that area?

Mr. Gillen: He didn't give the area, he didn't say which direction.

Q. Well, will you give the particular blocks, your best recollection?

A. Well, it was down Eddy from Mason to Powell and up and over to Ellis and down to Mason again on that block.

Q. That square block, and I ask you if that area which you were covering included the address known as 186 Eddy Street? A. Yes, it did.

Q. In what month or months were you conducting that particular survey?

A. April and May of 1944.

Q. Now, in the course of your survey, spot check, did you conduct any investigation on the premises known as 186 Eddy Street?

A. Yes, I did.

Q. And do you recall when that was?

A. The first time that I visited the establishment was on May 1, 1944. [1983]

Q. And had you ever been on those premises before that time? A. No.

Q. Had you been directed by anyone to go

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(Testimony of Louis H. Mooser, Jr.)

specifically to those premises, or did they simply fall within the area in which you were making this investigation?

A. They fell within the area, but I was also further directed to go——

Mr. Avakian: If this is going to be hearsay, I would like to have the foundation laid to see if it is admissible.

The Court: I don't recognize it as hearsay.

Mr. Avakian: I thought he was starting to give——

The Court: Read the answer.

Mr. Campbell: We will stop at "it fell within the area."

Mr. Avakian: May the rest be stricken?

The Court: It may go out.

Mr. Campbell: I have no objection.

Q. Now, you say that was about May 1st?

A. 1944.

Q. Let me ask you this, after your first visit to those premises on May 1, 1944, did you have further visits to those premises? A. Oh, yes.

Q. And extending over what period of time?

A. Over the entire month of May, 1944.

Q. And at the end of May, 1944, was that your last visit there? [1984]

A. Yes, that I can recall.

Q. Now, at the time you entered the premises at 186 Eddy Street, will you describe the premises that you physically saw, the physical appearance of the premises?

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(Testimony of Louis H. Mooser, Jr.)

A. Immediately to the right of the entrance was a cigar stand and there was a barricade or rather a door——

Q. A partition?

A. Partition, yes, with door on the end and door at the right going into the rear room, as I recall it.

Q. Did you enter the rear room? A. Yes.

Q. Will you describe the premises?

A. Well, there were card tables there.

Q. Do you recall approximately how many?

A. To the best of my recollection at that time I think there were about thirteen.

Q. Now, on the occasion of your first visit there who, if anyone, did you meet and have any discussions with without relating the conversation? Who did you meet there? A. Mr. Busterna.

Q. Do you refer to Bert Busterna?

A. Yes.

Q. And during the course of your investigations there who, if anyone, in addition to Mr. Busterna, did you meet with or have discussions with concerning the operations of that establishment? [1985]

A. Mr. Slater, one of the bookkeepers, and Mr. Willis Kyne.

Q. How was he known?

A. He was known as Willie, but as I had it, it was Willis. That is all at that time.

Q. Now, as a result of your going there on the first occasion, were you shown any tax returns purporting to be tax returns filed by the 186 Club?

A. No, I was referred to Mr. Slater.

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(Testimony of Louis H. Mooser, Jr.)

Q. Well, as the result of reference to Mr. Slater, were you shown any returns or copies of returns?

A. Yes, he showed me the corporate tax returns, then known as Victory tax return, and social security return and the partnership return, as well as the corporation return, covering a portion of the period.

Q. Whose return did the corporation return purport to be? A. For the 186 Club.

Q. Did you subsequently ascertain that that was the return of the operators at the time you examined the club, or by some prior operators?

Mr. Gillen: Objected to as leading and suggestive.

The Court: You may answer the question.

A. This was return prepared by the previous owners of the stock of the corporation, or owners of the club, which purported to show the operations of the club up to the time of its transfer to the new owners. [1986]

Q. You say you were shown a copy of the partnership return?

A. It wasn't a copy, it was the original.

Q. What was the date that you saw that?

A. The first few days of May. I wouldn't say exactly the date.

Q. Did you take that return away with you?

A. No, I did not.

Q. I am going to show you defendant's Exhibit "P," purporting to be partnership return for income of 1943 of the 186 Club filed with the col-

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(Testimony of Louis H. Mooser, Jr.)

lector April 15, 1944, and ask you if you have seen that document?

A. I don't think so. May I clarify my answer to another question? When I said I had seen the original, I was referring to the corporation return and not to this.

Q. You saw an original return?

A. Yes, an original of the corporation, which never had been filed. I saw a copy of this.

Q. You saw a copy of this defendant's Exhibit "P"? A. Yes.

Q. And you were also shown, as I understand you, the original of the corporation return which had not been filed? A. That is correct.

Q. Did you make a copy of that return?

A. I believe so.

Q. Do you know where that is? [1987]

A. No, I do not.

Q. Now, at the time you were shown these returns, I will ask you whether or not you requested to see the books and records of the 186 Club?

A. Yes, I did.

Q. Will you state what, if anything, you were shown?

A. Exclusive of the employment record, I saw a book of the win and loss book prepared by the day. I mean, it would show at the end of each period—I believe the club was open 24 hours a day and they had shifts—at the end of each shift an entry would be made whether a loss or gain at the end of the shift.

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(Testimony of Louis H. Mooser, Jr.)

Q. Just a single figure at the end of each shift, loss or gain?

A. As I recall one figure, either win or lose.

Q. And you say exclusive of pay roll records. Did you see pay roll records there?

A. Yes, I saw the complete pay roll record at Mr. Slater's office.

Q. In what form were they kept?

A. They were kept in pretty good shape, in regular employment record, pay roll record form.

Q. Did they appear to be a full and complete record?

A. I afterward got a copy of it and questioned each and every item. I think there were 150 odd employees.

Q. And you found this to be reasonably accurate? A. Yes. [1988]

Mr. Gillen: He said he found it in good shape.

Mr. Campbell: Good shape and reasonably accurate.

Mr. Gillen: I don't think so.

Mr. Avakian: I object to the word "reasonably." It calls for conclusion and opinion.

The Court: Objection overruled.

Mr. Gillen: He misquoted the record.

The Court: I wouldn't say it is misquoting the record.

Mr. Gillen: That is not what the witness said. The witness didn't say reasonably accurate at all.

The Court: Objection overruled.

Q. Aside from the book which you described

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(Testimony of Louis H. Mooser, Jr.)

as containing a win or lose figure for each shift, did you see any other records?

A. Only the records of the current day of each cashier. I asked to see those.

Q. And in what form were they kept?

A. They were in the form of a slip, a sheet, which would show the total of the operation during that particular man's shift.

Q. May I ask you, in making your inquiries and such examination as you made there, were you examining with relation to some specific tax period?

A. Well, with regard to the withholding and social security tax.

Q. As to all the taxes?

A. As to all the taxes, whenever they should have been filed [1989] up to that time.

Q. Up to the time of your investigation?

A. Yes.

Q. Now, you say you saw these daily sheets. Do you recall what they were called? Was there any name to the sheets? A. That I can't say.

Q. And you say current sheets?

A. Well, I mean for that shift when I was there.

Q. Did you see any for the period prior to the occasion of your being there?

A. For a couple of days prior.

Q. Did you inquire as to records back beyond that? A. I was told that they were destroyed.

Q. Did you ever see any for a period back before that? A. No.

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(Testimony of Louis H. Mooser, Jr.)

Q. Did you inquire whether or not there were other records maintained other than the pay roll record and this book showing win and lose that you have referred to? A. Yes, I did inquire.

Mr. Avakian: May we have the names of the persons these conversations took place with so we may know?

Mr. Campbell: Very well.

Q. Of whom did you make these inquiries?

A. Of Mr. Slater and Mr. Kyne.

Q. Did you ever receive any additional [1990] records? A. No, I did not.

Q. Mr. Mooser, did you then attempt in any manner to ascertain the daily income of the 186 Club? A. Yes.

Q. And in what manner did you do so?

A. Well——

Q. Just the method that was used?

A. By comparing the slips and totalling the wins and the losses of the slips for a given period. I compared those with the amounts entered in the book.

Q. For what period of time did you do that?

A. That was just for the immediate period of time I was there, not going back more than two days.

Q. As I understood you, records were not available prior to one or two days before you went in there? A. That is right.

Q. When was this comparison made, that is to say, did you make it daily or in what manner?

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(Testimony of Louis H. Mooser, Jr.)

A. The first comparison I made was immediately and while I was there and it was because of the discrepancy I found there that I compared further.

Q. On the first occasion that you went there, did you make a comparison between the book you referred to and the cashier's sheets that were available? A. Yes, I did. [1991]

Q. And compared one against the other?

A. Yes.

Q. And state what you found with relation to the book you saw as reflecting fully and correctly the amounts shown on the daily sheets.

Mr. Avakian: Just a moment—objected to as calling for opinion and conclusion of the witness and also on the ground that the record of any findings that he made would itself be the best evidence of this, bearing in mind this is a matter that goes back several years. Unless a foundation is laid by showing no record was made, we object to testimony in this form.

The Court: Let me have the question.

(Question read.)

The Court: Objection overruled. Answer the question.

A. I found that in no case did the amounts totalled upon the sheets agree with the amounts entered upon the books.

Q. Which was higher and which was lower?

A. Well, I found them both ways.

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(Testimony of Louis H. Mooser, Jr.)

Q. Now, as a result, will you state whether or not you found any relationship or correlation, based upon your examination, between the daily sheets and the book which purported to record the wins and losses for each day?

Mr. Avakian: We object as calling for speculation, opinion and conclusion. He testified the discrepancies were both ways and as to whether there was any correlation is purely [1992] a matter of conclusion.

The Court: The objection will be sustained.

Q. Did you take that book away with you?

A. No, I did not.

Q. And when was the last time you saw it?

A. I don't think that I had occasion to look at the book again after probably the third visit. It could have been about the third or fourth of May.

Q. Where was it when you last saw it?

A. In the possession of Mr. Kyne.

Q. And you have not seen it since?

A. Or Mr. Busterna.

Q. Have you seen it since that time?

A. No, I never have.

Q. Will you state for the period of the few days that you examined, that is on your initial visit, where you compared the book and the daily sheet, if the sum total of the daily sheets was more or less than that shown in the book?

Mr. Avakian: Just a moment—I object on the ground it is calling for opinion and conclusion and there has been no foundation laid by way of show-

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(Testimony of Louis H. Mooser, Jr.)

ing that there is no memorandum or report which would set forth this matter accurately. I object to the use of a seven-year-old recollection when there probably must have been a report made.

The Court: Objection overruled. Answer the question. [1993]

A. The slips showed more than was entered in the books.

Q. Now, after you made that determination, or after you found that, what then did you do, or what method of examination did you then follow, for the purpose of determining income?

A. I made a study of the slips over a period, beginning, I believe, May 16th and ending May 28th, so as to strike an average.

Q. And during that period of time did you visit the premises daily? A. Yes.

Q. Just describe what you did there.

Q. Well, I would go and pick up the slips for each day——

Q. From whom would you pick those up?

A. From whoever was in charge, mostly from Mr. Busterna, and I made a chart.

Q. As to the wins and losses for each shift.

A. That's right.

Q. And was that charge made at the time you were making that examination? A. Yes.

Q. And do you have that chart with you?

A. Yes, I have.

Q. Will you produce it. You have handed me a large sheet headed, "186 Club, San Francisco,"

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(Testimony of Louis H. Mooser, Jr.)

and I will ask you if this is the charge to which you refer? [1994] A. Yes, it is.

Mr. Campbell: I will ask to have this marked for identification as plaintiff's 166 for identification.

Q. Now, for the further purpose of identification, Mr. Mooser, I call your attention first to the columns appearing at the top of the page, there are indicated certain dates. Are those the dates upon which you made the examination? A. Yes.

Q. And there are under each day two columns, one headed "Win" and one headed "Lose," under which appear various figures. Where did you obtain those figures?

A. From the cashier's ticket, I believe they call it.

Mr. Avakian: Since the examination is going into the contents and this is marked simply for identification, I wonder if we may examine it?

Mr. Campbell: I shall further identify it to assist you in examination.

The Court: You may proceed.

Q. I am going to show you plaintiff's Exhibits 110 to 110F, and ask you if you, in the course of your examination, saw this type of sheet?

A. My recollection is that they were much the same type of material, but on a much smaller sheet at that time.

Q. A smaller sheet? A. Yes. [1995]

Q. At any rate, those figures, as I understand it, were obtained from the sheets which you obtained from the cashier, is that correct?

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(Testimony of Louis H. Mooser, Jr.)

A. Yes.

Q. And I notice there are here 7 days and below are some 5 days. Do I understand this was the period upon which you gathered this material?

A. Yes.

Mr. Campbell: It will take a little time to examine this.

The Court: We will take a recess.

(Jury and alternate jurors admonished and recess taken at 2:20 p.m.)

2:35 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MOOSER

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Mooser, referring to 166 for identification, you have identified this, have you not, as the chart which you prepared during the 10 days or two weeks that you were on the premises on the dates indicated in May of 1944? A. Yes.

Mr. Campbell: This will be offered in evidence, government's 166. [1996]

Mr. Avakian: Now, we again, only for the purpose of ascertaining the ruling in this jurisdiction, object to it on the ground it represents a conclusion

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(Testimony of Louis H. Mooser, Jr.)

and not proper evidentiary material and no foundation laid. As I said earlier, it is simply for the purpose of determining what rules should be followed.

The Court: The exhibit will be admitted in evidence, No. 166.

Q. Now, Mr. Mooser, in computing this chart, what did you find to be the average of the wins per day?

A. Eighty dollars a day was the figure determined to be a fair average.

Q. What was the actual average of the period?

A. Well, the average——

Mr. Avakian: Objected to—just asked and answered.

The Court: Objection overruled.

A. The actual average for the period was about $98.

Q. And when you say $80 per day, how did you arrive at that figure?

A. Because the last week was a short week and business was much better in 1944 than it was in 1943, and therefore I made that distinction so as to reduce it to the actual figure for the previous months. In other words, business was getting better as time was going on.

Q. You were attempting to ascertain some kind of an average for 1943? [1997]

A. That's right, for the fiscal year 1943-1944, and I took into account the fact that the business was improving in that line of business between '43

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(Testimony of Louis H. Mooser, Jr.)

and '44, and since this was to go back to '43, I adjusted it downward so as to reach a figure of $80.

Q. Now when you completed that examination in May of 1944, did you then pick up, Mr. Mooser, a corporation income and declared excess profits tax return of the 186 Club for the period July 1, 1942, to June 30, 1943? A. I did.

Q. I am going to show you defendant's Exhibit "J," and ask you if that is the return which you picked up? A. Yes, it is.

Q. And is that your signature as attesting deputy collector? A. Correct.

Q. I notice this is dated the 31st day of May, 1944, is that the date upon which you received it?

A. Yes.

Q. And do you recall upon what basis the gross receipts and the gross profits were arrived at in that return, if you know? A. Yes, I do know.

Q. And in what manner?

A. That could be divided into two sections, my answer. First of all I found a form 1120 covering the corporation's activities [1998] prior to the acquisition by the Remmer interests, and inasmuch as we were filing a corporation return on the fiscal year basis, the only figures that I had to include in this return were those that I found on the partially completed corporation return which was left on the premises when the former controller of the corporation, Silverman, left. I just took those figures and combined them with the figures that I took from the second part, which is based on the $80 a day

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(Testimony of Louis H. Mooser, Jr.)

for 122 days, if my memory serves me, for the balance of the fiscal year, which then gave me a gross income of $12,768 gross. I then used only the expenses that were shown on the original return, for the reason that the figures that I used in the $80 a day business were net figures, so I added the total amount of the $80 a day for the 122 days to the amount that appeared on the original return, which computed would be the tax.

Q. Those are the figures that are set forth in this return, upon which you have acknowledged the signature of Bert Busterna and William E. Kyne, is that correct? A. Yes.

Q. After this corporation return was filed, Mr. Mooser, did the Collector's office then have further jurisdiction, so far as auditing of the return was concerned?

A. No, our jurisdiction ended there.

Q. Corporation returns, as a matter of law and regulation, are audited and handled by revenue agent's office, is that correct? [1999]

A. Except where we find a delinquent return.

Q. Where you pick up a delinquent return?

A. That is right.

Q. But I mean so far as the office is concerned?

A. That's right.

Q. Now, I direct your attention to plaintiff's Exhibit 87A for the fiscal year July 1, 1943, to June 30, 1944, and I direct your attention to the signature of the attesting deputy collector as to the corporate signatures and also of Mr. Slater, the ac-

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(Testimony of Louis H. Mooser, Jr.)

countant, preparing the return, and ask you if that is your signature? A. Yes, it is.

Q. Do you recall the circumstances—answer this yes or no—under which you affixed your signature there? A. Yes.

Q. Where did that take place?

A. In the office of the Collector of Internal Revenue in San Francisco.

Q. Can you state upon what date?

A. On the 15th of November, 1944.

Q. That is the date upon which this document is acknowledged, is that correct? A. Right.

Q. And do you recall who was present on that occasion?

A. Mr. Kyne and Mr. Slater. [2000]

Q. Was Mr. Busterna present, if you recall?

A. No, he was not. Nor were the other——

Q. I mean Mr. Casselini—it was Casselini's signature. A. No, he was not present.

Q. As a deputy collector, do you have instructions relative to attesting the signatures of corporate officers on returns? A. Yes——

Mr. Avakian: Just a moment—it has been answered.

A. Yes.

Q. What are your instructions about that?

Mr. Avakian: The instructions themselves are the best evidence. The Collector's manual on that should be produced so we can see what the instructions are.

The Court: He may answer the question.

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(Testimony of Louis H. Mooser, Jr.)

A. We were directed to attest one signature on a corporate return.

Q. If one of the officers appeared before you?

A. Yes.

Q. Now at the time you attested this, did you make any examination of the return?

A. None whatsoever.

Q. At the time you attested these signatures, did you then retain the return?

A. No, I did not.

Q. What, if anything, was done with it, if you know? [2001]

A. It was taken away by the taxpayer.

Q. I call your attention particularly to typewritten Schedule 1 and ask you if you observed that at the time, at the time you attested the return?

A. No, I did not. I made no examination of the return whatsoever.

Q. Was this Schedule 1 subsequently called to your attention by any one? A. Yes, it was.

Q. When, to the best of your recollection?

A. To the best of my recollection some time after it was filed, probably the middle of 1944.

Q. I call your attention to the filing date, November 15th.

A. Well, at any rate some time after it was filed.

Q. By whom was it called to your attention?

A. By my superior officer.

Q. Who was that? A. Mr. John Boland.

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(Testimony of Louis H. Mooser, Jr.)

Q. Who was then the Assistant Chief Field Deputy? A. That's right.

Q. Now at the time you made your examination and investigation there, did you give any one instructions or directions as to the keeping of books and records? A. Yes, I did.

Q. And to whom did you convey that? [2002]

A. Mr. Kyne.

Q. Do you recall when that was?

A. Well, I repeatedly made the same request of him that in the future correct records should be kept, books of account should be kept, so as to determine the tax liability.

Q. After the termination of your investigation you made during the course of 1944, did you have anything whatsoever to do with investigating the affairs of income tax returns of the 186 Club?

A. None whatsoever.

Q. You had nothing further to do with the matter?

A. May I also say I made that admonition in writing by giving them a copy of the letter which was letter of transmittal of the return and the copy of that letter was given to Mr. Kyne, in which the last paragraph admonishes about keeping proper records.

Mr. Avakian: May we have this letter, rather than a recitation?

Q. You say you delivered that to Mr. Kyne?

A. I did.

Q. Do you have a copy of it?

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(Testimony of Louis H. Mooser, Jr.)

A. I have my original draft of it.

Q. Your original work copy of the letter?

A. Yes.

Q. Will you produce that. I notice this is in pencil. Was [2003] this typed up?

A. Yes, it was.

Q. And a typed copy given to Mr. Kyne?

A. Yes.

Mr. Campbell: I will ask that this be stapled together and marked 168 for identification.

Q. Mr. Mooser, is this your original report?

A. Yes, it is.

Q. May I ask you as to the copy which was delivered to Mr. Kyne, was it an exact typewritten copy of this document? A. Yes.

Mr. Campbell: This will be offered in evidence, 167.

Mr. Avakian: No objection.

The Court: Admitted in evidence, 167.

Mr. Campbell: At this time I will read this document, government's Exhibit 167, dated May 30, 1944.

(Reads Exhibit 167.)

You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Mooser, I believe you stated that you made this investigation as a part of a spot check which you were conducting in a certain area in San

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(Testimony of Louis H. Mooser, Jr.)

Francisco, is that correct? A. That is correct.

Q. And I believe you stated that the area began at the corner [2004] of what, Eddy and Mason?

A. Yes.

Q. And then it ran down Eddy to Powell?

A. Yes.

Q. And then up Powell to Ellis, is that right?

A. Yes. May I refer to my notes? In fact, I have a map.

Q. Yes.

A. Northeast corner Turk and Leavenworth, took another block, Jones down to Eddy, Taylor down to Mason and down Mason to Eddy, over Eddy to Taylor and Eddy to Grove and back over to Leavenworth Street.

Q. In connection with prosecution's Exhibit 167, which is the handwritten report addressed to John J. Boland, Assistant Chief Field Deputy, San Francisco, I note that you made the statement as follows: "The delinquency in filing the endorsed return was occasioned by the fact that the operators of this club were advised by their attorney to file as co-partnership and this was done." Did you, in the course of your examination, discuss this matter with the attorney of this enterprise?

A. Yes, I did.

Q. And that was Mr. John Taffe, was it?

A. Yes, it was.

Q. And he is now deceased? A. Correct.

Q. And you had discussion with him on this matter whether [2005] this enterprise should file as a

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(Testimony of Louis H. Mooser, Jr.)

partnership or corporation? A. Yes, I did.

Q. And it was his opinion, was it not, it should file as a partnership? A. No, it was not.

Q. I thought you said here they were advised by their attorney to file as a co-partnership and this was done, is that correct?

A. May I explain?

Q. Yes.

A. When the matter was broached to Mr. Taffe regarding filing of the matter as a corporation, he said he felt he was between the devil and the deep blue sea and I said "Why"? He said, "Well, I concluded filing as a co-partnership would be the lesser of the two evils for this reason, by filing as a co-partnership releases of any risk getting in wrong with the corporation, and inasmuch as the corporation had been filed, and probably should be filed, if we filed as a corporation, we would then put ourselves in the position of being attacked by all card-carrying members of this corporation, the 186 Club, any one of which might come in and bring suit against the club or otherwise attack any profits that might be there."

Q. And you told him that in your opinion a corporate return should be filed?

A. Yes, and he agreed with me and I showed him the reasons.

Q. You stated you discussed this matter with various people. [2006] Did you name everybody that you had discussed this investigation with, or are there other people with whom you discussed it?

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(Testimony of Louis H. Mooser, Jr.)

Mr. Campbell: May we have the question?

(Question read.)

Mr. Avakian: I will reframe it.

Q. Do you recall discussing the results of your examination with Revenue agent by the name of Sol Ezralow?

A. Yes, he called me up one time.

Q. And you discussed with him, did you not, this question of whether the 186 Club should file as a partnership rather than a corporation?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. During the time you were making your investigation you do have a recollection of the conversation, is that correct? A. Yes.

Q. Without telling me what the details of the conversations were, did they include the matter of whether the 186 Club should file tax returns as partnership or corporation?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Well, isn't it a fact that Mr. Ezralow told you he thought it should file as a partnership?

Mr. Campbell: Just a minute—that is objected to.

The Court: Objection sustained. That is the third time [2007] it has been ruled upon.

Q. Now you also said in this report to Mr. Boland, plaintiff's Exhibit 167, that in preparing the return you included in the income for a period of

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(Testimony of Louis H. Mooser, Jr.)

eight months prior to the time that the new owners took over the enterprise. Do you recall that?

A. Yes.

Q. And I believe in your testimony you referred to the new owners as the Remmer interests, that was your understanding of it? A. Yes.

Q. And you knew at that time, did you not, that the 186 Club had already filed a partnership return of income for the year 1943? A. Yes.

Q. And you knew, did you not, that in picking up, as you phrase it, a corporate return for the year ending June 30, 1943, you were including in the income in that return the income for this business which had been reported on the partnership return for the period from March 1, 1943, to June 30, 1943? A. Yes.

Q. And you also knew that you were including in this corporate return income for the eight months preceding the time that the Remmer interests acquired the business, is that right? A. Yes.

Q. You stated that you talked to one Bert Busterna at the 186 [2008] Club. Was he the manager of the card room?

A. As I understand it, yes.

Q. And do you know what Mr. Kyne's capacity or connection with the club was?

A. Well, I would say he had the over-all management.

Q. During the time you were on the premises making your examination, was he present in the active management?

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(Testimony of Louis H. Mooser, Jr.)

A. No, I don't think he actually worked on the floor. As I say, I believe he was on an over-all basis.

Q. He was an executive? A. Yes.

Q. And Mr. Slater was a public accountant, was he not? A. Yes, he was.

Q. And he had charge of keeping the records, is that correct?

A. He had charge of the pay roll records.

Q. And he had prepared the 1943 partnership return, of which you say you saw a copy at the time? A. Yes.

Q. Now were your discussions about this carried on with all three of these people I have named?

A. With Mr. Kyne and Mr. Slater. Mr. Busterna didn't know much about what was going on.

Q. You are quite sure that you did talk to some extent to Mr. Busterna?

A. Just simply to pick up the slips and such as that. I never [2009] discussed the matter of the liability of the club or anything like that, because, as I say, he just didn't know.

Q. Did you identify yourself to Mr. Busterna?

A. Oh, yes.

Q. Would it change your testimony at all if I told you when the prosecution called Mr. Busterna as a witness in this matter his recollection was he had never met or talked to you?

Mr. Campbell: Objected to as improper cross-examination.

The Court: He may answer the question.

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(Testimony of Louis H. Mooser, Jr.)

A. Oh, that isn't so.

Mr. Avakian: I will take your word for it. I just want to make sure that you are sure.

Q. On prosecution's Exhibit 166, which you presented here as a chart of the analysis you made, I note two separate summaries for the date of May 18th, one of which is designated as "Corrected." Could you explain those two summaries for me?

A. I do not recall at the present time why I corrected that, but I know that there were corrections made on the slips and due entirely to Mr. Kyne's request I made these corrections. In other words, I believe that in going over the slips as I would pick them up, there would be various changes made in the final outcome, so that he gave me the corrected slips.

Q. Were both of those made by you at the same time, May 18th summaries? [2010]

Mr. Campbell: You mean simultaneously?

Q. On the same occasion?

A. I don't understand.

Q. Well, I noted that across the top of this exhibit you have written in ink a summary for May 16th, then May 17th, and continuing across to the right of the page May 18, May 19, May 21, May 21, May 22 and May 23 and at the foot of each of those summaries there is in ink total wins and lose for each day. Then I notice still below that for May 18 there is a summary entitled "May 18 Corrected" and that is in pencil. Is that also in your handwriting?

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(Testimony of Louis H. Mooser, Jr.)

A. Yes. Let me try to explain. If you will note, the totals for the first eight days was pretty high. Mr. Kyne objected to it as not being a fair picture. I said, "All right, Mr. Kyne, we will go and look further." We went a little further and you will notice by having gone further it brought the average down considerably.

Q. My question relates to this column "May 18 Corrected" and my question is, was that summary of May 18th prepared by you on the same occasion that you prepared the other May 18th summary above?

A. No. That was not done until after this was done and all of it was done together but at that time you see the variation is very small. Now in this case there was quite a little difference. [2011]

Q. You are referring now to a corrected summary for May 20th? A. That is right.

Q. And that likewise is different from the original summary you made for May 20th, is that correct? A. That is correct.

Q. Now let us refer first to the income summaries which are the ones on the upper portion of this sheet for those two days. From what data was that information entered on the sheet?

A. From the slips of my summary from the cashier.

Q. Which you picked up?

A. I picked up myself.

Q. Now with respect to corrected May 18th

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(Testimony of Louis H. Mooser, Jr.)

section, that was prepared, you say, at some later time? A. That is right.

Q. And from what data or source were entries in that pencilled summary of May 18th obtained?

A. From data supplied to me by Mr. Kyne.

Q. What do you mean by data?

A. As I told you, one slip from a cashier might show a win of say $30 and for some reason or other it developed it should have been $30 or the recapitulation showed something else. You will notice where you brought those in, they were always in his favor.

Q. Well, you prepared the sheet, did you not?

A. I am telling you the source and I took them because I [2012] thought they were correct.

Q. You felt they were correct?

A. Oh, absolutely. He was cooperating in every way.

Q. You had no difficulty in obtaining information? A. None whatsoever.

Q. And likewise from Mr. Slater?

A. Correct.

Q. In the lower portion you have taken a period May 21, 25, 26, 29 and 30, is that correct?

A. Correct.

Q. And you have set forth information there which you likewise obtained from the cashier's sheets? A. Correct.

Q. And for the average for that week was less than the average for the first period; is that correct?

A. Right.

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(Testimony of Louis H. Mooser, Jr.)

Q. Do you notice the amount by which that averaged?

A. $118 was the first one, $77.30 the second, so that the total average was brought down.

Q. Now this average that you compiled was based on win and lose figures of the poker sheets, is that correct, the cashier's sheets? A. Yes.

Q. And do you recall at this time what those cashier's sheets contained as to type of information? [2013]

A. Yes, they contained the amount of money that the cashier was given to start the day and how much he turned back, how much money was given players with which to play and how much was returned to him and up in the right-hand corner there was always a large amount of money that represented amounts that players owed the establishment.

Q. That section of the poker sheet, the amount of money that players owed, was not entered into win or lose computation?

A. I never took that into consideration at all.

Q. I show you prosecution's Exhibit 110, I believe Mr. Campbell also handed to you. I believe you stated your recollection was that sheet was smaller but the type of information was the same. Will you examine that and see whether that is your recollection?

A. I would say it was substantially the same.

Q. Now in computing the amount of the net

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(Testimony of Louis H. Mooser, Jr.)

income of the 186 Club, did you make any allowances for rent paid for the premises?

A. Yes.

Q. And how did you make that allowance?

A. Well, that was paid by cash. All of their payments of expenses were deducted on their sheets.

Q. Did that enter into the win and lose figures?

A. Yes.

Q. Isn't it a fact that the rent of the 186 Club was paid by check?

A. I don't think so. [2014]

Q. Did you make an examination to determine that?

A. I can say this, nothing was paid by check. It was always cash.

Q. Did you determine how the rent was paid?

A. By cash, and everything else was paid by cash.

Q. For those particular days that you took as your sample, the days in May which I have read, was any rent paid on those particular days, if you recall? A. I can't recall.

Q. If your computations here did not include any rent payments, then to that extent they would not correctly reflect the net income of the place, isn't that correct? A. That's true.

Q. Do you know how the utilities for the place were paid? A. Yes.

Q. How were they paid? A. In cash.

Q. How did you determine that?

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(Testimony of Louis H. Mooser, Jr.)

A. Because they were written right on the slips.

Q. On the poker sheets? A. Tickets, yes.

Q. And how did that enter into win or lose computation, do you recall?

A. Well, the win or lose was the amount of money that the cashiers turned in and the amount showed as win or lose was [2015] after all those expenses had been paid.

Q. And do you know whether on these particular days in May that you used as your sample there were any actual utility payments?

Mr. Campbell: I suggest that the record is the best evidence of that.

Q. Will you refer to the exhibit sheet and state whether in the days in May you find any utility payments?

A. There is nothing here that would show that.

Q. And if there were any utility payments on those particular days, then again your computation of net income would be erroneous, would it not?

A. But it is not.

Q. I say if there were any payments made on those days, it would be erroneous?

A. But all payments came out of there. Anything they paid came out of that money. I discussed that with Mr. Kyne regarding these expenses.

Q. You computed the net income by taking the net win and lose on these selected days in May, is that right? A. That is right.

Q. And your computation was based entirely on what happened on those days?

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(Testimony of Louis H. Mooser, Jr.)

A. That is correct.

Q. So if on those days they had not paid any utility payments, [2016] then your computation would be erroneous, insofar as computing net income——

Mr. Campbell: Objected to as asked and answered three times.

Mr. Avakian: Asked but not answered, your Honor.

The Court: Objection sustained.

Q. You do not know at this time whether or not there were any utilities payments shown on these particular days?

Mr. Campbell: Same objection.

The Court: Same ruling.

Q. In making the computation which is reflected in prosecution's Exhibit 166, can you tell us whether or not at that time the 186 Club was paying any salaries to officers?

A. It was not, as I determined.

Q. As a matter of fact, the operators of the enterprise up to that time had been going on the theory it was a partnership rather than a corporation?

Mr. Campbell: Objected to as calling for his conclusion.

The Court: Objection sustained.

Q. Well, didn't you state in your report, Exhibit 167, that a partnership return had been filed on the advice of counsel?

Mr. Campbell: I will stipulate that is there.

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(Testimony of Louis H. Mooser, Jr.)

Q. Now to the extent that the 186 Club may have paid salaries to officers, your computation of net income as reflected in Exhibit 166 would be incorrect, would it not? [2017]

Mr. Campbell: Objected to as argumentative, speculative and not within the scope of direct examination.

The Court: Objection sustained.

Mr. Avakian: Your Honor, it is within the scope of direct examination because this has been presented——

The Court: The objection has been sustained.

Mr. Avakian: And you won't hear me?

The Court: No.

Q. Mr. Mooser, the 186 Club was located in the back part of certain premises in which in the front part was an operation known as the Day-Night Cigar Store, is that correct? A. Yes.

Q. And the entrance to the 186 Club was through the cigar store? A. Yes.

Q. Isn't it a fact there was a single lease on those two premises? A. I don't recall.

Q. Did you ever see the lease? A. No.

Q. Did you examine the books of the Day-Night Cigar Store to determine whether the entire rent on the combined premises was being paid through the Day-Night Cigar Store?

A. I do not recall whether I did or not. I do not think so.

Q. I call your attention to prosecution's Exhibit 117, which [2018] is one of the books of ac-

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(Testimony of Louis H. Mooser, Jr.)

count of the Day-Night Cigar Store, and particularly to an account in that book of the Day-Night Cigar Store entitled "186 Club," on which there is shown on December 31, 1943, a charge against the 186 Club in the amount of $1500 as rent. Will you examine that? Does that refresh your recollection that the rent for the 186 Club proportionate premises was paid by the Day-Night Cigar Store and was charged on the books against the 186 Club?

A. The only thing, this comes in the period prior to the time you are speaking of.

Q. You were making an examination over what period?

A. This goes for the period in which the Silverman interests held forth and there was no information whatsoever concerning this or any other figure and the figures that were taken were those found in the corporation returns, so this would not mean anything.

Q. The Silverman interests terminated February 28, 1943? A. That is correct.

Q. I call your attention to the fact that the entry I spoke to you about is December 31, 1943. Do you notice that?

A. But this actually covers all that money for that period.

Q. Do you notice it is December 31, 1943?

A. Yes.

Q. And that is within the period for which you were making your examination? [2019]

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(Testimony of Louis H. Mooser, Jr.)

Mr. Campbell: Do you mean the entry in the book or what is behind the entry?

Mr. Avakian: I do not know what is behind the entry. I am telling what the entry in the book is, December 31, 1943, rent charges against 186 Club, $1500.

The Court: What is your question?

Mr. Avakian: I do not think I put the question yet, your Honor; Mr. Campbell interrupted.

Q. This date, December 31, 1943, was within the period for which you made your examination?

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

Q. Do you understand the question?

A. Yes, I believe it is within the period.

Q. I will ask you again then this question—if the rent for the 186 portion of the premises was paid by the Day-Night Cigar Store to the landlord and was then charged against the 186 Club, that rent would not have been taken into account in the chart which you prepared as Exhibit 166, would it?

Mr. Campbell: Objected to as assuming a fact not in evidence.

Mr. Avakian: The book is in evidence, your Honor.

Mr. Campbell: The book does not so indicate.

The Court: Objection sustained.

Q. Can you refer me on prosecution's Exhibit 166 to any day [2020] listed there on which you found a record of a rent payment having been made?

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(Testimony of Louis H. Mooser, Jr.)

A. No, I can't do that. This is almost eight years ago. I can't remember.

Q. Do you know whether or not there were any rent payments? A. I can't say.

Q. Would a determination as to the amount of rent have been proper and material in determining the amount of the net income of the place?

Mr. Campbell: Objected to as not within the scope of direct examination; incompetent.

Mr. Avakian: Well, your Honor, he has presented an analysis which he represents as net income. Aren't we entitled to show whether or not——

The Court: Objection sustained.

Mr. Avakian: ——he has omitted material matters?

The Court: Objection sustained.

Q. Does your chart, Exhibit 166, include any expense in the way of officers' salaries? A. No.

Q. Does it include any expenses as rent?

A. That I can't say.

Q. Do you know whether or not the utilities for the 186 Club portion of the premises were paid through the Day-Night Store?

A. I do recall that, yes. [2021]

Q. I show you prosecution's Exhibit 87A, which is the corporation income and declared value excess profits tax return for fiscal year beginning July 1, 1943, and ending June 30, 1944. I believe you testified on direct examination that the signature, Louis H. Mooser, was your signature?

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(Testimony of Louis H. Mooser, Jr.)

A. Yes, I did.

Q. And that Mr. Kyne and Mr. Slater signed this return before you? A. That is right.

Q. And then I believe you said after it was so signed they took it away with them?

A. That is right.

Q. And then at some later time you testified, I believe, that you had a conversation with your superior, at that time Mr. Boland, regarding this return?

A. He called me in and showed it to me.

Q. Do you know approximately when that conversation was?

A. No, I can't say, but the return had not been filed very long.

Q. So it would have been shortly after the filing date of November 15, 1944?

A. That is right.

Q. I call your attention to the fact that the filing date of November 15, 1944, is the exactly same date on which you signed it as the party before whom the return was signed. Do you notice that? [2022]

A. That could be.

Q. You notice the two dates are the same?

A. Yes.

Q. And this was sworn to before you in the office of the Collector of Internal Revenue in San Francisco? A. As I recall, yes.

Q. And isn't it a fact that the return was left with you for filing on that occasion?

A. That is not a fact.

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(Testimony of Louis H. Mooser, Jr.)

Q. Do you receive returns for filing in connection with the authentication of them?

A. Yes, sometimes.

Q. So apparently they took this away and came back the same day?

A. Was there payment made?

Q. It says, "Received with payment."

A. I would not be taking the return.

Q. They would walk over to the cashier's office?

A. Yes.

Q. That is in the same building, is it not?

A. Yes.

Q. Can you point to any particular portion of this return which Mr. Boland discussed with you on the occasion which you mentioned on your direct examination? A. Yes, this Schedule 1. [2023]

Q. I believe you stated that the collector's office does not have jurisdiction of corporation returns except in instances where delinquent return is picked up, is that correct? A. Yes.

Q. Does the collector's office have jurisdiction over individual returns and partnership returns?

Mr. Campbell: I think the question is misquoted. The question was jurisdiction as to audit.

Mr. Avakian: Well, I will modify the question to that extent. Now my question is, does the collector's office in San Francisco have jurisdiction over the audit of individual and partnership returns?

A. At that time only certain individuals, not partnerships or corporations.

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(Testimony of Louis H. Mooser, Jr.)

Q. Now with respect to the 1943 partnership return of the 186 Club, a copy of which you said you saw during your examination before you picked up the corporate return covering a portion of the same period and after you advised the owners of the enterprise that they should file as a corporation rather than a partnership, did you make any recommendation to the effect that the individuals who were shown on the partnership return for that period receive any adjustment or refund in respect to that income?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained. [2024]

Q. Do you know whether any such adjustment or refund was made?

Mr. Campbell: Same objection; not within the scope of direct examination.

The Court: Objection sustained.

Mr. Avakian: Your Honor, I would like to be heard on that.

The Court: No, we will not take the time for that.

Mr. Avakian: I do not want to make an annoyance of myself requesting this, but I would like to be heard on some of these matters. Mr. Golden called my attention that these very same questions were put to Mr. Ezralow and your Honor permitted him to answer them.

The Court: The ruling will stand.

Mr. Avakian: No further questions.

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(Testimony of Louis H. Mooser, Jr.)

Redirect Examination

By Mr. Campbell:

Q. In response to one of Mr. Avakian's questions he had you describe a conversation you had with Mr. Taffe, the attorney, wherein he stated that the reason for not filing on a corporation basis was because card-bearing members might demand an accounting of the profits or distribution of the profits. Will you state what is meant in California with relation to this type of operation, what a card-carrying member is?

Mr. Avakian: Objected to on several grounds—it is incompetent, irrelevant and immaterial. This witness is not qualified as an expert on that point on California law. [2025]

The Court: Objection sustained.

The Court: Any reason why this witness could not be excused?

Mr. Avakian: He may be excused.

(Witness excused.)

ROBERT W. MORGAN,

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Robert W. Morgan.

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(Testimony of Robert W. Morgan.)

Q. Where do you live?

A. El Cerrito, California.

Q. What is your business or occupation?

A. Revenue agent, San Francisco Division.

Q. How long have you been a revenue agent?

A. Six years today.

Q. Have you been stationed in the San Francisco division at all times? A. That is correct.

Q. You say six years today?

A. Yes, sir, January 10, 1946.

Q. Are you also a certified public accountant, Mr. Morgan? A. Yes, sir.

Q. Now, Mr. Morgan, in connection with your official duties as [2026] a revenue agent, were you assigned to the investigation of the personal income tax returns of the defendant, Elmer Remmer?

A. Yes, sir.

Q. And in connection with that assignment, did you make an examination, or did you examine the books and records, that is to say, such books and records as were made available for your examination——

Mr. Gillen: Objected to as leading and suggestive. I suggest the correct question would be in connection with that investigation what did you do.

The Court: Objection overruled.

Mr. Avakian: I object to "such books as were made available." It has implications, your Honor.

The Court: Objection overruled.

Q. (Continuing): ——of the Day-Night Cigar Store? A. Yes.

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(Testimony of Robert W. Morgan.)

Q. Mr. Morgan, I am going to show you Exhibits 117, 117A and 117B, purporting to be the books of account of the Day-Night Cigar stand or Day-Night Cigar Store, and ask you if you examined those books in the course of your investigation?

Mr. Gillen: I move it be stricken out of the question the word "purporting." These were exhibits introduced by the government, by which they are bound.

The Court: Objection overruled.

Mr. Gillen: It is their exhibits, your Honor. [2027]

The Court: I know.

Mr. Gillen: We should get the testimony from the witness, not from Mr. Campbell's questions.

The Court: I think we are getting a little sensitive. Objection overruled.

Mr. Gillen: We have to object, we have a duty——

The Court: But we are wasting time.

The Court: I disagree. I do not think any inference is to be made from the use of the word—flyspecks.

Q. I show you plaintiff's Exhibit 119, return of William E. Kyne for the year 1943, and particularly therein to the schedule which is attached thereto, headed "Day-Night Cigar Store, 186 Eddy Street, San Francisco, California," and ask you if you examined that return in the course of your duties? A. I did.

Q. I also show you plaintiff's Exhibits 84, 85,

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(Testimony of Robert W. Morgan.)

and 86, being partnership returns of income of the Day-Night Cigar Store for the calendar years 1944, 1945, and 1946, and ask you if you examined those?

A. I did.

Q. Have you, Mr. Morgan, at my request, prepared a summary statement of the assets and liabilities of the business known as the Day-Night Cigar Store? A. I have.

Q. Pardon me, may I finish the question—as of the following [2028] dates: December 31, 1943; December 31, 1944; December 31, 1945; December 31, 1946? A. I have.

Q. And what was the source of the material from which you compiled that statement of assets and liabilities?

A. The books before me, the 117 series.

Q. And also from the returns before you?

A. Yes, sir.

Q. And in addition to that, have you, at my request and direction, also placed upon that summary the net worth or capital accounts as reflected in the books of the Day-Night Cigar Store as of each of those dates? A. I have.

Q. I am going to show you plaintiff's Exhibit 164 for identification, together with two schedules annexed thereto, and ask you if that is the summary statement of assets and liabilities which you prepared at my request, and from the sources which you have just identified? A. It is.

Q. In preparing this document was anything else, any other documents or exhibits, which are

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(Testimony of Robert W. Morgan.)

either in evidence or not in evidence in this case, utilized in its preparation? A. No, sir.

Mr. Campbell: This will be offered as plaintiff's Exhibit 164 in evidence. [2029]

Mr. Avakian: Your Honor, again simply for the purpose of obtaining clarification, we make the formal objection that the presentation of a summary representing the results in the opinion and conclusion and judgment of an expert witness is not a proper method of presenting the evidence, and again I state I think it is, but I know many courts differ in their rulings and I simply want clarification.

The Court: Very well. The exhibit will be admitted in evidence.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [2030]

Friday, January 11, 1952—10:30 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. MORGAN

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Morgan, yesterday you had identified as plaintiff's Exhibit 164 the statement of assets and liabilities of the Day-Night Cigar Store as drawn

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(Testimony of Robert W. Morgan.)

by you from Exhibits 117 series, Exhibit 119 and Exhibits 84, 85 and 86, is that correct?

A. Yes, sir.

Q. Now with regard to the figures that are set forth on this schedule or statement, that is, Exhibit 164, will you state whether or not any of these figures are adjusted figures or whether they are as appeared in the records to which I referred?

A. The figures all appeared in this 117 series, with the exception of certain figures that we obtained from the tax returns.

Q. As to bank balances, was it necessary for you to combine certain figures appearing in the 117 series?

A. Yes, sir, with respect to the year 1946 only. No general ledger was maintained for that year, so that we obtained the closing balance in cash account as of December 31, 1946, from cash receipts and disbursements book.

Q. And in arriving at the bank balances, you set forth the figures used and drawn from the 117 series of books in the two schedules annexed and made a part of Exhibit 164, is that correct? [2031]

A. That is correct.

Q. Reading from government's Exhibit 164, the net worth of the Day-Night Cigar Store as of December 31, 1943, $17,785.40; as of December 31, 1944, $39,494.37; as of December 31, 1945, $30,390.47, and as of December 31, 1946, $28,643.47. Did you also, at my request, place on this schedule the capital accounts as disclosed in the 117 series?

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(Testimony of Robert W. Morgan.)

A. Yes, sir.

Q. I direct your attention to the fact that no capital accounts were shown as of December 31, 1946. Will you state whether or not the sets, that is to say the 117 series, disclosed capital accounts as of the year-end '46?

A. Those accounts were incomplete as of December 31, 1946, so that I didn't transcribe the balances.

Q. As of the end of each of the years, 1943 and 1944 and 1945, will you state if the profit and loss accounts for those years were closed into the capital accounts?

A. Not in all respects. Particularly with respect to the year 1945, I remember those accounts were not closed into the capital accounts.

Q. Will you state how that showed on the books as of the year 1945?

A. Profit and loss accounts both years remained outstanding, were not closed to the capital accounts. On that schedule before [2032] you I show that in total.

Q. In setting up these capital accounts, you have simply copied what was shown in the books?

A. I totalled those profit and loss and showed as one net figure.

Q. That is, you have totalled them in the individual accounts?

A. I totalled the balances of the individual accounts shown as one figure as of December 31, 1945.

Q. That is in the individual accounts?

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(Testimony of Robert W. Morgan.)

A. That's right.

Q. And you have also placed here a total of all of the capital accounts as of the year-end of each of the years, 1943, 1944, and 1945, is that correct?

A. That is correct, sir.

Q. Now I direct your attention to the fact that in each of the year-ends, 1943, 1944 and 1945, the total amount shown in the books in the capital accounts exceeds the net worth of the business as disclosed in the statement of assets and liabilities set forth hereon. Can you state how that came about on the books?

A. I have prepared a schedule entitled "Reconciliation Net Worth From Books and Exhibit" and set forth that figure.

Q. And that is the schedule which you hand me? A. Yes, sir.

Mr. Campbell: I ask this be marked for identification.

The Clerk: 168. [2033]

Q. Showing you plaintiff's Exhibit 168 for identification—let me ask you first, these are your working papers? A. Yes.

Q. What was the source of the figures which you have utilized here?

A. The chief difference——

Q. No, the source of the figures—from what source did you obtain the figures?

A. Book figures, that is the 117 series and the tax returns, partnership returns.

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(Testimony of Robert W. Morgan.)

Q. You say the partnership returns, Exhibits 84 to 86 and 119? A. Yes, sir.

Mr. Campbell: This will be offered in evidence as Exhibit 168.

Mr. Avakian: In view of your Honor's rulings on the admissibility of summary prepared by the witness, we offer no objections.

The Court: Very well; the exhibit is admitted in evidence.

Q. Now, Mr. Morgan, will you explain the difference between the two accounts?

A. The chief difference is the first item called equipment or furniture and fixtures. The books, that is, the general ledger, 117 series, showed amount of $10,000, whereas, in my exhibit I show an amount of $2100. I used that figure because—— [2034]

Mr. Avakian: Just a moment, your Honor—we get into the field of argument here. I have no objection as long as I am permitted to cross-examine——

The Court: Let me have the question and answer.

(Question and answer read.)

The Court: Objection overruled. You may answer.

A. I used that figure $2100 because it is the amount on the 1946 partnership return. I disregarded the $10,400 because that is the figure obviously that includes equipment and various other assets applicable to the 186 Club. No general ledger

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(Testimony of Robert W. Morgan.)

was kept for the 186 Club and Mr. Slater stated to me——

Mr. Avakian: Just a moment—getting into hearsay.

Mr. Campbell: You can't say what Mr. Slater said to you.

Q. At any rate, you used the figure in the return, is that correct? A. That is right.

Q. Partnership return, in lieu of the one in the books? A. That's right.

Q. Now in that connection, and during the course of your investigation, did you see any books, general books, of the 186 Club? A. No, sir.

Q. Did you attempt to obtain any books or records of the 186 Club? A. Yes, sir. [2035]

Q. Did you, in the course of your investigation, find out whether or not books or ledgers were kept for the 186 Club?

A. I never located any and none were ever produced for me.

Q. In examining the books and records of the Day-Night Cigar Store, did you find whether or not certain of the expenses of the 186 Club were paid through the Day-Night Cigar Store?

A. That is correct.

Q. And in utilizing the furniture and fixture item from the partnership return of the Day-Night Cigar Store, rather than the amount shown in the books and records, did you have those facts in mind? A. Yes, sir.

Mr. Campbell: You may cross-examine.

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(Testimony of Robert W. Morgan.)

Cross-Examination

By Mr. Avakian:

Q. Mr. Morgan, I believe you stated yesterday was the sixth anniversary of your employment with the Bureau? A. That is correct.

Q. Were you engaged in accounting work prior to that time? A. Yes.

Q. Will you tell us for whom and for what period of time?

A. I was employed by two certified public accounts in New York City in '35 and '40 until I went into the service of the United States Army.

Q. And in your experience in New York, were you engaged in doing work in connection with the prepartion of tax returns? [2036]

A. That is correct.

Q. Now you stated that you were assigned to examine the returns of Mr. and Mrs. Remmer. Will you tell us approximately when that assignment was made? A. Approximately July, 1947.

Q. And what particular enterprises did you examine?

A. Well, I examined all the enterprises that we could ascertain had any connection with Mr. Remmer.

Q. Well, did you examine the Day-Night Cigar Store or did you examine the 186 Club?

A. Yes, sir.

Q. Did you examine the Menlo Club?

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(Testimony of Robert W. Morgan.)

A. Yes, sir.

Q. Did you examine 110 Eddy Street?

A. Right.

Q. The B. & R. Smoke Shoppe?

A. That is right.

Q. Did you examine the 21 Club and San Diego Social Club? A. No, sir.

Q. Or the 311 Club? A. No, sir.

Q. Did you examine the Cal-Neva, Inc?

A. No, sir.

Q. Did you examine the Transit Smoke Shoppe?

A. Yes, sir. [2037]

Q. You examined the six San Francisco enterprises that I have just named, which have been mentioned in the evidence?

A. That is right.

Q. And you said that you made those examinations in conjunction with other agents, I believe. Will you state what other agents you were working with in that examination?

A. During the examination I was associated with an agent by the name of Gerald Peel, Lynn Harkness, Ray Weaver and Farley N. Gould of the Oakland office.

Q. Did any other agents work on this case with you?

A. No, Mr. Barkley examined Cal-Neva, Inc.

Q. Did you work with Mr. Miner, who was on the stand here? A. No, sir.

Q. Was Mr. Whiteside associated with you at any time?

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(Testimony of Robert W. Morgan.)

Mr. Campbell: I thought this was a preliminary question. He asked who he was associated with and I think it is immaterial.

The Court: He may answer.

A. I did not work with Mr. Whiteside.

Q. Do you know whether or not he was assigned to the case?

Mr. Campbell: I object to that.

The Court: Objection sustained.

Q. In connection with the preparation of Exhibit 164, did you consult with any of the other gentlemen while you were preparing either the exhibit or the underlying material for it? [2038]

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

A. I received instructions from Mr. Campbell only.

Q. What were your instructions from Mr. Campbell?

A. To prepare statement of assets and liabilities from the books and returns.

Q. Just that general instruction? A. Yes.

Q. You did not consult with him as to particular matters that arose in the preparation of it?

A. I may have asked him several questions.

Q. Do you know what particular items in Exhibit 164 you discussed with him?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question.

A. One I remember was the amount I should use for the equipment.

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(Testimony of Robert W. Morgan.)

Q. You are speaking now of the item of furniture and fixtures which you show on 164 as being $2100 on December 31, 1943?

A. That is correct.

Q. Now you found in the books a figure of $10,400, had you not? A. That's right.

Q. And you discussed with him which of those two figures you should use?

A. Yes, sir. [2039]

Q. And did he state to you any opinion as to which you should use?

Mr. Campbell: I am going to object, if the Court please.

The Court: You may answer.

A. He told me which one to use.

Q. He told you to use the $2100 figure, is that right? A. Yes.

Q. Is it not true that if you would have used $10,400 figure shown in the books the pending net worth shown on Exhibit 164 would have been increased by amount of $8300?

A. That is right.

Q. You said you found this $2100 in the 1946 partnership return, is that correct?

A. That is correct.

Q. And that is Exhibit 86?

A. I don't know.

Q. Do you have it before you?

A. No, I do not.

Q. Will you show me on Exhibit 86, partnership return for 1946, the item which states that the total

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(Testimony of Robert W. Morgan.)

amount of furniture and fixtures on hand on December 31, 1943, was $2100?

A. The partnership return makes no such statement.

Q. The return does state the amount on hand at the end of 1946 is $2100, does it not?

A. I wouldn't say it stated. That is the only figure listed [2040] in the depreciation schedule.

Q. And that is for the year 1946, is that correct?

A. Yes.

Q. Exhibit 164—do you have it before you?

A. No, I do not.

Q. I will hand you Exhibit 164 and also hand you a sheet of paper to assist you in any computation you need to make. Do you have a pen or pencil with you? A. Yes.

Q. In Exhibit 164 you show the net worth of the Day-Night Cigar Store at the end of 1946 is $28,643.47, do you not? A. Yes, sir.

Q. And at the beginning of this three-year period, that is at the end of 1943, you show the net worth of $17,784.40, do you not? A. I do.

Q. Will you compute the difference between those two amounts for us? A. $10,858.07.

Q. Now if, instead of using the furniture and fixtures item of $2100, which Mr. Campbell told you to use on December 31, 1943, you had used the figure of $10,400 that you saw in the books, will you compute for us what the increase in net worth would have been from 1943 to 1946? Will you make that computation? [2041]

A. There was no increase.

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(Testimony of Robert W. Morgan.)

Mr. Campbell: May we have the question read?

(Question read.)

Mr. Campbell: Does that contemplate $10,400 throughout the period or simply at the beginning or end of the period?

Mr. Avakian: I think my question is clear.

Mr. Campbell: I object to the question as being incompetent and also unintelligible.

The Court: He may answer the question if he can.

A. The question does not make sense to me.

Mr. Avakian: Let me reframe it.

Q. Will you make a computation of what the net worth would be at December 31, 1943, if you substituted in Exhibit 164 the figure of $10,400 that you found in the books for furniture and fixtures, instead of the figure of $2100 that Mr. Campbell told you to use?

A. I would arrive at net worth as of December 31, 1943, of $26,085.40.

Q. And then would you tell us what, using that figure as net worth of 1943, would you tell us what the net worth increase would be from then to the end of 1946?

Mr. Campbell: Objected to as incompetent, if the Court please, because if that figure is changed in this size, the figure of $2100 to $10,400, then the comparison which he is seeking to draw from this witness must include an adjustment [2042] of the same item of furniture and fixtures at the end of the

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(Testimony of Robert W. Morgan.)

period. In other words, there is a $2100 figure used throughout the period or $10,400 throughout the period and this question does not contemplate that.

The Court: Does this question contemplate the use of $10,400 throughout the whole period?

Mr. Avakian: No, because the only evidence of furniture and fixtures at the end of 1946 is $2100.

The Court: Didn't the witness testify he used 2100 throughout the period?

Mr. Avakian: That is right, but he also testified that although he found no entry in the books of a different figure at the end of 1946, he did find one at the beginning of the period 1943.

The Court: If he testified he used 2100 throughout the period, I think your question should be confined to what would be the result if he used $10,400 throughout.

Mr. Avakian: There is no evidence of 10,400 at the end of 1946. That is my point. Here is the particular asset shown at the beginning of the period on the books as a high figure and the only entry we have in the evidence at the end of the period is a low figure and what Mr. Campbell had this witness do was to take the low figure at the end and instruct him to use it at the beginning, although there is not a single bit of [2043] anything in the record that that was the figure at the beginning of the period, in lieu of what the books show.

The Court: There is no evidence of this figure $10,400.

Mr. Avakian: He has testified——

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(Testimony of Robert W. Morgan.)

The Court: Let him use that.

Mr. Avakian: As of December 31, 1943; there is no evidence of $10,400 as of 1946 however. The only figure that we have——

The Court: Objection sustained.

Q. Mr. Morgan, did you find in all of the materials that you used, did you find any item for furniture and fixtures at the end of December 31, 1946, that is at December 31, 1946, other than $2100 figure which you used?

Mr. Campbell: Counsel just stated very emphatically to the Court that there was no figure anywhere.

Mr. Avakian: Will you stipulate that is a fact?

Mr. Campbell: No, I do not stipulate.

The Court: Let me have the question.

(Question read.)

Mr. Campbell: I object to the question in the form it is put because it is a type of compound question.

The Court: He may answer the question.

Q. Do you recall the question, Mr. Morgan?

A. Well, this whole thing is clear in my mind. I don't know whether it is in yours. The only figure that appears in the [2044] books throughout the entire period is $10,400.

Q. Does that appear as of December 31, 1946?

A. It appears in the record for the general ledger, which is the only general ledger which we have in the entire period.

Q. Would you show that to me?

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(Testimony of Robert W. Morgan.)

Mr. Campbell: May the record show that the witness has referred counsel to Exhibit——

Mr. Avakian: I will make that clear.

Mr. Campbell: I think the record should show at this point the exhibit and page number which the witness is showing.

Mr. Avakian: I am going to state that.

The Court: Go ahead.

Q. You have handed me plaintiff's Exhibit 117 and have pointed particularly to a page entitled "Equipment Account," have you not?

A. Yes, sir.

Q. And there is one entry on that page, is that right? A. Yes.

Q. And that shows March 1, 1943, $10,400, balance $10,400, is that correct? A. Correct.

Q. And there are no further entries following that date, is that right? A. That is right.

Q. I believe you testified, did you not, that the posting into [2045] the general ledger was not complete in 1946? A. That is correct.

Q. So you don't know for a fact whether there were any changes in this account during 1946, do you? A. I do.

Q. You do know there were no changes?

A. That is correct.

Q. You mean that you know there are no entries in the account? A. Yes.

Q. But in view of the fact and in view of your statement that the postings were not carried into the general ledger during the year 1946, it is pos-

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(Testimony of Robert W. Morgan.)

sible, is not not, that there may have been changes in the furniture and fixture account, even though they were not carried into the ledger?

A. I do not think so. I analyzed the cash receipts and disbursements, which is the only record we had of 1946, and they showed no acquisitions or sales of furniture or fixtures.

Q. Now if there were no changes, will you state why you did not use the $10,400 figure throughout your exhibit?

A. That figure did not seem realistic, based upon information I had available during my examination.

Q. You said that you discussed with Mr. Campbell which of those two figures to use, is that correct? A. That is correct.

Q. Now when you said that you had information available to you, [2046] are you referring to any information that is in evidence here?

A. Yes, sir.

Q. Would you refer me to the evidence?

A. Mr. Kyne's testimony?

Q. What was Mr. Kyne's testimony you used as a basis?

A. My recollection is he stated when he bought the business located at 186 Eddy Street in 1943 from Mr. Silverman, he paid approximately $22,000 of which he allocated approximately 16 thousand to 186 Club, which was on the same premises but just back of the store in front known as the Day-Night Cigar Store. That would leave a balance

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(Testimony of Robert W. Morgan.)

of approximately six thousand dollars to be allocated to the inventory of other assets of the Day-Night Cigar Store. Inasmuch as this $2100 was listed on the 1946 returns, it seemed to be a reasonable assumption of that value, one which would be more realistic than $10,400, which obviously included the value of assets which should have been applied to the 186 Club.

Q. The testimony of Mr. Kyne that you refer to was his testimony as to the amounts paid at the time these two businesses were purchased, approximately March 1, 1943? A. Yes, sir.

Q. And from his testimony you concluded that approximately six thousand dollars of what was paid should be allocated to the Day-Night Cigar Store business? A. Yes, sir. [2047]

Q. However, as of December 31, 1943, your Exhibit 164 shows total assets of the Day-Night Cigar Store of close to $18,000, is that right?

A. That is correct.

Q. So that between the purchase of the store around March 1st of 1943 and December 31, 1943, it is clear to you, is it not, from your examination, that there were substantial additions to the assets of that business? A. That is correct.

Q. Do you know whether or not any of those additions included furniture and fixtures?

A. No, sir.

Q. Can you point to any testimony in this record here to the effect that it did not include any additional furniture and fixtures?

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(Testimony of Robert W. Morgan.)

Mr. Campbell: I object to the question in that form.

The Court: Objection sustained.

Q. Did you hear any testimony in this case or see any exhibits in this case which would indicate to you that this increase in the assets of the Day-Night Cigar Store, from approximately six thousand to the figure that you concluded was correct on March 1, 1943, to the figure approximately 18 thousand dollars that you concluded correct as of December 31, 1943, did not include furniture and fixtures?

Mr. Campbell: Again I object to the form of the question. [2048]

The Court: Let us have the last question.

(Question read.)

The Court: Objection sustained.

Q. Mr. Morgan, in preparing Exhibit 164, with the exception of this furniture and fixture item we have been discussing, have you included in your summary all of the material contained in the books relative to the particular assets and liabilities which are set forth in Exhibit 164?

A. To the best of my knowledge.

Q. You are quite satisfied you have not omitted anything? A. Yes, sir.

Q. Will you show me the particular pages of the books from which you obtained the data labelled "Net Worth Accounts of the Various Partners" as set forth in Exhibit 164?

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(Testimony of Robert W. Morgan.)

A. I believe you have the general ledger.

Q. It is in the general ledger, is it?

A. Yes, sir.

Q. You have the sheets in question?

A. Yes, sir.

Q. Did you also use Exhibit 117B in that connection? A. No, sir.

Mr. Campbell: May the record show what sheets he is referring to?

Mr. Avakian: I will come to that.

Mr. Campbell: The record should be done at the time the [2049] question is answered.

The Court: The question was submitted and no answer.

Mr. Campbell: Then he went on to another.

Mr. Avakian: No, I asked him if he used 117B also and he said no.

The Court: You asked if that is the ledger and pages but you did not receive from the witness the answer as to the pages.

Mr. Avakian: Well, your Honor, preliminarily——

The Court: Let us not waste time on frivolous things.

Mr. Golden: Well, Mr. Campbell started it.

The Court: Easy, please.

Q. Will you describe the particular pages in Exhibit 117 that you used? Do they have a label on them?

A. They have the name, but no page number.

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(Testimony of Robert W. Morgan.)

Q. The name of the particular partner, is that it? A. Yes, sir.

Q. Is there more than one page?

A. Yes, sir.

Q. Would you state the names of each of the pages that you used in connection with the information set forth in the capital accounts on Exhibit 164?

A. They are the same as I have noted on Exhibit 164.

Q. That is William E. Kyne Investment Account? A. Yes. [2050]

Q. William E. Kyne partner account?

A. Yes, sir.

Q. Sylvan Lando? A. Yes, sir.

Q. And E. Remmer, is that correct?

A. Yes, sir.

Q. Did you note that accounts of the same names were carried for the year 1946 in Exhibit 117B?

A. Yes, sir.

Q. I believe you stated that you did not use the information from 117B in preparing your exhibit?

A. That is correct.

Q. In Exhibit 164 for Sylvan Lando you show the figure $3927.78 as the amount of his personal account of December 31, 1945. Is that the figure you find in Exhibit 117 on the page that bears his name?

A. Yes, sir.

Q. As of what date was that entry made?

A. There are two entries composed of that balance.

Q. What is the date?

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(Testimony of Robert W. Morgan.)

A. One entry is dated December 31, 1944, in amount of $1092.52. The second entry is dated May 31, 1945, in amount of $2835.27.

Q. The last entry you have there is May 31, 1945? A. Yes.

Q. Isn't it true, Mr. Morgan, that in order to correctly show [2051] the amount of the capital account of a partner at the end of any particular year, you should credit his account with his share of the profit for that year or charge his account with his share of the loss for that year, as the case may be?

Mr. Campbell: Objected to as calling for opinion and conclusion, not within the scope of direct examination.

The Court: You may answer the question.

A. That is customary procedure.

Q. Did you not find in Exhibit 117B the amount of Mr. Lando's capital account on January 1, 1946, after the crediting to him of his share of the profit for 1945? A. Yes, sir.

Q. And what is the amount of his capital account at that time?

A. There are two entries on this sheet, one dated January 1, 1946, shows balance $3927.78. There is an entry below it, without date, in amount of $897.61.

Q. Under proper accounting procedure, as you have just testified, the 1945 share of profits to be included in computing the 1945 closing capital account, will you tell us then in your judgment, as an accountant, what is the correct amount of Mr. Lando's capital account at the end of 1945? The figure

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(Testimony of Robert W. Morgan.)

shown on Exhibition 164 or the figure you have just read from the book?

A. The reason I didn't——

Q. (Interrupting): Can you answer the question first and give your reason afterwards. [2052]

(Question read.)

A. In my opinion neither one.

Q. In your opinion neither one, is that what you said? A. That is correct.

Mr. Campbell: You were told you could give your explanation.

Mr. Gillen: Did the gentleman say either or neither?

A. Neither. The reason I didn't make any computations on this schedule is Mr. Campbell instructed me to place here only balances on the books.

Q. Well, you have a number of entries here which are not balances on the books, isn't that true?

A. Some from the returns, yes.

Q. Did he instruct you in this particular case you should not go into other material to determine the correct amount of the capital account?

A. No, sir.

Q. Incidentally, is Mr. Campbell an accountant, as fas as you know?

Mr. Campbell: I will stipulate I am no accountant, Mr. Avakian.

A. Would you like me to give you a further explanation?

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(Testimony of Robert W. Morgan.)

Mr. Avakian: I think I have your explanation?

Mr. Campbell: If he has a further explanation, I think he is entitled to give it. [2053]

Mr. Avakian: If it is an explanation—if it is a volunteer statement, that is a different matter.

A. Well, here I think, as I gather what your objection is to the figure I used for Mr. Lando's balance of December 31st is that I did not include his share of the profit for that year.

Mr. Avakian: That is right.

A. However, you will note in the last entry on this 164 I have shown amount which I have entitled "Income and Expenses Accounts not Closed Out as of December 31, 1945," in amount of $2667.36, one-third of which is approximately, but not quite, the amount shown as his share of distributive net income in 117B. In other words, where I was taking the balances here as shown on the books, the profit and loss accounts as of December 31, 1945, were not closed out, the partnership accounts, therefore, I did not make any distribution.

Q. Did you not find in 117B, Mr. Lando's personal account, an amount which does represent the balance at the end of 1945, with the inclusion of his share of 1945 income? A. It purports to be.

Q. But you didn't use it, is that correct?

A. That is correct.

Q. In your list of assets you have an item of "Accounts Receivable 186 Club." Will you explain to us what that particular asset item represents?

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(Testimony of Robert W. Morgan.)

A. From examination of the records it appears that the Day-Night [2054] Cigar Store paid certain bills for the 186 Club. The mechanics was to issue checks on the bank account of the Day-Night Cigar Store and charge them to an account receivable entitled 186 Club. It then appears certain cash was received from the 186 Club. The mechanics there was to deposit those sums in the bank account of the Day-Night Cigar Store and credit to the account entitled 186 Club.

Q. In other words, the Day-Night Cigar Store paid certain bills on behalf of the 186 Club and then received cash in reimbursement?

A. That is correct.

Q. Did your examination show the types of bills that the Day-Night Cigar Store paid for the 186 Club?

A. I noticed certain entries, such as social security taxes, rent, certain accounting bills except, probably, Mr. Maundrell's services as accountant.

Q. Were there any utility bills?

A. I believe there were.

Q. Did you hear the testimony of Mr. Mooser yesterday, that it was his recollection that the 186 Club paid utility bills in cash?

Mr. Campbell: Objected to—the record speaks for itself. That is not my understanding.

The Court: Objection sustained.

Mr. Avakian: On the ground that was not Mr. Mooser's [2055] testimony?

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(Testimony of Robert W. Morgan.)

Mr. Campbell: I object, the record speaks for itself.

Mr. Avakian: What record, the transcript or the books?

The Court: I do not think the question is proper on any theory. This witness is not here to pass on any testimony.

Mr. Avakian: This witness has made an examination from which he can give us particular facts. Another representative of the government gave an inconsistent statement.

The Court: The objection is sustained.

Mr. Avakian: Your Honor, may I call your attention to the fact that this witness, in his testimony here, has relied on testimony he heard; for example, testimony of Mr. Kyne, and used that for the basis of his exhibit.

Mr. Campbell: No, no.

The Court: Objection sustained.

Mr. Avakian: Your Honor, I am at a loss to know why the objection is sustained. Will somebody enlighten me, so I will know how to proceed?

The Court: You may proceed if you want to.

Mr. Avakian: I certainly want to.

The Court: Well——

Mr. Avakian: If the basis of the objection and sustaining it is that my statement of the evidence was not correct, I would like to read to the witness and ask him if he heard the [2056] following testimony of Mr. Mooser yesterday——

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(Testimony of Robert W. Morgan.)

The Court (Interceding): The objection is sustained.

Mr. Avakian (Reading): Question——

Mr. Campbell: I am going to object.

The Court: I am going to object to your going into the same subject.

Mr. Avakian: I thought possibly that was the basis for the ruling.

The Court: I told you the objection was sustained.

Mr. Avakian: But the objection is on several grounds, but I do not know on what ground it is sustained.

The Court: My idea is that this witness is not here to pass on credence of another witness' testimony. That is for the jury.

Mr. Avakian: But he is here to testify to what the facts were.

The Court: The objection is sustained on the grounds I have stated.

Q. The fact is that utility bills of the 186 Club were paid by the Day-Night Cigar Store, is that correct? A. I notice it was in 1946.

Q. And those bills, after being paid by the Day-Night Cigar Store, were charged to the 186 Club, is that right?

A. There were no general ledger entries kept in 1946.

Q. You found charges to the 186 Club and reimbursements as the [2057] basis for what you set forth in 164? A. Yes.

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(Testimony of Robert W. Morgan.)

Q. That was a running account? A. No.

Q. Was it going in one direction only?

A. No, I obtained my entries from cash receipts and disbursements.

Q. And that showed charges from time to time from the Day-Night Cigar Store to the 186 Club?

A. Yes.

Q. And from time to time it shows the 186 Club paid the Day-Night Cigar Store for those?

A. Yes, sir.

Q. Did your examination show that the Day-Night Cigar Store made a rental charge against the 186 Club?

A. I do not know if that terminology is correct. There is a page in there entitled 186 Club in which certain entries were made for rent.

Q. Are you confused as to my terminology?

A. Yes.

Q. I use the word "rent."

A. No, I was confused by the other part of the question.

Q. Well, so there will be no confusion—the Day-Night Cigar Store did charge rent to the 186 Club?

A. I can say that. [2058]

Q. Do the books indicate whether rent was for the premises only or whether it might also have included furniture and fixtures?

A. There is no indication with regard to furniture and fixtures.

Q. You stated earlier that one of the reasons for using the figure of $2,100 for furniture and fix-

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(Testimony of Robert W. Morgan.)

tures on December 31, 1943, rather than the figure of $10,400 used in the book, was your conclusion, from various circumstances that came to your attention, that of the total purchase price paid for the two businesses, only six thousand should be allocated to the Day-Night. Did you conclude, as a part of that assumption then, that the furniture and fixtures must have been purchased for the 186 Club rather than the Day-Night Cigar Store?

Mr. Campbell: Objected to as argumentative.

The Court: He may answer the question.

A. I did not conclude the 186 Club purchased any furniture and fixtures.

Q. What happened? What is your conclusion as to what happened in regard to the $10,400 shown in the books for furniture and fixtures?

A. I concluded that that was an amount which also included furniture, fixtures, good will, as applicable to the 186 Club.

Q. Did you find anything that indicated that that included good will? [2059] A. No.

Q. You know, do you not, from your examination of these enterprises, that the 186 Club did use some furniture and fixtures? A. Yes, sir.

Q. I will hand you the returns of the 186 Club, prosecution's Exhibits 88, 88-A and 87-A. Have you examined those returns in connection with your examination? A. Yes, sir.

Q. On any of those returns was any depreciation claimed with respect to the furniture and fixtures?

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(Testimony of Robert W. Morgan.)

A. I see no indication there were any charges for depreciation.

Q. You find no deduction for depreciation?

A. No, sir.

Q. You stated earlier that you found a record during the year 1946, the Day-Night Cigar Store paid some utility bills for the 186 Club?

A. That is right.

Q. Can you tell from examination of the books whether that was also true during 1944, and 1945?

A. The first entry I see for anything of that nature is entitled, "Light, Gas and Power," December 31st, and charged to 186 Club at $325.41.

Q. What year? A. 1943. [2060]

Q. 1943 is the first item, and what was that for? Will you name those items again?

A. Light, gas and power.

Q. And then did you find other entries subsequent?

A. Subsequent to that date, yes.

Q. Right on through into 1946? A. Yes.

Q. Did you likewise find rent during the entire period?

A. There is a charge December 31, 1943, rent $1,500, and subsequent entries.

Q. Subsequent entries throughout the period?

A. Yes, sir.

Q. And do you find that throughout all three of these years payments were made by the 186 Club to the Day-Night Cigar Store from time to time in respect to those charges?

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(Testimony of Robert W. Morgan.)

A. I notice credits to the 186 Club account on the cash book, which I assumed to be cash received by the Day-Night Cigar Store for account of the 186 Club.

Q. And do you notice those throughout all three years? A. Yes, sir.

Q. The amounts that you have shown in Exhibit 164 as "Account Receivable 186 Club" is the balance which the 186 Club owed to the Day-Night Cigar Store at the end of each year indicated on your Exhibit 164, is that correct?

A. Yes, sir. [2061]

Q. But during the year there were charges made and payments made that resulted in that balance?

A. That is correct.

Q. And that shows then that on December 31, 1943, the 186 Club owed the Day-Night Cigar Store $4,878.58? A. That is correct

Q. And on December 31, 1944, the 186 Club owed the Day-Night Cigar Store $9,538.04?

A. Yes, sir.

Q. And December 31, 1945, the 186 Club owed the Day-Night Cigar Store $3,743.50?

A. Yes, sir.

Q. And on December 31, 1946, your calculation, as reflected in the attached Schedule 2, showed that the 186 Club owed the Day-Night Cigar Store $3,572.67? A. Yes, sir.

Q. And the amount of that indebtedness of the 186 Club to the Day-Night Cigar Store is listed by you as one of the assets in computing this net worth set-up? A. That is correct.

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(Testimony of Robert W. Morgan.)

Q. You have an item of prepaid licenses and taxes. Will you find the particular page or pages in Exhibit 117 showing the amount of those figures?

A. I have it.

Q. You have showed me Exhibit 117, page entitled "Prepaid [2062] Licenses and Taxes." Will you tell me what the amount shown in the book is for December 31, 1943, the balance on that date?

What is the amount shown in the book?

A. $344.10.

Q. Will you point that out to me? That is an entry as of date October 25, 1943.

A. I might point out it is very difficult to tell which year these entries belong.

Q. The plain fact is that you made a mistake in amount of $110?

A. I may have but I cannot tell whether that is for the year.

Q. Doesn't that exhibit show below the 344 figure another payment of 1943 of $110?

A. If that belongs to 1943, yes, sir.

Q. Well, the 1944 entries don't start until later, do they?

A. As I say, these dates have no years marked after them.

Q. Well, you find the year 1944 entered for the first time two entries below it, do you not?

A. That is right. I assume you are correct.

Q. So in preparing your exhibit you made a mistake of $110, is that right? A. Yes.

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(Testimony of Robert W. Morgan.)

Mr. Avakian: I am just trying to get the facts, not being critical.

A. The books are not kept very clearly. They should place the [2063] year after every entry.

Q. Incidentally, do you know who kept this book? A. No, I do not.

Q. Mr. Slater, was it not?

Mr. Campbell: Objected to—he said he didn't know.

The Court: He said he didn't know.

Q. I am asking if you know it was Mr. Slater?

The Court: He said he didn't know. Objection sustained.

Mr. Avakian: On cross-examination I can refresh his recollection, your Honor.

The Court: Objection sustained.

Q. Did you discuss this book with Mr. Slater?

A. I may have.

Q. Was he the bookkeeper?

A. My understanding was he was the public accountant who supervised the records. I am quite sure he did not make all the entries in these books.

Q. Did he make some of them?

A. He probably made some of them.

Q. He had general supervision?

A. Yes, sir.

Q. Do you know who else made entries in this book beside Mr. Slater? A. No, sir.

Q. So far as you know, Mr. Remmer never made entries in the [2064] book, did he?

Mr. Campbell: Objected to, it is argumentative.

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(Testimony of Robert W. Morgan.)

The Court: He said he didn't know. Objection sustained.

Q. You said that you had some discussions with Mr. Slater. Do you know if Mr. Slater is now living? A. I understand he is dead.

Q. Do you know approximately when he died?

A. No, sir.

Q. He was still living in 1947 when you were assigned to this case?

A. It must have been some time in '47.

Q. But you did talk to him during the time you were investigating? A. Yes, sir.

Q. During the course of your investigation were these different books that you have referred to in preparing Exhibit 164, namely Exhibits 117, 117A and 117B, were those books of the Day-Night Cigar Store made available to you during your investigation? A. Yes, sir.

Q. Were they turned over to you promptly on your request for them? A. Yes, sir.

Q. Did you take them from the premises of the Day-Night Cigar Store?

A. Certain records were given to me at 50 Mason Street and [2065] others were turned over to me by Mr. Ezralow, who had obtained them.

Q. Some of these records you obtained from Mr. Ezralow, is that correct?

A. That is right.

Q. Do you know whether these particular ones were obtained from him?

A. I do not recall which ones.

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(Testimony of Robert W. Morgan.)

Q. Do you remember from what particular individual you obtained the records at 50 Mason Street? A. Mr. Kyne and Mr. Maundrell.

Q. Do you remember approximately when that was? A. Which records?

Q. The records which you obtained from those two gentlemen?

A. We obtained records whenever we requested them, which would be at any time within our examination.

Q. What period of time would that cover?

A. 1947 to approximately April, 1949.

Q. 1947 to April, 1949?

A. Yes, sir.

Q. And you said that during that period you were given books and records as you requested them?

A. And we returned some of them during that time.

Q. Did you take away from the premises any of the records which you obtained from Mr. Kyne and Mr. Maundrell? [2066] A. Yes.

Q. And took them to your office in the Bureau of Internal Revenue? A. Yes, sir.

Q. Did you make out any receipts to Mr. Kyne or Mr. Maundrell with respect to those records?

A. Whether or not, I don't recall.

Q. If you made them, would you have copies of them?

A. I have not seen any since I have been here.

Q. At the time you obtained these records from

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(Testimony of Robert W. Morgan.)

Mr. Kyne and Mr. Maundrell, did you make any statement to them to the effect that you would return them on request? A. Yes.

Q. You did state that you would, is that request?

A. If they requested them, we would return them.

Q. During this trial have you seen here in this building, in the possession of the prosecution, any of those records which you obtained from Mr. Kyne and Mr. Maundrell?

Mr. Campbell: Oh, I am going to object.

The Court: Oh, he may answer the question.

A. Yes, sir, I have seen them.

Mr. Avakian: No further questions.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.) [2067]

January 11, 1952, 1:00 P.M.

(Defendant present with counsel.)

(In the absence of the jury.)

(NB 334, P. 47-68.)

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1:50 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Redirect Examination

By Mr. Campbell:

Q. Mr. Morgan, on cross-examination Mr. Avakian called your attention to the corporate returns of the 186 Club and asked you if there was set forth thereon any depreciation schedule or reference to furniture and fixtures. Will you examine these returns, which are Exhibits 87, 87A, 88 and 88A, and state whether or not these returns show any details of income or deductions other than, I think in some instances, officers' salaries?

A. The only information I see on these returns is an item called "Gross Take," from which is deducted administrative salaries to arrive at the net income.

Q. Those are the only figures appearing on the returns? A. Applicable to the income.

Q. Will you state whether or not you observe any reference on any of these returns to any deductions other than administrative salaries?

A. No, sir.

Mr. Campbell: That's all. [2068]

Mr. Avakian: No further questions. May it be

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understood in excusing Mr. Morgan we would like to have him remain subject to further cross-examination.

Mr. Campbell: Yes, he will be in attendance throughout the trial.

RAY A. WEAVER

a witness on behalf of the government, having been previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Ray A. Weaver.

Q. Where do you live, Mr. Weaver?

A. San Francisco, California.

Q. What is your business or occupation?

A. I am special agent of the Intelligence Division of the Bureau of Internal Revenue.

Q. How long has that been your occupation?

A. About ten years, except for about 2½ years in the army.

Q. You are a certified public accountant, Mr. Weaver? A. Yes.

Q. And will you relate briefly and generally your accounting experience and background, including your accounting education?

A. I studied accounting in college and received a bachelor's degree.

Q. What college?

A. University of Pittsburg. Took some graduate work at Northwestern [2069] University where I

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(Testimony of Ray A. Weaver.)

received a Master Degree in business administration. I had a year of private accounting with a subsidiary of Paramount Publications in Chicago. I was in practice on my own account for about a year in the town of Emaus, Pennsylvania. I taught accounting and related subjects for about four years in several colleges.

Q. Will you name those colleges?

A. Lafayette College, Easton, Pennsylvania; William Penn, Oskaloosa, Iowa; Whitworth College, Spokane, Washington, and Northwestern University in Evanston, Illinois.

Q. Did you go directly from that teaching experience into the Intelligence Unit?

A. No, I went into the Internal Revenue agent's office first.

Q. For how long a period were you there?

A. About six years.

Q. Do you recall when you first entered government service? A. July 1, 1935.

Q. So that as between your service in the Revenue agent's office and Intelligence Unit and aside from your service in the army, you have been continuously in government employment since 1935, is that correct? A. That is correct.

Q. Your army experience, of course, was also government experience.

A. That is correct. [2070]

Q. Incidentally, what is your position in the Intelligence Unit?

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(Testimony of Ray A. Weaver.)

A. Special agent, assigned to assist in reviewing reports.

Q. As a special agent of the Intelligence Unit, will you state generally the nature of the duties of that office?

A. Generally that office makes investigations of all cases involving any alleged or suspected fraud against the revenues of the United States, concerning all possible tax evasions, with the exception of those relating to alcohol tax violations.

Q. Do they also include narcotic violations and customs violations—you do not handle?

A. No. Those are additional exceptions, that is true. Most of the work, of course, pertains to income tax violations.

Q. In connection with the handling of investigations relating to income tax violations, will you state generally the procedure; that is to say, whether or not such investigations are conducted jointly with any other agencies or bureaus?

The Court: That means his duties has to do with alleged fraud cases, alleged violations?

Mr. Campbell: Yes, I will use the word "alleged" instead of purported.

Q. In relation to these alleged violations of the Internal Revenue laws, will you state generally whether you work in conjunction with representatives of other agencies who are also assigned to those duties?

A. Yes, on all income tax cases we work jointly either with a [2071] deputy collector from the col-

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(Testimony of Ray A. Weaver.)

lector's office, or an Internal Revenue agent from the Revenue agent's office.

Q. Now, for the information of the jury, will you state generally the division of the cases, as to how it comes about as to whether or not you are working jointly with a deputy collector or an Internal Revenue agent?

A. Generally speaking, the cases originate in the collector's office and thereafter require the services of a special agent. If it is an alleged fraud, it will remain in the collector's office unless the case is considered too large for one agency to handle.

Q. In that event what agency enters?

A. In that event the Internal Revenue men handle the case.

Q. In regard to auditing of income tax return, is there some method by which the examination and audit of returns which are filed by taxpayers with the government are divided as between the collector's office and the Internal Revenue agent's office, for the examination?

A. Yes, I do not recall precisely what the division is, but generally speaking the smaller individual returns, let us say those with net income of five thousand or less or gross income of perhaps say fifteen thousand or less, would be examined by the collector's office.

Mr. Avakian: If it is material—I don't say it is—I think we should have exact figures. I assume there are exact figures and we surely should get an exact figure rather than [2072] an assumption.

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(Testimony of Ray A. Weaver.)

Mr. Campbell: This is shown simply for the background.

Mr. Avakian: If it is material, let us get it right and if it is immaterial, let us not spend time on it.

The Court: What do you question?

Mr. Avakian: We object to speculation as to the division between the two officers.

The Court: Give your objection on the next question.

Mr. Avakian: The question did not call for the objection. It came from the answer as stated. I didn't have a chance to object until he came through with speculation.

Mr. Campbell: I am not through with the subject matter.

Q. Now, Mr. Weaver, were you, in the course of your duties as Special Agent of the Intelligence Division, assigned to the investigation of the individual income tax returns of Elmer Remmer and Helen Remmer, his wife? A. Yes, I was.

Q. When did you receive that assignment?

A. I believe the assignment was initially made late in November of 1946.

Q. And has the case since that time, the matter since that time, been assigned to you in your official capacity? A. Yes, it has.

Q. Now, how soon, or when, after the case had been assigned to you did you commence active investigation? [2073]

A. I believe it was about July, 1947. I was en-

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(Testimony of Ray A. Weaver.)

gaged in other investigations prior to that time.

Q. Were you from that date forward actively engaged in the investigation of this case?

A. Yes; not continuously.

Q. Well, was it inclusive to your investigating that case and handling other duties?

A. For a period of time.

Q. But over the period of times that you were assigned or commenced your active investigation, did you devote all of your time to this individual case? A. No, sir.

Q. You had other cases to handle?

A. Yes, sir, also other duties.

Q. Now, in the course of your investigation of this case, were you working in cooperation with other agents of the government? A. Yes, I was.

Q. And will you state who they were and what their official titles were?

A. When the case was first assigned to me there were two Internal Revenue agents assigned, too, Mr. Morgan, who preceded me on the stand, and Mr. Peel, who subsequently went to Korea on some other assignment, and he was replaced by Mr. Harkness, who continued until the investigation was completed. After that date I was also assisted by——

Mr. Avakian: After what date, your [2074] Honor?

A. After the Revenue agents completed their work, which I believe was about April of 1949, I was assisted at times by other special agents, including

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(Testimony of Ray A. Weaver.)

Mr. Miner, who appeared here on the stand, Mr. Whiteside and Mr. Hemphill.

Q. And in that connection will you state whether or not you also had the cooperation and services, with regard to various aspects of the investigation, of agents in other cities than San Francisco?

A. Yes, we received collateral reports from our New York office, from the office covering New Orleans, Louisiana area, from our Los Angeles office and Portland.

Q. You are speaking of the office of Intelligence Division, as it is now known?

A. Yes, sir, that is right.

Q. Now, will you state who, during the investigative stages of the case, what individual was in charge of the investigation?

A. I was in general charge of the various features of the case.

Q. Is that the usual method in these investigations which are cooperatively conducted by the revenue agents or deputy collectors and Intelligence Division, that the agent of the Intelligence Division is in general charge of the investigation?

A. Yes, that is correct.

Q. Now, during the course of your investigation did you directly examine various books and records pertaining to certain businesses in which the defendant was purportedly interested? [2075]

A. I examined some of the books and records. Most of the direct examination was done by Internal Revenue agents.

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(Testimony of Ray A. Weaver.)

Q. Incidentally, in that connection and with respect to this investigation, will you state the general assignment of the Revenue agents in the investigation?

A. Generally speaking they were to examine all of the books and records, and make reports on any additional tax liability that might be disclosed.

Q. Did you also examine various of the books and records of the enterprises in which the defendant was allegedly interested? A. Yes, I did.

Q. And based upon your examination and your investigation, by you or by those working under your direction, what enterprises or businesses were examined into in which the defendant allegedly had an interest?

A. We examined fully into either partial or——

Mr. Avakian: May I make an objection to the general nature of that question? It is so broad it may call forth statements as to the mention of many businesses in which there is no connection with the defendant and yet the enumeration of any such business may be improper.

Mr. Campbell: I didn't intend the question to be that broad. Maybe I can reframe the question to meet counsel's objection.

Q. What businesses or enterprises did you yourself examine, or [2076] have examined under your supervision, in which it was found that the defendant, Elmer Remmer, purportedly had some interest?

Mr. Avakian: Just a moment. That kind of statement, the question as to the businesses in which

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(Testimony of Ray A. Weaver.)

it was found he had an interest, calls for conclusion; that Mr. Remmer purportedly had an interest calls for conclusion. We have had here records of various businesses in which the government contends he had an interest. Why couldn't the question be limited to those particular organizations?

The Court: Have you any reason for not doing that, Mr. Campbell? Will you do that?

Mr. Campbell: Well, yes, I will do that.

Q. Mr. Weaver, during the course of your investigation—and in order to keep from repeating a long question each time I will state the question to you at this time and then in subsequent questions I will simply call your attention to a particular entity—during the course of your investigation, did you make investigation yourself, or have made under your supervision, investigation into the affairs of the B. & R. Smoke Shoppe? A. Yes.

Q. Into the 186 Club? A. Yes, sir.

Q. Into the Day-Night Cigar Store?

A. Yes, sir.

Q. Into 110 Eddy Street? [2077]

Q. Into the Menlo Club? A. Yes, sir.

Q. Into the Transit Smoke Shop?

A. Yes, sir.

Q. Into Cal-Neva, Inc.? A. Yes, sir.

Q. Into the Mountain City Consolidated Copper Company?

A. Not into the affairs of the company itself; only so far as it related to stock purchased therein by Mr. Remmer.

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(Testimony of Ray A. Weaver.)

Q. Possibly I should amend my question and say into any ownership Mr. Remmer may have in any of these enumerated concerns? A. Yes.

Q. Into the matter of loans to Brice and Silver?

A. Yes.

Q. Into the matter of loan to Hazel Harris?

A. Yes.

Q. Into acquisition of property in Morhaga Estates? A. Yes, sir.

Q. Into the acquisition of property in Richmond Annex? A. Yes, sir.

Q. Into the matter of loan to P. R. Badobinatz?

A. Yes.

Q. Into the matter of a bank account in the name of the defendant at the Tracy Branch of the Bank of America? A. Yes. [2078]

Q. Into the 21 Club at El Cerrito?

A. Yes, sir.

Q. Into the San Diego Social Club at El Cerrito? A. Yes, sir.

Q. Into a bank account at the Grand Lake Branch of the Bank of America?

A. May I clarify those El Cerrito places in this since, that the investigation was not made jointly under my direction, but the results of the examinations of revenue agents were subsequently used in the findings.

Q. They were made available to you?

A. That is correct.

Q. You are referring to results of Revenue Agent Gould, who appeared here? A. Yes.

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(Testimony of Ray A. Weaver.)

Q. And the work in conjunction with Revenue Agent Farley? A. Yes.

Q. Did you inquire into a bank account under the name of Helen L. Remmer at Grand Lake Branch of the Bank of America? A. Yes.

Q. Did you inquire into the acquisition of certain real property in what is known as Morhaga Highlands? A. Yes.

Q. Did you make inquiry into the conduct of an office at 50 to 52 Mason Street, San [2079] Francisco?

Q. Did you also include in your investigation the matter of any liability from the Bank Club of Reno? A. Yes, I did.

Q. Did you also investigate, or cause to be investigated, as to his government bonds in the name of the defendant or his wife? A. Yes.

Q. Did you also make some investigation or inquiry as to the cash on hand in possession of the defendant? A. Yes.

Q. Did you also cause investigation to be made into the matter of the acquisition of certain Gallagher and Burton whiskey? A. Yes, I did.

Q. Will you state what year or years the matter of your investigation of the tax liability of the defendant, Elmer Remmer, and his wife covered?

A. Covered the years 1942 to 1946, inclusive.

Q. And in connection with your investigation for the purpose of establishing his and his wife's correct liability for those years, did you make investigation which covered years prior to that?

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(Testimony of Ray A. Weaver.)

A. Yes, I did.

Q. And how far back?

A. I tried to determine whether any returns had been filed——

Q. How far back did you go? [2080]

A. For any years as far as records would reflect, back to 1918.

Q. Now during the course of your investigation by you or by those under your direction, did you attempt to ascertain as at the beginning and end of all pertinent years involved in that investigation, the assets and the liabilities of the defendant and his wife?

Mr. Avakian: Just a moment. I object to the use of the word "pertinent" years. We would like to have the years enumerated.

Mr. Campbell: Well, let us frame it this way:

Q. Mr. Weaver, during the course of your investigation did you cause to be made by those acting under your direction, investigation to determine the true and correct assets and liabilities of the defendant and his wife, Helen Remmer, as of December 31, 1943; December 31, 1944; December 31, 1945, and December 31, 1946?

A. Yes, I did.

Q. During the course of that investigation did you also attempt to ascertain whether or not, during any of those years, that is to say, 1943 to 1946, inclusive, either Elmer Remmer or Helen Remmer received any money or property by way of gift or devise?

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(Testimony of Ray A. Weaver.)

Mr. Avakian: Your Honor, I object to the question in that form, since it calls for something that is based on investigation that was made rather than testimony or documentary [2081] evidence that has been present; in other words, questions that are going to call forth statements or conclusions as to material matters should be based on evidence in the record, rather than upon some extra-judicial inquiries and conversations he may have had.

Mr. Campbell: At this time he is being asked for the scope of the examination.

The Court: It is immaterial unless it has bearing on this case. Read the question.

(Question read.)

The Court: I think counsel is entitled to know the scope of the investigation.

Mr. Campbell: Yes, that will be ascertained. This is preliminary. This calls for yes or no.

The Court: Very well. He may answer the question, then.

Mr. Avakian: Yes or no answer.

A. Yes.

Q. And for the years 1944 to 1946, did you also make, or cause to be made by those acting under your direction, investigation for the purpose of ascertaining the living expenses and other expenditures not deductible for income tax purposes, as expended by the defendant and his wife, Helen Remmer?

Mr. Avakian: Object to that portion of the ques-

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(Testimony of Ray A. Weaver.)

tion which calls for conclusion of this witness on the matter of law as to whether or not expenditures may have been deducted. [2082] He can simply ask if he made inquiry as to expenditures. That is factual.

Mr. Campbell: The words "not deductible" may go out of the question. Will you answer it as amended?

A. Yes, I did.

Q. Now, Mr. Weaver, preliminarily I will ask you whether or not at my direction you prepared a summary of the assets and liabilities of the Menlo Club as of the dates December 31, 1945, and December 31, 1946? A. Yes, I have.

Q. I show you Plaintiff's Exhibit 165 for identification, and ask you if that is the schedule which you prepared under my direction or at my direction? A. Yes, it is.

Q. And will you state, Mr. Weaver, the source of the figures which you placed on that exhibit?

A. These figures were taken from other exhibits we found in evidence or from testimony of witnesses who appeared here.

Q. Now will you state first as to what exhibits you consulted in preparing this summary?

A. There are quite a number. Do you want all of the numbers?

Q. Yes, just give us the numbers.

A. Do you want items to which each refers?

Q. No, just the exhibit numbers because the exhibit is not at this point in evidence. [2083]

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(Testimony of Ray A. Weaver.)

A. 114-A; 132-A.

Q. Pardon me, 114-A, what is that exhibit?

A. That is a poker sheet, or two poker sheets, of the Menlo Club.

Q. What other exhibits?

A. 132-A. Do you want a description of the exhibit?

Q. Well, I do not think that would be necessary at this point. Just give us the exhibit numbers that you referred to.

A. Exhibits 53, 89, 90, 133-K, 134, 135, 136, 132-C; the testimony of Mr. Maundrell; 132, 133-A, 27; the testimony of Mr. Miner, who appeared here yesterday; No. 34.

Q. Does that cover all of the exhibits?

A. I believe so, with the possible exception of the Menlo Club books themselves, from which I extracted the capital accounts appearing therein. I do not recall that exhibit number.

Q. I believe that is one of the exhibits whose number you have already given.

A. It may be.

(Jury and alternate jurors admonished and recess taken at 2:30 for 15 minutes.)

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2:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further [2084]

Direct Examination

By Mr. Campbell:

Q. I believe you have before you, Mr. Weaver, Exhibit 165 for identification? A. Yes.

Q. And by request you enumerated the exhibits from which you stated you drew the figures hereon, with the exception of two items which you stated that you took from the testimony of Mr. Maundrell and from the testimony of Mr. Miner?

A. Yes.

Q. And as to those two particular figures, I will ask you if you placed those in this exhibit at my direction? A. Yes, I did.

Mr. Campbell: Now at this time I will offer in evidence Plaintiff's Exhibit 165.

Mr. Avakian: May we examine the witness on his voir dire on that?

The Court: Yes, sir.

Q. (By Mr. Avakian): Mr. Weaver, have you set forth in Exhibit 165 all of the liabilities reflected in the books of the Menlo Club?

A. I believe there is one sheet of the Menlo Club showing liability to Gene Schriber which we considered personal——

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(Testimony of Ray A. Weaver.)

Q. Your answer is that you did not include one liability contained in the books of the Menlo Club?

A. Not in this particular exhibit. [2085]

Mr. Avakian: Then, your Honor, I object to the offer of this exhibit in its present form, on the ground it is not what it purports to be because it purports to set forth a net worth figure that the witness has testified in making that computation he omitted a liability shown on the books. I submit that is not the proper way of computing net worth and the introduction of the exhibit in this form is misleading, creates a completely false picture, and I do not want to state the amount in the presence of the jury, but I would be glad to show the amount of it.

The Court: While you are discussing that, perhaps any matter concerning the absence of one liability could be taken up on cross-examination.

Mr. Avakian: Your Honor, the amount is so large that it completely distorts the net worth figure. I presume Mr. Campbell is going to read it to the jury the minute it gets in evidence.

Mr. Campbell: May I ask another question or two?

The Court: Very well.

Q. (By Mr. Campbell): Mr. Weaver, in regard to your examination of the records of the Menlo Club, did you examine this book, 125-C?

Mr. Golden: We don't know of any 125-C.

Mr. Campbell: Pardon me, it is Exhibit 125.

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(Testimony of Ray A. Weaver.)

Without referring to the pages, can you say, generally, if you examined [2086] that book?

A. Yes, I did.

Q. And during the course of your investigation, was that book in your possession; that is to say, in your custody, in your official capacity?

A. Was it in my custody?

Q. In your official capacity?

A. Yes, it was.

Q. Over what period of time?

A. I can't state the exact date that the revenue agent secured the book, but from that date until the time his records were turned over to Mr. Semenza it was in my custody.

Q. And what date were they turned over to Mr. Semenza? A. I believe it was July 7, 1949.

Mr. Avakian: May we have what records? He said all—may I have him enumerate which of those he had in his custody?

Mr. Campbell: Just a minute, Mr. Weaver.

Q. When you say the records were turned over to Mr. Semenza, did you receive a receipt for them at that time?

A. Mr. Semenza prepared a list in his own handwriting of the records which he took at that time.

Q. I show you Exhibit 70 for identification and ask you if that is the document to which you refer as having been prepared by Mr. Semenza at the time you turned the records over to him?

A. Yes, this is it. [2087]

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(Testimony of Ray A. Weaver.)

Q. Incidentally, does that refresh your recollection as to the date they were turned over?

A. Yes, it was July 11, 1949.

Mr. Campbell: This receipt will be offered in evidence as Plaintiff's Exhibit 70.

Mr. Avakian: No objection, your Honor.

The Court: Exhibit 70 is admitted in evidence.

Q. Now I observe, Mr. Weaver, that there is listed hereon quite a number of items of records. Were these the records that were turned over to him at that time? A. Yes, they are.

Q. And included in those records was there Plaintiff's Exhibit 125?

Mr. Avakian: We will stipulate to save time.

A. Yes, it was.

Q. And after having turned this over to Mr. Semenza on this receipt, when was the next time after July 11, 1949, that you saw this ledger, or did you see it at any time prior to its production here in court?

A. Yes, I saw it either a day or two after it was deposited with the clerk in court.

Q. But between July 11, 1949, and the time it was deposited with the clerk of this court, did you see this ledger? A. No, I did not.

Q. Now I am going to direct your attention to the page herein [2088] which has been marked 125-C, which is entitled "Tiny's Restaurant, Menlo Bar, Menlo Club Furniture, Fixtures, Equipment and Lease," and ask you if you will state when you first saw that sheet?

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(Testimony of Ray A. Weaver.)

A. When I saw this book after it was deposited with the clerk of the court is the first recollection I have of seeing that here.

Q. At the time you made your examination of these records and with respect to furniture, fixtures, equipment and lease, did you see some other sheet containing other entries?

A. Yes, I did. As a matter of fact, I have a photostat of it.

Q. I show you Plaintiff's Exhibit 140 in evidence and ask you if that is the sheet to which you refer? A. Yes, this is the sheet.

Q. And have you examined the books since they were deposited with the clerk, for the purpose of ascertaining whether or not the original of this sheet which you hold in your hand as a photostat, is contained in any of the records which were deposited with the clerk? A. Yes, I have.

Q. And what did you find?

A. I could find none. That is, I couldn't find this particular one.

Q. You couldn't find the original of which that is a photostat? A. No, sir. [2089]

Q. Now will you examine the sheet which is now in this ledger, which has been marked 125C, and also this photostat which has been marked plaintiff's Exhibit 140, and state, if you will, first, do the two sheets apparently relate to the same general subject matter?

A. Yes, both appear to relate to the purchase

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(Testimony of Ray A. Weaver.)

of the Menlo Bar, restaurant and club from Mr. Schriber.

Q. Now are the entries on 125 and the entries on Exhibit 140 the same?

A. Not in all respects, no.

Q. Will you state in what respects they differ?

A. On 125C the total cost of $175,000 is allocated $143,801.50 to the lease, $31,895.50 to the cost of equipment and inventory, whereas on 140 the cost of the lease is shown as $100,000 and the cost of equipment and inventory at $75,000.

Q. Now as to the entries of payments against that liability, how does the one sheet, that is sheet 125C, which is part of the ledger, compare with the photostat, Exhibit 140?

A. The photostat 140 on April 30, 1945, shows a credit for payment to Mr. Schriber of $25,000, which does not appear on 125C, and Exhibit 125C has an entry under date of May 1, 1947, for a payment of $25,000 which does not appear on No. 140.

Mr. Avakian: I wonder if we couldn't stipulate any portion counsel wants to read may be read. This is a matter that was very thoroughly gone into with Mr. Miner and explained. [2090] This is not new; this is repetition of testimony of Mr. Miner.

The Court: It may be preliminary.

Mr. Avakian: I assumed it was in connection with the voir dire on 165. It seems to be going far afield.

Mr. Campbell: It is preliminary.

The Court: I think on the questions of voir dire

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(Testimony of Ray A. Weaver.)

Mr. Campbell undertook to lay some additional foundation.

Mr. Campbell: Yes, your Honor, and I am gradually, maybe somewhat cumbersomely, getting into that subject.

Q. The differences would and did affect the year-end balance, would they not, as showing amount due? A. Yes, they would.

Q. Now with reference to plaintiff's Exhibit 165 for identification, did you include in that exhibit the liability as shown by either plaintiff's Exhibit 125C, the page that is now in the ledger, Exhibit 125, or the photostat, Exhibit 140?

A. No, sir.

Q. And did you on the schedule eliminate or leave out that liability upon my instructions?

A. Yes, I did.

The Court: When you say schedule, do you mean 165?

Mr. Campbell: Yes, your Honor.

Q. Now were any other liabilities as shown by any of the records which have been produced here relative to the Menlo Club eliminated? [2091]

A. May I see that ledger again, please? There are no other liabilities in this ledger.

Q. Were there any other liabilities which you found and which were eliminated, however, on that Schedule 165, other than the Schriber liability?

A. No, sir. I might add that we did adjust the reserve for amortization which is claimed in the return, which is not, strictly speaking, a liability,

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(Testimony of Ray A. Weaver.)

although we have considered it under that section.

Q. All right, we will come to that in a minute. Now, Mr. Weaver, as an expert accountant, will you state the reason why the theory for the elimination from the schedule of assets and liabilities of the Menlo Club of the liability to Gene Schriber?

Mr. Avakian: Objected to as already asked and answered. He said on instructions of Mr. Campbell, who is not an expert accountant.

The Court: Objection overruled.

A. The liability was eliminated from the Menlo Club because the testimony of Mr. Schriber indicated all his dealings were with Mr. Remmer personally and that Mr. Remmer had in fact pledged or deeded over on a trust deed to Mr. Schriber as security for the liability some of his personally owned real estate.

Q. So that accountingwise it was treated as a personal [2092] liability of Elmer?

A. That is correct.

Q. Rather than of the Menlo Club, for that purpose? A. That's right.

Mr. Campbell: I will now offer in evidence Exhibit 165 for identification.

Mr. Avakian: May I continue my voir dire?

The Court: Yes, sir.

Q. (By Mr. Avakian): Mr. Weaver, insofar as the liability to Mr. Schriber is concerned, the difference between Exhibit 140 and Exhibit 125C is the amount of 25 thousand dollars at the end of 1945 and 1946, is it?

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(Testimony of Ray A. Weaver.)

Mr. Campbell: You mean the liability itself?

Mr. Avakian: Yes, the difference in the amount of the liability.

A. As I recall, it is 25 thousand at the end of 1945 only. Would you care to have me check that?

Q. Yes, would you, please?

A. At the end of 1946, No. 125C shows balance of 75 thousand, which agrees with the last balance in '46 on No. 140 of 75 thousand, so they agree as of that date.

Q. The difference is only to the end of 1945?

A. That is right.

Q. And at the end of 1945 would you read the amount of liability shown by the respective [2093] exhibits?

A. No. 125C shows 125 thousand and 140 shows 100 thousand.

Q. So at the very least there was a liability of 100 thousand, if you use Exhibit 140; is that right?

Mr. Campbell: Objected to as not proper voir dire. It is cross-examination.

Mr. Avakian: I am trying to develop the amount of liability which he has permitted.

The Court: You may proceed.

Mr. Campbell: The weight to be given——

The Court: Let me hear the question again.

(Question read.)

The Court: How does that affect——

Mr. Avakian: Because the cost is listed as an asset of the Menlo Club. It is as if I bought a house

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(Testimony of Ray A. Weaver.)

for twenty thousand dollars and sold it for ten thousand, I would list twenty thousand as an asset, but to show my true net worth I would have to list ten thousand mortgage.

The Court: This is his explanation and summary of the different exhibits and of in connection with testimony of one or two witnesses.

Mr. Avakian: That is right, but his explanation as to why he——

The Court: I think that is a matter for cross-examination.

Q. Let me ask this—both those pages relate to a liability [2094] with respect to the purchase of the Menlo Club from Mr. Schriber, do they not?

A. That is right.

Q. And you have set forth in the assets of the Menlo Club in 165 for identification the full purchase price of the Menlo Club; isn't that right?

Mr. Campbell: Objected to as not proper voir dire. It is cross-examination.

The Court: I think it is all cross-examination.

Mr. Avakian: Your honor, the purpose is to show that this is not truly a net worth statement.

The Court: This would be the purpose of cross-examination.

Mr. Avakian: If this is not what it purports to be, then it should not be received in evidence. I have not finished my voir dire.

The Court: Along this line I will sustain the objection.

Q. You stated the reason for omitting any lia-

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(Testimony of Ray A. Weaver.)

bility to Mr. Schriber in net worth of 165 was that you concluded the purchase of the Menlo Club was a transaction between Mr. Schriber and Mr. Remmer?

A. Yes, therefore showed it as Mr. Remmer's personal liability.

Q. Then should you not likewise, as proper accounting practice, show the asset as belonging to Mr. Remmer personally, rather than to the Menlo Club? [2095]

Mr. Campbell: We are getting into another subject matter.

Mr. Avakian: It is a question whether this is a proper accounting, your Honor.

The Court: This is his summary of records and testimony and I think the questions are proper for cross-examination.

Mr. Avakian: But voir dire is cross-examination, directed to the point whether the summary is what it is or purports to be.

The Court: That is for the jury to determine.

Mr. Avakian: If I can develop it is not accurate net worth, it should not go into evidence.

The Court: Well, it will be admitted in evidence and you may cross-examine on those points.

Q. (By Mr. Campbell): I will return to Mr. Weaver plaintiff's Exhibit 165—incidentally, I neglected to ask; this is headed "Menlo Club"; does this also include the waffle shop and the bar?

A. Yes, it does.

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(Testimony of Ray A. Weaver.)

Q. The three are treated as one entity; is that correct? A. Yes.

Q. Now based upon this summary, what is shown to be from the records which you have identified and drawn in the manner in which you have identified, the net worth of the Menlo Club organization at that date, on December 31, 1945? [2096]

A. At that date the net worth, based on these figures, $183,647.94.

Q. And as of December 31, 1946?

A. $192,836.47.

Q. Now I believe you stated that you made some adjustment relative to the reserve for amortization as set forth here. Now first will you state if there was an account set up on the books of the Menlo Club for amortization?

A. No, I do not believe there was.

Q. Will you state whether amortization was claimed in the partnership returns of the Menlo Club to which you have referred?

The Court: I don't know that all the members of the jury thoroughly understand——

Mr. Campbell: I was going to have him pick up the item and then explain what it refers to.

A. As I recall, if the answer I gave refers to the returns, the original 1945 and 1946 returns had no claim for amortization shown.

Q. But in the amended returns filed at a subsequent date, which are here in evidence, do they show amortization? A. Yes.

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(Testimony of Ray A. Weaver.)

Q. Amortization of what? Would you explain what it refers to?

A. Amortization of the cost of the lease. As an explanation, it is stated the lease is for a five-year period and at a cost—— [2097]

Mr. Avakian: I think the witness has misquoted, and may we have him refer directly to the returns?

Mr. Campbell: Yes, we are just getting the returns.

Q. I am going to show you Exhibits 89, 90 and 91, together with Exhibit B, the lease from Gene Schriber to Joseph Billington. Are those the documents which you wish to have?

A. There is also a receipt from Mr. Schriber.

Q. I will give you Exhibit 51, the original lease. I also hand you Exhibit 53, the receipt of Mr. Schriber to Mr. Billington.

A. You want me to explain why the change was made in the amortization?

Q. Yes, and what the amortization refers to.

A. Well, according to the lease itself, Mr. Remmer was to have a lease on the premises at 32 Turk Street and also the ground floor premises of 18 Turk Street for a period of ten years for a total rental of 219 thousand dollars, which was payable, the first five years at the rate of $1650 a month and the second five years at the rate of two thousand dollars a month. Now that was a rental that had to be paid. In addition to that rental, in order to secure the lease, according to Exhibit 53, Mr.

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(Testimony of Ray A. Weaver.)

Remmer also had to pay 100 thousand dollars as and for a ten-year lease of the hereinafter described premises, which refers to the same premises, which was in addition to the rental itself. Well, that 100 thousand dollars actually represents, [2098] therefore, an additional rental for the ten-year period, which is paid in one lump sum at the beginning of the lease period, and therefore from accounting, also from a tax standpoint, should properly be allocated or written off over the term of the years, which is ten years, which is the term over which it has been written off in connection with the figures shown on Exhibit 165. As I stated, such a deduction was not claimed on the original returns filed, but was claimed on the amended returns filed. However, there the sum was computed by stating that the lease cost $143,801.50, whereas the receipt, Exhibit 53, specifically designates a cost of 100 thousand as and for a ten-year lease. Also the returns spreads or allocates that cost over a five-year period, whereas the receipt itself states that the lease will be for ten years, and Exhibit 51, which is the lease itself, refers to a term of ten years commencing May 1, 1945, as the lease period.

Q. Now in setting up the liability, by which you are charging off the reserve for amortization of the lease, I observe that for 1945 you have set up the figure of $6,666.67. Will you state how you arrived at that figure?

A. To begin with, supposing the entire cost of 100 thousand dollars were allocated over ten years,

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(Testimony of Ray A. Weaver.)

it would mean that ten thousand dollars applied to each year.

Q. Ten thousand dollars a year, would it not?

A. Yes. [2099]

Q. How did you arrive at the figure of $6,666.67 as of the end of 1945?

A. That applies for a portion of the year during which the lease was in effect during 1945, from May 1st, 1945, to the end of the year, a period of eight months. That represents eight-twelfths of ten thousand dollars.

Q. Or two-thirds? A. That's right.

Q. And at the end of 1946 that reserve had been increased to $16,666.67, or an increase of ten thousand dollars? A. That's right.

Q. And how did you arrive at that additional ten thousand dollars?

A. That represents one-tenth for each succeeding year, for the year 1946 added $6,666.67 remaining at the end of the prior year.

Q. Now referring again to the Exhibit 165, the item of cash on hand as of December 31, 1945, of ten thousand dollars, and December 31, 1946, of $10,003. From what source did you obtain that figure?

A. Those were taken from the poker sheets, which I believe are Exhibit 114A.

Q. Now on the books or ledgers of the Menlo Club did you find any account for cash on hand other than the entries on the poker sheets for those days and other than petty cash item?

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(Testimony of Ray A. Weaver.)

A. Is there another ledger for the Menlo Club? [2100]

Q. I hand you plaintiff's Exhibits 126, 128, 129, and 127, Mr. Weaver, the cash account I am referring to, is that the cash on hand bank roll?

A. There is one sheet in Exhibit 126 which under "Change Fund" shows balance of ten thousand dollars, but there are no dates indicating when that was established or how long it was in existence.

Q. So the figure you took was taken from the poker sheets? A. That is right.

Q. For those respective dates, is that correct?

A. Yes.

Q. Now the next item which you have listed here is that of "Accounts Receivable," advance for purchase of equipment at 50 Mason Street. What is the source of those figures?

A. I don't have the exact exhibit numbers for those, but those were taken from the exhibits identified by Mr. Maundrell as representing payments for improvements and alterations to the premises at 50 Mason Street.

Q. Those were the series of checks which were identified here by Mr. Maundrell?

A. Not all of them, but in part.

Q. But they were taken from that series of checks which are here in evidence? A. Yes.

Q. And which have been given the series numbers of 132, 133, [2101] 134, 135 and 136, is that correct?

A. I can't give you the detail of the checks be-

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(Testimony of Ray A. Weaver.)

cause I just have the one figure here and the detail is supported by another schedule.

Q. Do you have that other schedule?

A. No, I believe that is in the possession of another agent.

Q. Will you have that Monday? A. Yes.

Q. I will at this time ask you to identify another sheet here, in order that we may give it to counsel over the week end. I will ask you if you prepared, at my instructions, a schedule setting forth the assets and liabilities of the B. & R. Smoke Shoppe as of December 31st, 1943, 1944, 1945 and 1946?

A. Yes, I did.

Q. And is that the schedule which I show you?

A. Yes.

Q. And have you indicated on this schedule the sources from which you drew the information that is set forth hereon? A. Yes, I have.

Mr. Campbell: I will ask to have this marked for identification.

The Clerk: 169.

Mr. Campbell: May I suggest a recess at this time.

(Jury and alternate jurors admonished and recess taken at 3:45 until Monday, January 14, 1952. [2102]

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State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at Carson City, Nevada, commencing November 28, 1951, and concluding February 21, 1952, and that the foregoing pages, numbered 1293 to 2102, inclusive, dated Dec. 27, 1951, to Jan. 4, 1952, inclusive, being Vol. III of four volumes, constitutes a true and correct transcript of my said shorthand notes, not including arguments in the absence of the jury, to the best of my knowledge and ability.

Dated at Carson City, Nevada, February 22nd, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter. [2102-A]

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January 28, 1952, 10:00 A.M.

(Defendant present with counsel. Mr. Gillen absent.)

(Roll call of jury and alternate jurors.)

MR. WEAVER

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Weaver, at the close of the last session you had identified and there was received in evidence plaintiff's Exhibit 165, being the assets and liabilities statement of the Menlo Club, concerning which you had given testimony. Now I direct your attention to one of the assets which you have set forth thereon, to wit: the item appearing as of December 31, 1946, the last asset upon that sheet, "Bank of America Menlo Club account $15,265.54." I also show you plaintiff's Exhibit 34, the photostatic copies of the signature cards and ledger sheets in the Day and Night office of the Bank of America of commercial account in the name of Menlo Club, and ask you if, in arriving at that balance as of the year-end December 31, 1946, you examined Exhibit 34? A. Yes, I did.

Q. And will you also state, Mr. Weaver, the date as shown by that exhibit as to when that account was opened?

A. This account was opened to the first deposit on October 2, 1946.

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(Testimony of Ray Weaver.)

Q. On October 2, 1946, is that correct? [2103]

A. Yes, that is correct.

Q. And I call your attention to the fact that on those ledger sheets there are shown, between the date of the first deposit and December 31, 1946, a number of deposits to that account, is that correct? A. Yes, that is correct.

Q. And in connection with those deposits, did you examine the deposit tickets which made up those deposits?

A. I didn't examine them personally; I had them examined.

Q. Under your direction? A. Yes.

Q. And did you cause to be secured from the bank photostatic copies of the deposit tickets?

A. Yes, I did.

Mr. Campbell: I am going to ask that this be marked for identification, this group of photostats, as 170 for identification.

Q. Are these the photostatic copies to which you refer? A. Yes, they are.

Q. I am going to return these exhibits to you, Nos. 34 and 170 for identification, and ask if you made an examination and state if the slips set forth in 170 for identification are in the same number as the number of deposits shown between the opening of the account and December 31, 1946, in plaintiff's Exhibit 34?

Mr. Avakian: We stipulate to that, your Honor. [2104]

Mr. Campbell: I will offer these photostatic

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(Testimony of Ray Weaver.)

copies of deposit slips, instead of 170 for identification, I will offer them as 34A, so that they may bear the same number as the bank account.

Mr. Avakian: No objection, your Honor.

The Court: Exhibit 170 marked for identification admitted in evidence as 34A.

Q. Mr. Weaver, I am going to hand you these deposit slips, plaintiff's Exhibit 34A, and I will ask you to state the date of each deposit, the amount and the form of the deposit in which the deposit is made.

A. October 2, 1946, there was deposit in amount of $46,890.10. The deposit slip is marked "New account" and indicates the deposit consisted of cash. The next deposit was on October 3, 1946, in amount of $29,719.25, all of which was in currency and coin. The next deposit was on October 14, 1946, in amount of $7,785.25, all of which was in currency and coin. The next deposit was October 22, 1946, in amount of $5,217, all of which was in currency. The next deposit was November 4, 1946, in amount of $4,494, all of which was in currency. The next deposit was November 14, 1946, in amount of $5,757.75, all in currency and coin. The next deposit was on November 26, 1946, in amount of $4,998, all in currency. The next deposit was December 3, 1946, in amount of $5,801.25, all in currency and coin. The next deposit was on December 19, 1946, in amount of $8,939.50, all in [2105] currency and coin. That is the last deposit in the year 1946. The next runs into the following year.

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(Testimony of Ray Weaver.)

Q. Do those represent, according to the deposit slips and according to the ledger sheets of the account of the Menlo Club at the Day and Night office of the Bank of America, all of the deposits that were made from the opening date, October 2, 1946, to and including December 31, 1946, to that account?

A. Yes, these are all the deposits.

Q. On the ledger sheets of the commercial account of the Menlo Club at the Bank of America, there are certain withdrawals or charges against that account during the period of October 2, 1946, when the account was opened, to and including December 31, 1946, and I will ask you if, in the course of your examination of the records of the Menlo Club, which are here in evidence, if you examined and analyzed the withdrawals or charges to that account?

A. Yes, we did, to the extent possible. I do not remember whether we could identify all of them or not.

Q. Now I call your attention to the fact that the first withdrawal as shown in Exhibit 34 bears date of October 14, 1946, in amount of $18,331.06. Did the records disclose in what manner that amount was withdrawn from the bank account?

A. I believe it did——

Mr. Avakian: May that be answered yes or no?

The Court: That answer is about the same. He said, "I [2106] believe it did."

Mr. Avakian: I thought he was going further.

Q. Did you examine the records pertaining to

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(Testimony of Ray Weaver.)

this account for the purpose of ascertaining in what manner the charges against this account were accrued?

A. You mean the Menlo Club records or the bank records?

Q. The bank records.

A. Yes, I examined the bank records.

Q. By bank records are you referring to the records of the Bank of America?

A. Not necessarily. If a charge represented a transfer to some other bank account, that would involve examination of that account also.

Q. And did you also, in that connection, examine the records of the Menlo Club that were available to you? A. Yes.

Q. What did your examination disclose as to item October 14, 1946, charge against this account in amount of $18,331.06?

Mr. Avakian: We object to that, the records are the best evidence.

The Court: Objection overruled.

A. May I refer to our working papers?

Mr. Campbell: Yes. The witness has handed me a document consisting of two sheets, to which is also appended a further sheet, which I will ask to have marked for identification [2107] as plaintiff's 171 for identification.

Q. Referring to this 171 for identification, are those the working papers to which you refer?

A. Yes, it is.

Mr. Avakian: It might save time if we inquire

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(Testimony of Ray Weaver.)

of counsel whether he intends to examine Mr. Weaver on all of these entries or just the one referred to.

Mr. Campbell: I am going to examine him as to charges against that account from October 2, 1946, to December 31, 1946.

Mr. Avakian: As to all of them.

Q. Mr. Weaver, will you refer to 171 for identification to refresh your recollection, if you can, and state from your refreshed recollection, answer my question as to the charge of $18,331.06, as shown against the account on October 14, 1946.

A. That represented a transfer of funds from this account to the account of the Crocker First National Bank in the name of Harold H. Maundrell.

Q. And that is the same bank account, the ledger sheets of which are here in evidence?

A. That is correct.

Q. Now the next charge against that account shows on the bank records, Exhibit 34, as November 8, 1946, in amount of $65,000. Will you refresh your recollection and then, having refreshed your recollection, will you state what your examination disclosed as to that item? [2108]

A. That was a check payable to Willie E. Kyne in amount of $65,000 and it was cashed by Willie E. Kyne.

Q. Is that the same check which has been marked plaintiff's Exhibit 115 in evidence?

A. Yes, that is correct.

Q. I direct your attention to the fact that the

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(Testimony of Ray Weaver.)

next charge against the Menlo Club bank account at the Day and Night office of the Bank of America is as of December 3, 1946, in amount of $16,005.50. Will you refresh your recollection and then, having refreshed your recollection, will you state what your examination disclosed as to that item?

A. That item represents a check payable to Willie E. Kyne, which was cashed by Mr. Kyne.

Q. Is that the same check which I show you which has heretofore been marked plaintiff's Exhibit 120? A. Yes, that is correct.

Q. In amount of $16,005.50? A. Yes.

Q. Now the final charge against that account during the year 1946, as disclosed by plaintiff's Exhibit 34, is a charge on December 13, 1946, in amount of five thousand dollars. Will you refresh your recollection and state from your refreshed recollection what your examination disclosed as to that item?

A. It was a check payable to Harold Maundrell and deposited to the account under his name at the Bank of America. [2109]

Q. And is that one of the accounts which is here in evidence? A. Yes.

Q. Now with regard to these four items of charges against this account from the date of its opening, October 2, 1946, to and including December 31, 1946, did you find entries in the books of the Menlo Club which you examined relative to those charges?

A. May I see the 1946 record, please?

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(Testimony of Ray Weaver.)

Q. I hand you government's Exhibits 125, 127 and 129. If those are not the records which you were looking for, you may step down to where the books are and find the proper book.

(Question read.)

A. No, I found no entries in the books.

Q. Did you find any entries on the books with relation to the bank account itself, other than the check stubs? A. No.

Q. Now specifically with regard to plaintiff's Exhibit 115 in evidence, which is a check in the amount of $65,000, drawn in favor of W. E. Kyne, marked "Loan to Elmer Remmer" and signed Menlo Club, W. E. Kyne, and endorsed W. E. Kyne, did you find any record, in the course of your examination or investigation, relative to whatever transaction is represented by that check?

A. No, sir. Other than the notation on the check itself, which contains, "Loan to Elmer Remmer."

Q. Did you find any record other than the check itself? [2110] A. No, sir.

Q. Now with regard to plaintiff's Exhibit 120, which is check dated December 2, 1946, on the same account, payable to Wm. E. Kyne, $16,005.50, signature Menlo Club, Wm. E. Kyne, and handwriting, "Loan for Transit" and signature Wm. E. Kyne, did you find any record in any of the books or records which you examined, in the course of your investigation, pertaining to the transaction which

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(Testimony of Ray Weaver.)

that check represents, other than the check itself?

A. No, sir.

Q. I show you Exhibit 169 for identification, which I believe you identified at the last session of the court as a document drawn by you, is that correct? A. Yes, that is correct.

Q. Now calling your attention to the various items which make up this exhibit, you have set forth here opposite certain of the items referring to exhibit numbers. Are they numbers of exhibits which have been admitted here in evidence in this case? A. Yes, they are.

Q. And when that reference appears herein, were those exhibits to which reference is made the source from which you obtained your figures?

A. Yes.

Q. In addition I notice, in relation to two of the items, that you refer to testimony, giving the name of a witness. [2111] In those cases where that is set forth, were those entries made at my direction? A. Yes, they were.

Q. And are all of the figures set forth herein, other than the totals as set forth, either from exhibits as referred to herein and which are in evidence in this case, or from testimony to which reference is made? A. Yes.

Mr. Campbell: This will be offered as 169 in evidence.

Mr. Avakian: Your Honor may we examine this witness on voir dire as to the foundation of some of these entries?

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(Testimony of Ray Weaver.)

The Court: Very well.

Q. (By Mr. Avakian): Mr. Weaver, on your proposed Exhibit 169 you have shown a certain amount as cash on hand on December 31, 1943, with reference to Exhibit 111A as the source. I will hand you 169 for identification and I will also hand you 111A, would you show me the page in Exhibit 111A on which the amount of cash on December 31, 1943, is set forth?

Mr. Campbell: Objected to as not proper voir dire. It is proper cross-examination, if the Court please.

Mr. Avakian: I am testing the foundation of a statement is the exhibit as to the source.

The Court: He may answer the question.

Mr. Campbell: Then I make the objection that the question is misleading, in that the item referred to on Exhibit [2112] 169 states that it was obtained from Exhibit 111A and testimony. You asked as to date——

Mr. Avakian: I asked the page of 111A on which the source of that information appears.

Mr. Campbell: Which information?

Mr. Avakian: The item shown as the amount of cash for December 31, 1943.

Q. Will you show me the page for December 31, 1943?

A. Under date of January 1, 1943, there is a notation on top of that page, $15,000 BR cash. Subsequent to that date there were no other entries for the bank roll. We finally secured the figures

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(Testimony of Ray Weaver.)

of the bank roll from Mr. Kyne and Mr. Maundrell——

Mr. Avakian: Pardon me——

Mr. Campbell: I think he has a right to finish his answer.

The Court: If he wants to finish his anwer, he may do so.

Mr. Avakian: All right.

A. We tried to secure information as to the bank roll on subsequent dates of Mr. Kyne and he said he couldn't remember and Mr. Remmer, whom we couldn't talk to. We had no other source of information for any bank roll of any later date and we were forced to carry the same figure through to the later years. The only other which we have some information is from Mr. Pritchett's testimony, who gave us the bank roll at December [2113] 31, 1945, of $20,000, and that is the reason we changed the bank roll at the end of 1945 to $20,000.

Q. I am going to repeat my question, as to whether you can show on Exhibit 111A the figure for December 31, 1943.

Mr. Campbell: Objected to as asked and answered.

The Court: Objection sustained.

Q. With respect to December 31, 1944, you have made entry as cash on hand with source being stated as Exhibit 111A. Will you show me the page in Exhibit 111A on which there is a cash figure shown on Exhibit 111A?

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(Testimony of Ray Weaver.)

Mr. Campbell: Objected to as asked and answered.

The Court: He asked only as to 1943 before. You may answer.

Q. Show me.

A. The same figure is carried forward from December 31, 1943, to December 31, 1944——

Q. Will you show me the page?

A. ——because we were unable to find any record kept of the bank roll on that date and none of the partners whom we could interview——

Q. Will you show me the page?

A. ——were able to give us anything.

Q. Is there a page? A. There is no entry.

Q. Is there any entry for December 31, 1944? [2114]

A. No, because there was no bank account after January 1, 1943.

Q. With respect to cash on hand on December 31, 1945, you have an amount of $20,000, which you have labelled as source Pritchett testimony, and you say Mr. Campbell instructed you to put that figure in there? A. That is correct.

Q. Can you refer us to Mr. Pritchett's testimony to the effect there was $20,000 on hand?

Mr. Campbell: The record speaks for itself.

The Court: Sustained.

Q. Did you personally examine the record before making this entry?

Mr. Campbell: Same objection.

The Court: Objection sustained.

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(Testimony of Ray Weaver.)

Q. With respect to the figure $20,000 shown as cash on hand December 31, 1946, you have shown as the source of that Mr. Pritchett's testimony, is that correct? A. That is correct.

Q. Did you hear Mr. Pritchett's testimony that during 1946 he was employed for only one week and that was March, 1946?

Mr. Campbell: Objected to as argumentative. The record speaks for itself.

The Court: Objection sustained.

Q. Can you point to Mr. Pritchett's testimony with respect to [2115] any cash on hand December 31, 1946?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Mr. Avakian: I am going to make objection to this exhibit for these grounds: I think your Honor will bear in mind was that except for the totals, this represented data taken from evidence in this case and to that extent thereof it purports to be a summary of the evidence, and in that respect it is not a matter of accounting analysis or judgment, but simply a condensation into one sheet of what is purportedly the evidence in the case, and in that respect, your Honor, if it is offered as a summary of evidence in the case, it should be accurate or it has no place here at all. Now there are four items here as to which we make objection on different grounds for each one. First of all, with respect to the entry December 31, 1943, that purports to show cash on hand of $15,000 at the end of 1943. The witness has testified on voir dire, although the

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(Testimony of Ray Weaver.)

Exhibit 169 purports that the source of that Exhibit 111A, actually it was his own conclusion, that there was no change in the bank roll after January 1, 1943. There is no entry in Exhibit 111A or any bank roll on December 31, 1943. With reference to the next date, December 31, 1944, there is no entry whatsoever in Exhibit 111A as to that date. As a matter of fact, Exhibit 111A is the diary for 1943 and does not even purport to relate to 1944, so the figure for December [2116] 31, 1944, although it has been represented as simply a figure taken out of the evidence, actually represents, as shown by the voir dire testimony, as being conclusion that the bank roll on January, 1943, was still in exactly the same figure two years later. As to the figure December 31, 1945, cash on hand $20,000, which is labelled as Mr. Pritchett's testimony, I call your attention to the fact that the record shows—in view of the fact this was marked for identification two weeks ago, we have carefully read the testimony—shows that December 31, 1945, his best recollection was that cash on hand was $5,000, that in addition there were accounts receivable of $15,000. Now he said that twice, the only two times he was questioned that is what he said, not $20,000 cash, but $5,000 cash, so that this is directly contrary to the evidence, and I might say if counsel can point to anything contrary, I would be glad to hear it and would be glad to read to your Honor the record references on that testimony. This exhibit purports to show cash on hand at the end of 1946

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(Testimony of Ray Weaver.)

of $20,000 and the source is labelled as Pritchett's testimony. We have searched Pritchett's testimony. He testified in 1946 he was at the B. &. R. Smoke Shoppe for one week only and that was in March. He gave no testimony regarding the end of 1946. He wasn't asked any questions about the end of 1946 and obviously there is nothing in the record about it because he was only there one week in March. How can we present to the jury as a summary of evidence [2117] taken from this record a statement that at the close of the period involved in this indictment there was $20,000 cash according to Mr. Pritchett, when there is not one iota of testimony to that effect? Now to admit this exhibit in evidence that can be given to the jury, with representation it is summary of the evidence, would be highly improper because it is contrary to the evidence as to that $20,000 figure of 1946. There is not a word in the record as to that figure for 1946 from any witness, let alone Mr. Pritchett, who is the source of the figure according to the exhibit. So we object on the ground that although it purports to be a summary of testimony, it is contrary to the testimony and not proper; also the introduction will be misleading and prejudicial.

The Court: If I am correct in assuming it is the contention of the government that this is a correct summary of the records, supplemented by the testimony of different witnesses, if the government so contends—and I assume the government does or the government would not have offered the exhibit—if it is not correct, it would be in the same

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(Testimony of Ray Weaver.)

position as any of these exhibits which are in evidence. Counsel can show at the proper time, if they can, that any of these exhibits are not accurate, so the objection will be overruled and the exhibit will be admitted in evidence. [2118]

Mr. Avakian: Perhaps I did not make myself clear. The witness said this is a summary except as to totals he made, that the items are taken from the evidence. It is not taken from the evidence. It is picked out of thin air.

The Court: You can meet that situation later if it exists.

Mr. Campbell: Reading from plaintiff's Exhibit 169, "B. & R. Smoke Shoppe, Assets and Liabilities December 31, 1943; December 31, 1944; December 31, 1945, and December 31, 1946." Without reading these specific items as set forth herein at this time, the exhibit reflects a net worth of B. &. R. Smoke Shoppe as of December 31, 1943, of $18,413.36; as of December 31, 1944, $18,231.47; as of December 31, 1945, $23,344.66; as of December 31, 1946, $23,-293.39."

Mr. Avakian: Your Honor, we would request in conjunction with that partial reading that the items of cash on hand, Exhibit 111A, and Mr. Pritchett's testimony likewise be read to the jury.

The Court: It is not necessary at this time.

Q. Now, Mr. Weaver, in connection with your examination of the various books and records here, did you make an examination of the drawing account of Elmer Remmer on the books of Cal-Neva,

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(Testimony of Ray Weaver.)

Inc., for the period December 31, 1943, to December 31, 1946, inclusive? A. Yes, I did. [2119]

Q. And in connection with that examination did you analyze the records of that corporation which are here in evidence? A. Yes, I did.

Q. And in connection with such examination and analysis, have you drawn up a schedule reflecting the results of your examination and analysis of that account? A. I have.

Q. And will you produce that? I will ask you to have this document, consisting of some four pages, be marked for identification as government's 172 for identification. Showing you 172 for identification, is this the schedule and supporting schedules with reference to that matter to which you have referred? A. Yes.

(Jury and alternate jurors admonished and short recess taken at 10:55 a.m.)

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. I am going to refer you, Mr. Weaver, to plaintiff's Exhibit 146, which purports to be the books of account of Cal-Neva, Inc., and ask if you will——

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(Testimony of Ray Weaver.)

Mr. Avakian (Interrupting): They were introduced as such and they don't purport to be—they were introduced by [2120] the government and we object to the use of the word "purport."

The Court: Objection overruled. I don't believe there is any purpose in using the word. They are here as records of the Cal-Neva.

Mr. Campbell: I do not mean——

The Court (Interceding): I understand you do not mean to cast any reflection as to the exhibit.

Q. I ask you to turn to the account denominated E. Remmer, which is account No. 10, under heading of "Assets" in that record. That is, is it not, Mr. Weaver, the account that has heretofore been referred to as the drawing account of Elmer Remmer? A. Yes, that is correct.

Q. Of which the debits and credits have heretofore been read into evidence? A. Yes.

Q. Now I direct your attention to the fact—if it is a fact—that that record shows a year-end debit balance in that account as of December 31, 1943, of $10,652.77, is that correct?

A. That is correct.

Q. And debit balance as of December 31, 1944, of $17,886.66; is that correct?

A. That is correct.

Q. And debit balance as of the year-end December 31, 1945, of $25,361.68; is that correct? [2121]

A. Yes, that is correct.

Q. And a debit balance as of the year-end December 31, 1946, of $18,148.22.

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(Testimony of Ray Weaver.)

A. That balance is not entered in the books as such, but that is the balance——

Q. Well, is that amount reflected by adding the credits and debits as shown during the course of the year 1946? A. Yes.

Q. And taking into consideration the debit balance as of December 31, 1945?

A. That's right.

Q. Now in connection with those debit balances as shown by the books, have you on plaintiff's Exhibit No. 172 for identification set forth certain accounting adjustments to those year-end balances to arrive at a corrected balance in that account as of each of the year-ends?

A. Yes, I have. I might add that they are not really adjustments. They are additions and deductions to bring into the proper year any transactions that might affect the account. For example, withdrawals might be made in the year 1945 and might not be entered on the books until the year 1946. Actually, to represent the proper balance of the account, the transaction should be reflected in the year 1945, and those are the types of adjustments that were made in that work sheet.

Q. And in making such adjustments on the work sheet, was that [2122] for the purpose of arriving at the correct balance as of the end of each year?

A. That is correct.

Q. And in that connection have you set forth upon that schedule each of the items by which you adjusted each of the year-end balances?

A. Yes, I have.

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(Testimony of Ray Weaver.)

Q. And have you also set forth upon the supporting documents, or the following pages in this Exhibit 172 for identification, an explanation as to each such adjustments as to the source in the records which you examined of the items utilized?

A. Yes, I have.

Q. And have you also set forth in this exhibit the charges and credits by years to the account of Elmer Remmer, known as account No. 10, to which your attention has been directed?

A. Yes, I have.

Mr. Campbell: At this time I will offer in evidence plaintiff's Exhibit 172 for identification.

Mr. Avakian: We have no objection, to your Honor. If the prosecution has an extra copy, we would appreciate the use of it.

The Court: It will be admitted in evidence, 172.

Mr. Campbell: I think we can make that available subsequently.

Q. Mr. Weaver, I will ask you also if, in connection with the [2123] adjustments to this account, you had some correspondence with Mr. Semenza, the accountant who kept these records, as to various of the entries on this account which you were examining? A. Yes, I did.

Q. Will you produce that correspondence? Now you have produced here a group consisting of some four letters, two of which purport to be carbon copies of letters written by you, and two of which appear to be original letters of the firm of Semenza & Kottinger. Is this the correspondence to which you refer? A. Yes, it is.

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(Testimony of Ray Weaver.)

Mr. Campbell: May this be marked for identification?

The Clerk: 173.

Q. Referring, Mr. Weaver, to the carbon copies, which are a portion of this exhibit, are these copies of letters forwarded by you to the firm of Semenza & Kottinger? A. Yes, they are.

Q. And are the original letters the letters received by you in response to your communications?

A. Yes, they are.

Q. Incidentally, in connection with Exhibit 173 for identification, referring to original letter dated November 11, 1949, I observe here some pencil written date. Do you know by whom that was written? [2124]

A. Yes, that was made by me.

Q. It was some memorandum of your own?

A. Yes, that is correct, as well as the pencilled notation of the year 1946, the second sheet.

Mr. Golden: We overlooked that. We had better take a look at it.

Mr. Campbell: With the exception of the pencilled written notations which may be obliterated, we will offer this in evidence as Exhibit 173.

Mr. Avakian: We have no objection to the pencilled notation remaining in this exhibit so long as Mr. Weaver put that on.

Mr. Campbell: Very well.

The Court: The exhibit then is admitted in evidence, No. 173.

Q. Now directing your attention to plaintiff's

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(Testimony of Ray Weaver.)

Exhibit 172, which you have identified as the schedule which you have prepared reflecting the adjustments to the year-end balances of the Elmer Remmer drawing account of Cal-Neva, known as account No. 10, what did you find to be the corrected balance of that account as of December 31, 1943?

A. $23,152.77.

Q. Was that a credit or debit balance?

A. That was a debit balance on the books of Cal-Neva.

Q. Will you state what is meant by debit balance, applying to [2125] a drawing account?

A. A debit balance on the books of Cal-Neva would represent the amount receivable from Mr. Remmer.

Q. So far as Mr. Remmer is concerned, it would represent an amount which he owed to Cal-Neva?

A. That is correct.

Q. Now your attention is directed to the fact that the balance as shown by the book itself is a debit balance of $10,652.77. Will you state what adjustments you made in your schedule to arrive at a debit balance of 23 thousand some odd dollars?

A. I added thereto three items, one of which represented a credit to Mr. Remmer in 1943, which, by looking at the detail of the transactions, actually was not received by Cal-Neva until the calendar year 1944; therefore, should not have been credited to them until the subsequent year; therefore, a debit balance of this account should be increased by that amount by the end of 1943. Also was added to that a similar item for exactly the same

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(Testimony of Ray Weaver.)

reason, in amount of $2,000. Also there was added to it an amount which was charged to him in 1945 for loans made by him to one Albert Villaudy in 1941 and 1943. Therefore, since the charges made in 1945 were amounts which had been made prior to 1943, that charge should also be reflected in the year-end 1943 balance. Adding those three items to the debit balance already on the books of that date gave me the correct debit [2126] balance, $23,152.77.

Q. And the source of information in each of those instances was from the books of Cal-Neva, Inc.?

A. Yes, or in one or two instances from the books and records of 110 Eddy, which had offsetting items.

Q. In 1944 will you state what adjustments were made to arrive at the correct debit balance in the Remmer drawing account?

A. In the year 1944, to the balance on the books I added one item of $8,000, which is the same item I added in the year 1943, for the loans made to Mr. Albert Villaudy in 1941 and 1943. Those items were still not reflected in the balance of Mr. Remmer's account at the end of 1944 and the entry was not made on the books of Cal-Neva until the year 1945, although the transaction itself took place in the years 1941 and 1943; therefore, should have been reflected in the year-end 1944 balance, as well as year-end 1943 balance, so the same adjustment was made of that item by adding $8,000 to the debit balance already in the books.

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(Testimony of Ray Weaver.)

Q. You say you add $8,000 to the debit balance. The effect, is it not, is to show that Mr. Remmer owed that amount additional to the Cal-Neva, Inc., account of drawings? A. That is right.

Q. What other adjustments?

A. Then I made two deductions from the balances of his account, one was a credit, which was entered on the books of 1945 in [2127] amount of $24.98, for an item explained on the records as having been charged to him in error in 1944. Since the original error was made in 1944, I also made the adjustment of the error in the same year. The other adjustment represents a deduction from the balance of $7,500 for a credit made to his account on the books in the year 1945, with the explanation "For cash advanced by Mr. Remmer to Cal-Neva" in the prior year, and since the advance was actually made in the prior year, the entry should also have been made there, and that is the reason for that adjustment.

Q. And with those adjustments you arrived at the debit balance as shown on this exhibit 172 at the year-end December 31, 1944, of $18,361.68; is that correct? A. That's right.

Q. Now with relation to the year 1945, will you state what adjustments you made as reflected in the schedule?

A. For the year 1945, in addition to the debit balance on the books, I also added thereto the following debit items: Under date of April 30, 1946, the books showed a debit to Mr. Remmer's account

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(Testimony of Ray Weaver.)

in amount of $51,486.34, with the explanation, "For cash advanced to Mr. Remmer in 1945." Since the advance was made to him in the year 1945, it should be applied in the balance at the end of the calendar year 1945 and that is the purpose of that adjustment.

Q. Yes. [2128]

A. In addition I added thereto an amount which was entered on Cal-Neva books on April 30, 1946, as a charge to the account, in amount of $7,000, with the explanation, "An amount charged to Bank Club in error in 1945," which would indicate that for 1945 the loan as charged was made to the Bank Club for $7,000, which should have been made to Mr. Remmer personally. Since the transaction was in 1945, I made the adjustment of the year-end 1945 balance.

Q. Yes.

A. A further adjustment was made to reduce the balance at the end of the year 1945 in amount of $2215.69, for this reason—on April 30, 1946, Mr. Remmer's account was credited in that amount with the explanation, "For bad check included in cash received by Mr. Remmer." Since that cash, by the explanation was a prior entry, had been explained as having been received by Mr. Remmer in the year 1945, the checks included therewith would also have been received in 1945 and any bad checks included in that amount should have been reflected in the balance at the end of the year 1945, so that adjustment was also made for the year 1945.

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(Testimony of Ray Weaver.)

Q. Now what adjustments did you make in the debit balance shown by the books in that account for the calendar year 1946?

A. For the year 1946 I added to the debit balance shown on the books an amount of $97,300, because the books showed an entry on April 30, 1947, debiting Mr. Remmer's account with [2129] that amount, with the explanation, "For items credited to Mr. Remmer in error in 1946." Since the original error was made in 1946, my correction was also made to the balance of the account at the end of the year 1946. In addition I deducted from the account balance these two items—one resulting from an entry made on the books on April 30, 1947, with the explanation, "Credited to E. Remmer for cash advanced by him for 1946." Since the cash was advanced in the year 1946, this entry was made to reflect that advance in the year-end balance of his account. A similar correction was made in the amount of $34,705.83 because of an entry made on Cal-Neva books under date of April 30, 1947, with the explanation, "Credited to E. Remmer for additional cash contributed by him in 1946," and since the contribution was made in the year 1946, the credit should be reflected for the year-end 1946 balance of this account. After those adjustments, the corrected debit balance of his account at the end of 1946 was $60,742.39.

Mr. Campbell: At this time I wish to read plaintiff's Exhibit 173, carbon copy of letter dated San Francisco, California, October 31, 1949, addressed

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(Testimony of Ray Weaver.)

to Semenza & Kottinger, Title Insurance Building, Reno, Attention Lawrence J. Semenza;

(Reads—"* * * reference C-39 * * *")

Q. If I may interject at this time, in accounting practice, Mr. Weaver, what does "Reference C-39" refer to?

A. The reference indicates the book and page of the book of [2130] original entry from which the entry is posted to the ledger.

Mr. Campbell: Very well.

(Continues reading.)

Second, a letter dated November 11, 1949, on the letterhead of Semenza & Kottinger, Certified Public Accountants, Reno, Nevada, re Cal-Neva, Inc.

(Reads.)

Next is carbon copy of letter November 14, 1949, San Francisco, California, to Semenza & Kottinger, Title Insurance Bldg., Reno, in re: Cal-Neva, Inc.

(Reads.)

Next original letter dated November 16, 1949, on the letterhead of Semenza & Kottinger.

(Reads.)

The Court: I think we will take our recess at this time.

(Jury and alternate jurors admonished and recess taken at 11:50 a.m.)

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January 28, 1952, 2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Weaver, there has been evidence introduced here by way of checks relative to certain improvements made at the offices and warehouse at 50-52 Mason Street. Have you examined the records and the checks produced here relative to such improvements? [2131] A. Yes, I have.

Q. And in that connection have you drawn up, at my request, a schedule setting forth such expenditures? A. Yes, I have.

Q. Will you produce that. Is this document which you handed me the schedule which you so prepared? A. Yes, sir.

Q. And are the exhibits which are referred to here by number exhibits which are in evidence?

A. Yes, they are.

Mr. Campbell: I will ask to have this marked for identification as 174 for identification.

Q. And in connection with this schedule, have you also at my request, set up a schedule of reserve for depreciation? A. Yes, I have.

Mr. Avakian: I might say if Mr. Campbell in-

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(Testimony of Ray Weaver.)

tends to offer that, we have no objection to its being received in evidence.

Mr. Campbell: Very well, I will offer it in evidence as plaintiff's Exhibit 174.

The Court: Admitted.

Mr. Avakian: I wonder if at the end of the day these exhibits introduced today may be released to us for the purpose of having photostats made?

Mr. Campbell: No objection. [2132]

Q. I am going to hand you Exhibit 174, Mr. Weaver. Now I observe that at the top of the page you have listed under various columns first the exhibit number. To what does the exhibit number refer, not each specific one, but in general?

A. To the number given to the exhibit in this court as exhibit introduced in evidence.

Q. And with relation to the items appearing on the top half of the page, starting with 132D, I believe is the first item, to 135E, do you recall the nature of those exhibits?

A. They all represent cancelled checks.

Q. The next item bears date, I presume that is date of the check? A. Yes, that is correct.

Q. And the name of the payee, followed by a column you have headed "testimony P. No.," does that refer to the page upon which the check was identified for the purpose of the check?

A. Yes, I believe most of those refer to the testimony of Mr. Maundrell.

Q. And that was testimony given in this court?

A. That is correct.

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(Testimony of Ray Weaver.)

Q. And the final column being "Amounts." Now in connection with your examination of the records and exhibits of office improvements, fixtures and equipment of the offices and warehouse of 50-52 Mason Street, did you give effect to the acquisition in 1944 of the safe as set forth in Exhibit 139 in evidence? [2133] A. Yes, I did.

Q. Now with regard to the year 1944, what is the total amount of acquisitions which your examination disclosed by way of office improvements, fixtures and equipment for 50-52 Mason Street?

A. $425.00.

Q. Which is the safe referred to in Exhibit 139?

A. Yes, that's right.

Q. Now what were the acquisitions in 1945 by way of office improvements, fixtures and equipment, as found in your examination?

A. They amounted to $7,489.76.

Q. So that the balance of such improvements, fixtures and equipment represented what amount as of the end of 1945? A. $7,914.76.

Q. And what were the amount of 1946 acquisitions as found by your examination?

A. $1,110.44.

Q. So what did you find to be the total amount of office improvements, fixtures and equipment of 50-52 Mason Street as of December 31, 1946?

A. $9,025.20.

Q. Mr. Weaver, I will ask you if it is customary and proper accounting procedure, with regard to office equipment, improvements and fixtures, to set

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(Testimony of Ray Weaver.)

up a reserve for depreciation, that [2134] is to say, setting up of a reserve to offset the age and obsolescence of equipment? A. Yes, it is.

Q. And in connection with the acquisitions during the years 1944, 1945, and 1946 of these improvements, fixtures and equipment for the premises known as 50-52 Mason Street, have you set up a schedule of reserve for depreciation on this exhibit which you hold in your hand?

A. Yes, I have.

Q. Let me ask you first the basis upon which you set up such reserve for depreciation?

A. The reserve is based on the ten-year life, which is customary in cases of office equipment, in the absence of any special circumstances.

Q. That is the customary period that is set up for total depreciation? A. Yes.

Q. And it is the practice, is it not, where a ten-year period is set up as the period of depreciation, to set up a reserve annually for one-tenth of the cost of the improvement, where such ten-year period be used? A. That is correct.

Mr. Avakian: May the answer be stricken so I may make an objection?

The Court: Yes. [2135]

Mr. Avakian: Objected to as leading and suggestive and particularly on direct examination of an expert witness. Under the expert laws, the testimony should come from the expert witness rather than the attorney who has produced him. What is customary accounting is a matter of peculiar expert

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(Testimony of Ray Weaver.)

testimony and for Mr. Campbell to state what is customary and get a yes answer, is not proper direct examination. He should have the man tell us in his own words what customary accounting is.

The Court: This answer may stand. Try to avoid leading questions.

Q. What is your answer, Mr. Weaver?

(Question and answer read.)

Q. Was that the method which you used in setting up the reserve for depreciation which is shown on the schedule which you hold in your hand?

A. Yes, the yearly acquisition, which also follows general practice, in the year of acquisition, depreciation is computed for the period of six months.

Q. And is that the usual practice?

A. Yes.

Q. And in that regard what was the amount of depreciation reserve that you set up as of December 31, 1944? A. $21.25.

Q. And what amount did you set up as of the year-end, accumulated [2136] as of year-end December 31, 1945?

A. By that time the accumulated depreciation amounted to $438.23.

Q. And what was the amount of the accumulated depreciation which you set up in your schedule as of the year-end December 31, 1946?

A. $1285.22.

Q. Now in regard to the assets which you have set forth on this schedule and as shown by the

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(Testimony of Ray Weaver.)

checks to which you have referred, Exhibits 132D to 135E, as appear here on the schedule, will you state upon what bank account they were drawn?

A. They were drawn on the bank account in the Crocker First National Bank, that was carried in the name of Harold Maundrell and Elmer Remmer.

Q. That is the bank account, the ledger sheets of which are here in evidence?

A. Yes, that is right.

Q. As I recall, Mr. Weaver, the testimony was that that bank account was maintained with reference to the affairs of the Menlo Club, Tiny's Waffle Shop and the Menlo Bar, is that correct?

A. That is correct.

Q. Now what, if any, entries did you find in the records of any of those concerns, other than by way of cancelled checks and their corresponding stubs, which have been produced here in [2137] evidence, as to these expenditures?

A. The checks were entered in the check register, but there was no entry in the general ledger of any ledger account nor any asset accounts set up.

Q. Incidentally, in that connection, with reference to the records maintained for the Menlo Club, the Menlo Bar and Tiny's Waffle Shop, will you state what type of records, from accounting theory and practice, were kept? That is to say, were they double entry records, single entry records, or what?

A. I would call them neither double entry nor single entry. They are actually merely a record of

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(Testimony of Ray Weaver.)

receipts and disbursements and supplemented by a few ledger accounts.

Q. Were the books which you examined of a nature from which a trial balance as of any period could be drawn?

A. No, not without supplementing by outside information.

Q. But from the books and records themselves?

A. No.

Q. Now so far as your examination of the various records of the various concerns are involved, did you find anywhere, other than by way of the cancelled checks and the corresponding check stubs, any asset account reflecting the acquisition of the office improvements, fixtures and equipment which is set forth on the schedule which you hold in your hand?

A. No.

Q. Now, Mr. Weaver, have you also, at my request, drawn up a [2138] schedule with relation to the acquisition and disposition of certain Gallagher & Burton brand whiskey? A. Yes, I have.

Q. And you have that schedule with you?

A. Yes.

Q. You have handed me a document consisting of two pages headed "Gallagher & Burton Whiskey." Is that the schedule to which you refer?

A. Yes, it is.

Mr. Campbell: I will ask to have this document marked for identification as 175 for identification.

Q. Mr. Weaver, handing you plaintiff's Exhibit

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(Testimony of Ray Weaver.)

175 for identification, I will ask you the source of the figures set forth thereon?

A. These figures are based on testimony of Mr. Barengo, the Sierra Wine and Liquor Company, and Mr. Stewart of the Nevada Transfer Warehouse Company.

Q. Are they also based upon the records and exhibits produced by those gentlemen?

A. Yes, that's right.

Q. Now in connection with the figures set forth hereon, relative to the cost prices per case of whiskey and the allocation of the costs, to what decimal point did you carry out the per case cost?

A. I carried the per case cost out to five decimal places. [2139]

Q. And in connection with the preparation of this Exhibit 175 for identification, did you also examine the books and records of Cal-Neva, Inc.?

A. Yes.

Mr. Campbell: I am going to offer this in evidence as Plaintiff's 175.

Mr. Avakian: Your Honor, we object to proposed Exhibit 175 because of one item, and one item only, and that is that there is shown here in the building up as a part of Mr. Remmer's equity in this liquor an item of $7479.22, described as 1944 floor stock tax. Your Honor will recall the evidence in that regard shows that the Cal-Neva corporation filed a floor stock tax return on which a tax—I don't remember the exact amount, but that amount was approximately that—was paid. There

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(Testimony of Ray Weaver.)

was no showing whatsoever in this case that Mr. Remmer paid any portion of that money. Now your Honor will appreciate, from what has been said in the opening statement of counsel here, that in building up income on the net worth theory, it is the cost to the defendant, it is the money he put into the assets that entered into determining his equity for net worth purposes. If the tax on this liquor was not paid by Mr. Remmer, it is not a part of his equity. There is no showing in this evidence that Mr. Remmer paid one penny of taxes. It is shown that the Cal-Neva corporate tax return was filed. This is not Mr. Remmer's individual return, but the Cal-Neva corporation [2140] floor stock on which that tax was paid. There is no evidence whatsoever he paid any portion, either directly or on behalf of the corporation, so that inclusion of that amount, $7479.22, as a part of Mr. Remmer's increase in net worth, is contrary to the evidence. I am sure your Honor is aware, as we all are, that it is proper for an expert witness to assume facts which are covered by the evidence, but it is not proper to assume facts which are not covered by the evidence, and if your Honor would care, I could cite you authority on that, Wigmore has a statement specifically in point. We object to the inclusion in this proposed exhibit of a substantially large item which is not supported by any evidence whatsoever, and the basis of our objection is because of that fact, this proposed exhibit con-

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(Testimony of Ray Weaver.)

tains portions which are contrary to and inconsistent with the evidence.

Mr. Campbell: I will ask a further question and I think we can clarify that very well. May I have the exhibit?

Q. Mr. Weaver, directing your attention to plaintiff's Exhibit 175 for identification, and the item to which counsel has directed attention, namely the item of 1944 floor stock tax in amount of $7479.22, will you state the basis upon which that item was included in this schedule?

A. Yes. There is no record whatsoever on the books of Cal-Neva that floor tax in that amount was paid. The floor stock tax return itself has a notation on it showing that the amount [2141] paid as was, was paid in cash, not by check.

Q. And it was on that basis, under my instructions, that that was included?

A. Yes; also on the basis that undoubtedly Mr. Remmer——

Mr. Avakian: Object to any "undoubtedly" statements.

Mr. Campbell: Very well, the answer can stop there. I offer the exhibit in evidence.

Mr. Avakian: It still doesn't show Mr. Remmer paid the tax. If this is an equity of Cal-Neva, it has nothing to do with the defendant. Unless the defendant paid it, it is not his net worth, not his equity.

The Court: Objection will be overruled. Admitted in evidence.

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(Testimony of Ray Weaver.)

Q. Now, Mr. Weaver, I return to you plaintiff's Exhibit 175. I call your attention first to the fact that this schedule apparently refers to two carloads of whiskey, one which you have denominated first carload, and the other second carload, is that correct? A. Yes, that is correct.

Q. Now with regard to the first carload, you have set forth on the schedule in regard to that 1197 cases certain figures of cost and have arrived at a cost price per case of that whiskey. Will you state what that cost price was? A. Per case cost?

Q. Yes. [2142] A. $27.68095.

Q. What costs were taken into consideration in arriving at that cost?

A. That included the invoice cost FOB shipping point of $24.44 a case, amounting to $29,254.68; freight and demurrage in total amount of $1006.62; State tax of $1.20 a case, or a total of $1436.40, and handling charge of $1.20 a case, or a total of $1436.40, or a total cost of first carload of $33,134.10.

Q. And from that you found your per case cost, the figure you have given of $27.68095?

A. That's right.

Q. Now with regard to that first carload, have you set forth on this schedule and taken into account the number of cases which were delivered in 1943, based on the testimony here, and the number of cases which remained then on hand at the end of the year 1943? A. Yes, I have.

Q. And have you also set forth the accumulated costs in 1944 with reference to the balance of cases

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(Testimony of Ray Weaver.)

of whiskey remaining as of the first of the year and the delivery of those cases during 1945?

A. Yes, I have.

Q. Now as of the end of 1943, December 31, 1943, according to your schedule, how many cases remained on hand? [2143]

A. Of the first carload there were 147 cases left, with a cost of $4069.10.

Q. And during the year 1944 were any of those cases disposed of, according to your schedule?

A. No, none.

Q. Were there additional costs during that year?

A. Yes, during the year 1944 there was floor stock tax paid on it.

Q. What amount? A. $918.31.

Q. So as of December 31, 1944, what was the cost price of the 147 cases of the first carload remaining on hand? A. $4097.41.

Q. And were all of those delivered in 1945, according to the records which you have examined?

A. Yes, they were.

Q. So that none of the first carload of whiskey remained on hand as of December 31, 1945, is that correct? A. That is correct.

Q. Now in relation to the second carload of whiskey, I believe the evidence showed consisted of 1194 cases. Did you find the cost price per case of that whiskey? A. Yes, I did.

Q. And what was that?

A. $27.72494. [2144]

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(Testimony of Ray Weaver.)

Q. What cost did you take into consideration in arriving at that cost per case?

A. That represented invoice costs FOB shipping point of $24.44 a case, or a total of $29,181.36; freight and demurrage of total of $1006.62; State tax of $1.20 a case, or a total of $1432.80; handling charge of $1.20 a case, or a total of $1432.80, and draying of $50, making a total cost of $33,103.58 for the 1194 cases.

Q. Now according to the records which you examined in this connection, was any of that whiskey delivered in 1943?

A. No, it was all on hand at the end of 1943.

Q. Now during the year 1944 were any additional costs made in connection with that whiskey?

A. Yes, floor stock tax plus a penalty as paid herein. We have taken into account here only the tax itself of $7479.22.

Q. So that with that addition the total costs of the 1194 cases of whiskey became what amount?

A. $40,582.80.

Q. And what would that be per case?

A. $33.49894.

Q. And according to the records and testimony you heard, was a portion of that whiskey delivered in 1944?

A. Yes, in 1944 two hundred cases were delivered.

Q. Incidentally, in connection with the delivery of both the first and second carloads, have you set forth in a supporting [2145] schedule on the second

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(Testimony of Ray Weaver.)

page of this exhibit, the dates and to whom the whiskey was delivered? A. Yes, I have.

Q. So that as of December 31, 1944, there were on hand how many cases? A. 994 cases.

Q. Having a cost price of what amount?

A. $33,785.01.

Q. During the year 1945 were any of those cases delivered and disposed of?

A. Yes, 194 cases were delivered.

Q. Having a cost price of what amount?

A. $6,593.86.

Q. So as of December 31, 1945, there were on hand how many cases of the original carload?

A. 800 cases.

Q. Having a cost price of what amount?

A. $27,191.15.

Q. Now in that connection were there received back into the whiskey on hand from the second carload certain cases which had theretofore been delivered in a prior year?

A. Yes, 100 cases were received back in 1946.

Q. From whom? A. From Cal-Neva.

Q. So that there were then on hand how many cases? [2146] A. 900.

Q. And were those cases, according to the records you examined, transferred to any one in 1946?

A. Yes, 900 cases were transferred to the Bank Club in 1946.

Q. And what was the total cost represented by those cases? A. $30,590.04.

Q. Now in connection with your examination of

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(Testimony of Ray Weaver.)

the various books and records, and particularly of the books and records of Cal-Neva, Inc., I will ask you if you found any entries in the books and records of Cal-Neva as to the payment of any of the costs with relation to this whiskey, either by way of its original acquisition or subsequent costs accruing on the whiskey, or the receipt by Cal-Neva of any of the money for which the whiskey was sold?

A. No, there were no entries in connection with this whiskey that appeared in the books of Cal-Neva whatsoever, except one entry, indicating the purchase by Cal-Neva from Mr. Remmer of a lot of 100 cases.

Q. But other than whiskey purchases by Cal-Neva, Inc., as shown on their books, did you find any other reference to either the payment costs or the receipt of proceeds with relation to this whiskey? A. No, none whatsoever.

Q. Now what was the amount of the whiskey which you refer to as having been reflected in the Cal-Neva books as having been [2147] delivered to Cal-Neva?

A. Represented a lot of 100 cases. I believe it was 100 cases, I am not sure of the amount.

Mr. Avakian: Your Honor, may we have the record then as the best evidence, rather than his hazy recollection? The records of Cal-Neva, Inc., have been available to the government. They are in evidence here.

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(Testimony of Ray Weaver.)

Q. Mr. Weaver, can you refer to the Cal-Neva records and to where that entry appears?

A. Yes.

Q. Would you do so. What book is that in?

A. Under date of September 27, 1944, on page 113 of the check register.

Q. That is exhibit——

A. 146. There is an entry E. R. Remmer, 27th day of September, check No. 6435, and the amount is $6,896, and it is charged to liquor and whiskey purchases. That refers to the purchase of——

Q. Are you reading from the book?

A. No, but I know that refers to purchase of Gallagher & Burton whiskey.

Mr. Golden: That is not responsive. The question is what the books show.

Q. Mr. Weaver, will you state in what manner you identify that as referring to the Gallagher & Burton whiskey? [2148]

A. There might have been a notation on the check itself. If I could see the original check.

Mr. Campbell: All right, we will pass that and if you will look for it during the afternoon recess we will come back to it.

Q. At any rate, that is the item which you now identify referring to that acquisition?

A. That is correct.

Q. Incidentally, in connection with your examination of the records of Cal-Neva, will you state, based upon such examination, what you found the practice of Cal-Neva, Inc., to be relative to the

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(Testimony of Ray Weaver.)

payment of bills, other than pay items; that is to say, were they paid by cash or by check?

A. Practically all their bills were paid by check.

Q. Now in connection with your testimony relative to the drawing account of Elmer Remmer, account No. 10 in the ledger which is before you, you made reference to certain items concerning which you made adjustments, having to do with loans totalling some eight thousand dollars to Albert Villaudy, which were charged against Mr. Remmer's account, do you recall that? A. Yes, I do.

Q. And in that connection I will ask you if you made examination and investigation for the purpose of determining when, if at all, such loans were repaid to Mr. Remmer? Answer that [2149] yes or no. A. Yes, I did.

Mr. Campbell: I wonder if the clerk would produce at this time a certificate received from the doctor of Albert Villaudy.

Mr. Golden: Your Honor, this pertains to some matters that apparently arose about a week ago while this case was in recess. We would like to have an opportunity to talk it over among ourselves.

Mr. Campbell: May I suggest I mark these for identification at this time, so counsel may see them?

The Court: All right.

Q. Mr. Weaver, I show you three checks and ask you from what source you received these?

A. I received these from Mr. Villaudy.

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(Testimony of Ray Weaver.)

Q. I will ask that these be marked for identification as one exhibit, as 176 for identification.

(Jury and alternate jurors admonished and recess taken at 3:00 o'clock for 15 minutes.)

3:15 P.M.

(Defendant present with counsel.)

(In the absence of the jury.)
(NB 335 PP 27-33.)

3:25 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [2150]

MR. WEAVER

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

The Court: May I understand that the record may show the defendant was present during the past discussion.

Mr. Golden: Yes, your Honor.

Mr. Campbell: If the Court please, it has been stipulated by counsel that two checks which have been received in evidence as plaintiff's Exhibit 176 are checks of Albert Villaudy.

The Court: Isn't it correct to state by stipulation they are admitted?

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(Testimony of Ray Weaver.)

Mr. Campbell: Yes, by stipulation they are admitted in evidence as plaintiff's Exhibit 176; that the checks are repayments to the defendant, Elmer Remmer, by Albert Villaudy in the amounts and upon the dates as set forth in the two checks, is that correct?

Mr. Golden: That is correct, and for clarifying——

Mr. Campbell: I am going to read them. The first one is check bearing imprint Albert Villaudy, No. 321, September 6, 1944, "Pay to the order of Mr. Elmer Remmer $2,600," signed A. Villaudy, drawn on the Melrose Brae Branch Hollywood, California, Bank of America and endorsed Elmer Remmer and Harold H. Maundrell. The second is similar check, being No. 441, dated January 8, 1945, pay to the order of Elmer Remmer, two thousand dollars, and signed by A. Villaudy, bearing the endorsement [2151] of Elmer Remmer and F. W. Griss.

Q. Mr. Weaver, are you familiar with the personal exemptions allowed by law to a married person without dependents for the years 1935 and 1946, inclusive? Will you answer that yes or no?

A. Yes, I am.

Q. And have you, at my request, set forth on a schedule the amount of such exemptions as allowed by the Internal Revenue Code for each such years?

A. Yes, I have.

Q. Will you produce it. That is the document which you have just handed me? A. Yes.

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(Testimony of Ray Weaver.)

Mr. Campbell: I will ask that this be marked for identification as 177 for identification.

Q. In that connection, Mr. Weaver, I asked you upon this schedule to place a sub-total with reference to the years 1935 to 1941, inclusive, showing the total amount of exemption provided by law of a married person in those seven years. Have you done that upon this schedule?

A. Yes, I have.

Mr. Campbell: We offer it as 177.

Mr. Avakian: Your Honor, with respect to that, we offer the objection on these grounds: first, that it is incompetent, irrelevant and immaterial insofar as it relates to years prior to the indictment period and also to a year subsequent to the [2152] indictment period; secondly, that it relates to matters which are not covered by the evidence, namely matter of dependents during that entire 14-year period, and the third ground is simply for the purpose of obtaining from this Court, in the event there may be other offers, both by the prosecution and the defense, as to the extent to which an expert witness may present testimony based on his interpretation of the law, and for that purpose we want to object now, for the purpose of our own cross-examination and on direct testimony, as to whether the Court—and we know it is within the Court's discretion—is going to permit a witness to testify as to what the law is, and the third ground of the objection then is that the substance and contents of the exhibit

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(Testimony of Ray Weaver.)

contain matters of law and this is the witness' interpretation of the law.

Mr. Campbell: I might state, your Honor, that this is a matter of law set forth by law and the amount of personal exemption—I am offering this exhibit merely as a convenience. So far as the interpretation is concerned, it is not a matter of interpretation. The law sets forth in round figures what the exemption is for each year. As to the year 1947 feature, I have no objection to strike that from the exhibit, if counsel has serious objection to that.

Mr. Avakian: I do not know what the materiality of it is, your Honor. I would not make the objection if I was not serious. If it isn't material, it shouldn't be in. If counsel [2153] can point to the materiality——

Mr. Campbell: The year 1947 may be stricken.

The Court: The exhibit may be admitted in evidence, 177. I assume from remarks of counsel that there is no question as to the accuracy of the document. If there was, we might have it checked.

Mr. Avakian: No, I don't question the accuracy in one respect. In another respect, it is a matter of interpretation and analysis of evidence as to whether there were any dependents.

The Court: That is the thought I had in admitting the exhibit in evidence, that you did not raise any question as to the accuracy of the scheduled exemptions.

Mr. Campbell: The materiality or application

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(Testimony of Ray Weaver.)

to the evidence here I think is the basis of the objection.

Mr. Avakian: Primarily I was interested in knowing to what extent this Court would permit a witness to set forth in an exhibit of what the law means.

The Court: I do not understand this to be an expressed opinion of what the law means or interpretation of the law. It is merely a recitation of a statutory matter.

Mr. Avakian: It isn't that easy. A grammar school child couldn't do it. It takes some one who reads difficult [2154] language to go through the Internal Revenue code and read what is contained in there.

The Court: Well, that is the basis of my ruling. I don't intend to go much farther than that.

Q. Now, Mr. Weaver, during the course of your investigation of this case, both as to the work done by you personally and by referring to the work done under your direction by other agents, did you attempt to ascertain whether or not, at any time before December 31, 1946, the defendant, Elmer Remmer, received any property or money—by property I refer to both real and personal—by means of any devise, bequests, inheritance or gift? Will you answer that yes or no?

A. Yes, I did.

Mr. Golden: May the answer go out?

The Court: The answer may go out.

Mr. Golden: My objection is it calls for conclu-

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(Testimony of Ray Weaver.)

sion and also calls for an opinion in a field in which he is not an expert, as to what is devise, bequest and inheritance.

The Court: This question was merely whether or not he made an examination.

Mr. Golden: The question was did he, and others under his supervision, attempt to make an investigation as to whether any property was so received. Now that calls for conclusion.

The Court: He answered that he did make an attempt. The answer may stand. [2155]

Q. Will you state—without including in your answer to this question the results of your investigation—will you state the nature of the investigation which you made, the nature and its extent?

A. We determined the place of residence at the time of the death of the parents of both Mr. and Mrs. Remmer and examined the indexed records of the probate courts in both those locations.

Q. What other investigation did you make as to gifts or inheritances?

A. We spoke to the only living relatives of Mr. Remmer who has any considerable amount of property, and that was his brother——

Mr. Avakian (Interrupting): Now he is stating conclusion and opinion.

The Court: It may go out.

Q. State simply what investigation was made and not any conclusions or findings you made from it.

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(Testimony of Ray Weaver.)

A. Well, we did talk to him, that was part of our investigation.

Mr. Avakian: May that be stricken?

The Court: That may stand.

Mr. Avakian: I am sorry—I thought he said he didn't talk to him.

Q. What other investigation did you [2156] make?

A. We saw an inventory of his mother's estate, which listed only one item of real property, and that was——

Mr. Avakian: Just a minute——

Mr. Golden: He was asked to tell what he did.

Q. Did you examine probate records?

A. Yes.

Q. Where? What counties?

A. In San Francisco County, where Mrs. Remmer——

Mr. Avakian: Just a moment—again stating conclusions.

Q. State what you examined.

A. We examined probate records in San Francisco County and Alameda County.

Q. During the course of that investigation, did you determine where Mr. Remmer's father's death had occurred? Answer yes or no.

A. Yes.

Q. And did you examine the probate records of that county? A. Yes, I did.

Q. And did you do the same with respect to his mother? A. Yes, I did.

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(Testimony of Ray Weaver.)

Q. And did you examine members of his family?

A. Yes.

Q. Will you state whether or not you, and those under your direction, examined the records of banks and trust companies?

A. Yes, we did. [2157]

Q. I will ask you whether or not you examined into——

Mr. Avakian (Interrupting): Your Honor, these are all leading and suggestive. Can't the witness testify what he examined?

The Court: I think leading questions here might help to avoid your previous objections of keeping the witness from wandering away and making some conclusions.

Mr. Avakian: All the witness needs to do is to state what he did. He knows what he did.

The Court: The objection will be overruled. You may answer the question.

Mr. Campbell: I think he did answer the question.

Q. Did you, during the course of your examination and investigation, examine friends and business associates of Mr. Remmer?

Mr. Avakian: Just a moment, your Honor. We again object to that as calling for opinion and conclusion as to who are friends and who are business associates. If he examined particular people, he can name them, but the characterization leaves us uncertain as to who he talked to.

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(Testimony of Ray Weaver.)

The Court: Objection overruled. You can go into it on cross-examination.

Mr. Avakian: It is calling for opinions and conclusion as to who are friends and who are business associates. [2158]

The Court: Objection overruled.

A. Yes, I did.

Q. Did you, during the course of your examination, make every effort within your ability to ascertain any and all of Mr. Remmer's properties, real or personal, and its source?

Mr. Avakian: Just a moment—object to that as calling for opinion and conclusion, particularly the portion as to the best of his ability.

The Court: Objection sustained.

Q. Will you state, Mr. Weaver, what other investigation, if any, you made for the purpose of determining the ownership of Mr. Remmer in property, real or personal, and the sources from which it was acquired, without stating what you found, but stating the nature of the investigation which you conducted?

A. I have made a summary that refers to that.

Q. Do you have that summary on hand?

A. Yes.

Q. Will you produce it. Now you have produced here a number of sheets, consisting of some nine pages, is that the summary to which you refer?

A. Yes, it is.

Q. Is this a summary to which you wish to refer

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(Testimony of Ray Weaver.)

to refresh your recollection as to the exact nature of the inquiry which you made? [2159]

A. Yes, they are.

Q. I observe here, for the purpose of further identification, that you have set forth certain dates. Is that the date the particular inquiry or examination took place to which the notes refer?

A. It may be the date the inquiry took place or the date the reply was received to the inquiry.

Q. I take it then that some of your inquiries were made by correspondence, as well as by person?

A. Yes, that's right.

Q. Did this inquiry include matters of public records?

The Court: Just a minute—do you want to examine that?

Mr. Avakian: We do not care how you proceed, but we want to examine it.

Mr. Campbell: I have this before me to refresh my own recollection as to certain questions.

The Court: All right.

Q. Mr. Weaver, did you examine or cause to be examined any public records? A. Yes, I did.

Q. And will you state, as best you recall at this time, prior to refreshing your recollection from this document, what those records consisted of; that is, the nature of the records of what offices?

A. The offices of the recorder of San Francisco County and [2160] the county clerk in respect to both civil and criminal actions. The same records in the County of Alameda and Contra Costa County

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(Testimony of Ray Weaver.)

and San Mateo County and San Joaquin County and in Washoe County, Nevada. Records from the recorder's office for periods that I can't recall off-hand of Los Angeles County.

Q. Did you examine other recorder's records?

A. That's all I remember.

Q. Of each of those counties that you have stated? A. Yes.

Q. And in that connection I will ask you if you examined the real property records of those counties in the recorder's office? A. Yes, I did.

Q. And will you state whether or not they also included probate records?

A. Only examined the probate records in the Counties of San Francisco and Alameda; except, perhaps in some smaller counties where those indexes might have included with others that are covered during the examination.

Q. I believe you stated that you also examined civil cases filed in certain counties, is that correct?

A. Yes, that is correct.

Q. In that connection, did you examine the files and records for those actions?

A. Yes, I did. [2161]

Q. Now, in connection with the ownership of property—I think, your Honor, before I pursue this line, the document should probably be made available to the witness because in some instances at least I can duplicate it without appearing to do so. May I suggest a recess.

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(Testimony of Ray Weaver.)

Mr. Avakian: Will counsel trust us with it over night?

The Court: I don't think you should make that remark in that regard.

Mr. Avakian: It was an inquiry.

The Court: I know, but be a little more gentle in your inquiry.

Mr. Avakian: I was smiling I thought.

The Court: The smile doesn't go in the record.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [2162]

Tuesday, January 29, 1952—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumed the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Weaver, I am going to return to you plaintiff's Exhibit 178 for identification, which you stated yesterday you required to refresh your recollection as to questions asked you regarding the scope and extent of the investigation which you made, or was made under your direction, relative to the affairs of Elmer Remmer. I will ask you to state, without including in your answer what

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(Testimony of Ray Weaver.)

your investigation disclosed, what, if any public or semi-public records you examined or caused to be examined?

A. We examined the records of the recorders for various counties.

Q. What counties?

A. Relative to either real estate purchases or sales in San Mateo County and San Francisco County and Alameda County and Contra Costa County and Washoe County and San Joaquin County and in Los Angeles County.

Q. All of those, with the exception of Washoe County, are in California?

A. That is correct. [2163]

Q. Washoe County is in Nevada?

A. Yes.

Q. All right, proceed.

A. We also examined some of the county records with respect to probate proceedings, in most cases had to do——

Q. No, just state in what county.

A. In Alameda County and in San Francisco County.

Q. Proceed.

A. We examined the records of the San Francisco police department of the civil and criminal and bankruptcy actions in the United States District Court in the clerk's office in San Francisco and also in the clerk's office in Carson City. I secured a copy of the sworn statement of Mrs. Remmer given in Stockton——

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(Testimony of Ray Weaver.)

Mr. Avakian: Just a moment—I think we are getting into contents.

Mr. Campbell: He is not stating any contents.

The Court: You may proceed.

A. We examined the records in the Collector's office in Reno for the period, 1930 to 1943, inclusive.

Q. The Collector of Internal Revenue?

A. Yes, I examined the record of certain civil actions in the County of San Francisco. Made inquiry of the United States Treasury Department in Washington, and in the Chicago Regional Office relative to United States savings bonds, or any other United States bonds that might have been purchased. We made [2164] inquiry of credit agencies in Reno, Stockton and San Francisco.

Q. Does that cover that phase of the matter?

A. Yes. We also made inquiry at the Collector's office in San Francisco for any returns filed for the period 1930 to 1943, inclusive. I made unofficial inquiries—they were official inquiries, but hadn't occurred to me——

Q. Never mind. Now, will you relate of what banks or financial institutions you made inquiries, or caused to be made?

A. Made inquiries of all banks in San Francisco, of all of the branches of the Bank of America in Oakland and Berkeley.

Q. You say of all banks in San Francisco?

A. Yes, sir. The First National Bank of Nevada, Carson City Branch and the Lake Tahoe

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(Testimony of Ray Weaver.)

Branch, the Farmers Bank of Carson Valley at Minden, the First National Bank of Nevada, both of the Reno branches, Security National Bank of Reno, Manufacturers Trust Company of New York City, First National Bank of Bellmore, Bellmore, New York; Stockton Savings & Loan Bank, Bank of America in Tracy, Mechanics Bank in El Cerrito, California. We also made some search of film records at the Bank of America's Transit Department in San Francisco, as well as looking at detailed records of certain of the banks that I have mentioned.

Q. You refer to the Transit Department of the Bank of America?

A. The Transit Department handles all of the items going in or out of San Francisco to any of the branches of the Bank of America. [2165]

Q. In other words, the Bank of America has its own clearing department as among its various offices, is that correct? A. Yes.

Q. And the Transit Department handles their business in the way of interchange of the credits or debits as between the various branches of the Bank of America, is that correct?

A. That's right.

Q. Does that cover the banks and financial institutions? A. Yes, it does.

Q. Now, in what city or cities did you make, or cause to be made, investigations relative to Mr. Remmer's connections there?

A. Investigations or inquiries were made in

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(Testimony of Ray Weaver.)

New York and Honolulu and Fresno and New Orleans, in Portland, Las Vegas, Los Angeles, Sacramento, Santa Rosa, Reno, and the cities surrounding the Bay Area, such as Oakland and El Cerrito.

Q. And San Francisco as well?

A. Yes. That about covers the various places.

Q. Now, during the course of your investigation did you also interview, or cause to be interviewed, business associates of Mr. Remmer?

A. Yes. The persons interviewed——

Mr. Golden: That is the answer to the question, your Honor—the question has been answered.

The Court: Yes, the question has been answered.

Q. Will you state whether or not in that connection you [2166] interviewed all such former business associates as you were able to contact?

Mr. Avakian: Just a moment—that calls for his opinion and conclusion, your Honor.

The Court: Objection will be overruled.

A. Yes, all that we could contact were interviewed.

Q. And will you state whether or not inquiries were made on the subject of Mr. Remmer's living expenses? A. Yes.

Q. And will you state the nature, without stating the findings, of the investigation in that regard?

A. Well, in that respect we made inquiry of the credit associations in Reno, Stockton and San Francisco. We also made inquiry of various retail and wholesale establishments in Chicago, San Francisco, Del Mar, California; Inglewood, California;

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(Testimony of Ray Weaver.)

Berkeley, Long Island, New York; San Bruno, California; Oakland, California; Arcadia, California; Carson City, Richmond, California; Lafayette, California; Oakland, California; Los Angeles, California; Beverley Hills, California; Stockton California, and Kansas City.

Q. Now, in connection with your investigation, Mr. Weaver, did you attempt to follow up every lead from whatever source having to do with Mr. Remmer's business affairs? A. Yes.

Mr. Avakian: May we have the question? [2167]

The Court: The answer may go out.

Mr. Avakian: That calls for conclusion and characterization of quality and work he did. It is not factual.

The Court: Overruled. Answer the question.

A. Yes, we attempted to follow every lead that we received from any source.

Q. Now, Mr. Weaver, during the course of your examination, did you find any evidence or indication that Mr. Remmer received any money or property by gift or inheritance?

Mr. Avakian: We object to that, your Honor, because it is obviously calling for results of his investigation, what he found or didn't find. That is not testimony, that is conclusion as to what his investigation was. It is not based on evidence in the record but on other things he said he did. Not a proper way to establish it.

Mr. Campbell: I would submit, your Honor——

The Court (Interceding): Objection overruled.

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(Testimony of Ray Weaver.)

A. We found no evidence or even any indication of any gifts or inheritance.

Q. Now, during the course of your investigation—I will ask that you answer this question yes or no—during the course of your investigation, were you able to determine the living expenses of Mr. Remmer for the years, 1944 to 1946, inclusive?

A. No, we were not.

Q. Now, were you able, during the course of your investigation, [2168] to ascertain the contents of any of the safes or safety deposit boxes, concerning which evidence has been produced here, as of any date during the period January 1, 1944, to December 31, 1946?

A. No, sir, we never ascertained the contents of any safe.

Q. Or at any date during your investigation?

A. No, sir.

Mr. Avakian: Just a moment—you are going beyond the period 1944 to 1946.

Mr. Campbell: I asked any date.

Mr. Avakian: I object to the question so far as it goes outside the period——

The Court: The answer may stand.

Mr. Avakian: Was the answer given?

Mr. Campbell: The answer was no.

Q. Now, during the course of the investigation, did you or any of your agents who were working under your direction, talk to the defendant, Elmer Remmer?

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(Testimony of Ray Weaver.)

Mr. Avakian: May that be answered yes or no, your Honor?

The Court: It may.

A. No, sir.

Q. Did you—and you may also answer this yes or no—did you make an effort or attempt to talk to Mr. Remmer concerning the matters of your investigation?

Mr. Avakian: Just a moment, your Honor, we object to that question as improper, in violation of the legal rights of [2169] the defendant and the asking of that question in the presence of the jury is prejudicial and misconduct on the part of the prosecution. If your Honor would care to hear argument on the matter, we would be glad to take it up.

The Court: The objection will be sustained.

Mr. Avakian: Will the jury be instructed to disregard that?

The Court: Oh, there is no need of that. I have told the jury about five or six times that the only thing that they are concerned with, and the only basis of their verdict, must be what they hear here legally admitted in evidence and documents admitted in evidence. I am sure this jury is not so apt to depart from that as believe—I am sure they won't.

Q. Mr. Weaver, during the course of your examination, did you have before you the returns filed by Mr. Remmer, which are here in evidence?

A. Yes, I did.

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(Testimony of Ray Weaver.)

Q. And did you also have before you the returns which are here in evidence of the various enterprises in which he had, or purported to have, an interest? A. Yes, I did.

Q. And did you have before you the books and records which have been produced here?

A. Yes. [2170]

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, in your direct examination you stated that you had studied accounting at the University of Pittsburgh, is that correct?

A. That is correct.

Q. When did you receive the bachelor's degree there? A. In 1928.

Q. And you obtained your master's degree in business administration at Northwestern University? A. That is correct.

Q. What year did you obtain that degree?

A. In 1930.

Q. When was it that you did this work with the subsidiary of Paramount Pictures Corporation?

A. '29 and '30.

Q. Where was that?

A. That was in Chicago.

Q. Were you going to school at Northwestern at the same time? A. Yes, I was in school.

Q. Subsequently you had about a year's prac-

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(Testimony of Ray Weaver.)

tice in Emmaus, Pennsylvania? How do you pronounce that? A. Emmaus.

Q. Was that entirely your own practice or were you associated with others? [2171]

A. It was entirely my own.

Q. When was that year of practice in Emmaus?

A. It was in 1932 or 1933.

Q. Now, you also stated that you taught accounting subjects for about four years. During what four-year period did you do that teaching?

A. 1930-31 was one period.

Q. And where did you teach then?

A. Lafayette, Colorado.

Q. Was that full time teaching? A. Yes.

Q. What subjects did you teach?

A. Accounting, economics and sociology.

Q. Was that one school year, 1930-31?

A. That is right.

Q. Where did you teach next?

A. At Northwestern University.

Q. When was that?

A. That was the following year, 1931-32.

Q. The school year 1931-32? A. Yes.

Q. Was that likewise full time?

A. That was part time on a teaching fellowship.

Q. And your next school where you taught?

A. Was William Penn College. [2172]

Q. When was that? A. 1933-'34.

Q. And that, I believe, is located in Iowa?

A. That's right.

Q. Was that full time teaching? A. Yes.

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(Testimony of Ray Weaver.)

Q. And likewise in accounting subjects?

A. Yes, that's right.

Q. And then you taught at Whitworth College in Spokane? A. That is right.

Q. What year was that? A. 1934-'35.

Q. Was that likewise full time? A. Yes.

Q. So that you taught in Lafayette 1930-31, Northwestern '31-'32, then you had this year in your own private accounting practice in Emmaus, Pennsylvania, is that right? A. Yes.

Q. And two more years teaching?

A. Yes.

Q. And that brings us to 1935 and I believe you said that is when you went with the Internal Revenue Bureau? A. That is right.

Q. During the course of your employment by the subsidiary of Paramount Pictures, what type of accounting were you doing? [2173]

A. General ledger bookkeeping, accounting, preparation of financial statements.

Q. Bookkeeping and preparing financial statements for that particular company?

A. That is right.

Q. What was the nature of your practice during the year that you practiced in Emmaus, Pennsylvania?

A. Auditing and preparation of tax returns.

Q. And Emmaus, I take it, is a fairly small town? A. Yes, about eight thousand.

Q. You represented mostly small business men in Emmaus?

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(Testimony of Ray Weaver.)

A. That's right. There was one or two corporations there represented.

Q. And did you represent partnerships in the course of that practice?

A. I don't believe so.

Q. Did you prepare any partnership tax returns during that year of private practice?

A. No, sir.

Q. From 1935 until approximately 1940 you were in the office of the Internal Revenue agent?

A. Until 1941.

Q. And was that in San Francisco?

A. That's right.

Q. The entire period? [2174] A. Yes.

Q. What type of work were you doing for the Internal Revenue?

A. I was field agent until the last year I was there, when I was engaged in reviewing for several months before transfer.

Q. During the time you were field agent, you made audits of tax returns filed by various taxpayers and business organizations? A. Yes.

Q. And did that include audits of returns filed by partnerships? A. Yes.

Q. And you became familiar, then, with the manner of preparing partnership returns?

A. Well, more familiar than before.

Q. In other words, you had experience during that period with the problems involved in preparing partnership returns, is that correct?

A. That's right.

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(Testimony of Ray Weaver.)

Q. Now, what happened to your accounting career in 1941? You went in the service then, is that right?

A. No, in 1941 I transferred to the Intelligence Division.

Q. And then were you in the Intelligence Unit until this date?

A. Except for the period of war time.

Q. When was that? A. 1943 to 1946.

Q. From 1941 to 1943 and from 1943 to 1946 until the present [2175] you were in the Intelligence Unit, or as it is now called, the Intelligence Division, is that right? A. That's right.

Q. When you were in the Internal Revenue Agent's office, your work there dealt primarily in auditing tax returns to determine the correctness of income tax as reported on returns you were auditing, is that right?

Mr. Campbell: I object to the question in that form.

The Court: Let me have the question.

(Question read.)

The Court: Objection overruled. Answer the question.

A. Yes, that was my primary duty.

Q. The Internal Revenue Agent's office is a branch of the Internal Revenue Bureau which is independent of the Intelligence Division, is that correct?

A. It is independent in the sense it is not under

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(Testimony of Ray Weaver.)

their control. It is inter-independent in the sense that we work jointly in certain cases.

Q. You work jointly but you are really different units? A. That is correct.

Q. And the function of the Intelligence Division now is principally that of investigating cases in which there are alleged, or suspected to be, some fraud in connection with federal taxes, primarily income taxes, is that right?

A. Yes, that is right. [2176]

Q. So that when you transferred to the Intelligence Unit, you entered into that different phase of work dealing primarily with the question of investigating frauds, or suspected frauds, is that right? A. Yes, that's correct.

Q. Now, you have presented various exhibits here, which purport to set forth the net worth of certain businesses which you and your associates examined. Can you explain to us what the term "net worth" means in an accounting sense?

Mr. Campbell: Objected to as a fact not in evidence. There is a certain charge here which reflect what the books show the net worth to be, or what the books which are here in evidence reflect as to certain assets and liabilities.

Mr. Avakian: That is not true——

The Court: Let me have the question.

(Question read.)

The Court: Objection overruled. Answer the question.

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(Testimony of Ray Weaver.)

A. In the manner in which the term "net worth" is used in a net worth case, it refers to the net cost of the assets which a taxpayer owns after deducting his outstanding obligations.

Q. Would it be correct to say that it is the difference between all the assets and all of the liabilities?

A. Well, it doesn't go quite far enough because it is specifically said the assets at cost.

Q. In other words then, it would be correct to say, for the [2177] purpose of determining income by the net worth method, the term net worth means the difference between all the assets valued at cost and all of the liabilities likewise valued at cost?

Mr. Campbell: Objected to—that is misleading —the cost of liabilities. I do not understand the liabilities are what you own.

The Court: Well, the witness may answer the question.

A. Well, the liabilities would be at cost value.

Q. And the assets valued at cost, is that right?

A. That is right.

Q. And valued at cost to whom? To the person or entity whose net worth you are determining?

A. That's right.

Q. In order then to determine the correct and accurate net worth of a particular taxpayer or entity that you are analyzing, would it be necessary to have before you all of the assets and all of the liabilities as of the particular date for which you were determining the net worth?

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(Testimony of Ray Weaver.)

A. In order to determine the correct net worth as of that particular date, yes.

Q. So that if any particular asset or liability were omitted, then you would not have a correct and accurate net worth computation?

A. The net worth computation would not be correct, but the [2178] income computation may be.

Q. By that you mean that the income computation is based on increasing the net worth, is that right? A. That's right.

Q. You are, I believe, a certified public accountant, is that right? A. Yes.

Q. Can you tell us the significance of the word "certified" in that designation?

A. Well, it is merely you have passed an examination prescribed by some State statute.

Q. And in the accounting business it is customary, is it not, for a certified public accountant to make audits which he certifies to be correct in an accounting sense? A. That is right.

Q. An accountant who is not a certified public accountant does not have the privilege of submitting a certified audit, is that correct?

A. Well, he may.

Q. Where the State statute calls for certain qualifications?

A. It depends on the State statute.

Mr. Campbell: Objected to as immaterial.

Q. You are certified in what State?

A. Iowa.

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(Testimony of Ray Weaver.)

Q. Is that the only State you are [2179] certified? A. Yes.

Q. In connection with the computation of net income on net worth method, it is necessary, is it not, Mr. Weaver, to determine the net worth at the beginning of the particular period that is covered by your income computation?

A. Yes.

Q. And that is commonly referred to as the starting point, is it not?

A. I have heard it referred to as such by many attorneys here.

Q. Well, don't accountants refer to the beginning point as the starting point of the net worth computation?

A. From mechanics standpoint, actually each new year presents a new beginning point.

Q. I said for whatever period is involved in your income computation, the beginning is called the starting point, isn't that right, whether one year or three years, whatever it may be?

A. That's right.

Q. In computing the net worth, at the starting point it is necessary, in order to make an accurate computation of net worth increase, to determine the amount of cash, if any, which that particular taxpayer or entity possessed at the starting point, isn't that correct?

A. That is highly desirable, yes.

Q. Well, if there is cash in existence at that time, you can [2180] not make an accurate com-

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(Testimony of Ray Weaver.)

putation of net worth at the starting point without knowing the amount of the cash, is that correct?

A. That's correct.

Q. And it is likewise true, is it not, Mr. Weaver, that in order to make an accurate computation of net income on the net worth method, it is essential to know the amount of cash, if any, at the end of the period for which you are making the computation?

A. Yes, unless the cash remains constant.

Q. In other words, you have to know what the cash picture is at the beginning and end in order to make an accurate computation, don't you?

A. Yes, we always try to determine that if we can get the information.

Q. I believe you stated that you, did you not, were unable to determine the amount of cash that was in the various safes and safe deposit boxes which have been mentioned in evidence here, at any time during the period covered by your investigation?

A. That is right because Mr. Remmer——

Mr. Avakian: Just a minute——

Mr. Campbell: I submit he has a right to finish his answer.

The Court: You may proceed.

Mr. Avakian: The question has been answered. I ask the rest go out. [2181]

The Court: He may proceed.

Mr. Golden: It is purely voluntarily and gratuitous.

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(Testimony of Ray Weaver.)

The Court: He may proceed.

(Question and answer read.)

The Court: You may proceed.

A. ——because Mr. Remmer refused to talk to us to give us any information whatever, including cash.

Q. Did he make that refusal to you?

A. Yes, he did.

Q. Where was that made?

A. In Mr. Thatcher's office in Reno.

Q. When? A. April 8, 1948.

Q. April 8, 1948, in Mr. Thatcher's office in Reno? A. Yes.

Q. And Mr. Thatcher is an attorney in Reno?

A. That is right.

Q. Do you know the name of his firm?

A. At that time it was known as Thatcher, Woodburn and Forman.

Q. And do you remember which Mr. Thatcher it was? A. John P. Thatcher.

Q. That is the younger one? A. Yes.

Q. Was that in his private office?

A. I believe so. [2182]

Q. Who was present?

A. Present at the time were Mr. Thatcher, Mr. Remmer, the young lady from the Collector's office, who was the stenographer, I can't recall her name at the moment, Mr. Harkness and Mr. Morgan and myself.

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(Testimony of Ray Weaver.)

Q. And all these people you named were present in the same room? A. Yes.

Q. In Mr. Thatcher's private office?

A. Yes, sir.

Q. Just what was it that Mr. Remmer said to you at that time?

A. Mr. Thatcher stated that he had advised Mr. Remmer not to answer any questions or make any statement to us whatsoever and I asked Mr. Remmer if that was his own conclusion in the matter and he said yes.

Q. Did he say the statement was on the advice of the lawyer?

A. I don't recall as he stated that, but he apparently followed the lawyer's advice.

Q. Were these statements preceded by any other discussions between those of you who were present? Just answer yes or no. A. Yes.

Q. And isn't it a fact that prior to that statement being made Mr. Thatcher asked you if you would state what it was that you wanted to talk to Mr. Remmer about?

A. Yes. We told him we wanted to talk to him about his income [2183] tax affairs.

Q. Isn't it a fact that Mr. Thatcher asked you if you would state what particular problems you wanted to talk about?

A. He asked if we had any particular charges and we said we couldn't make any charges, we were only making an investigation.

Q. Isn't it a fact Mr. Thatcher asked you

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(Testimony of Ray Weaver.)

whether or not you were planning to recommend criminal prosecution of Mr. Remmer?

A. I told him I couldn't answer that question before he was investigated.

Q. He asked you that and you gave him that answer? A. Yes.

Q. Isn't it a fact Mr. Thatcher told you unless you were willing to state what you had in mind by way of specific problems as to taxes, as to whether or not you would recommend criminal prosecution, he would not permit you to question Mr. Remmer?

A. Yes, and I told him I couldn't make any recommendations or reach any conclusions until the investigation was made.

Q. That was your reply?

A. Yes, I told him that questioning Mr. Remmer was part of the investigation and that until that was done I couldn't make any proper recommendations.

Q. And didn't Mr. Thatcher also ask you if you would not state what particular accounting problems you were concerned with in the forthcoming interview?

A. He didn't refer to accounting problems so much as to what [2184] specific charges I might have against Mr. Remmer.

Q. And did you, at that time, have in your mind particular problems that you wanted to ask Mr. Remmer?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

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(Testimony of Ray Weaver.)

Q. Did you tell Mr. Thatcher any particular problems that you planned to discuss with him and Mr. Remmer?

A. I believe I said that we wanted to determine what his living expenses were. I don't know if we went into any detailed discussion.

Q. Isn't it a fact that you declined Mr. Thatcher's request for a statement as to the particular thing that you wanted to question him about?

A. It would be impossible to list all of the items he might be questioned about because the questioning process itself raised other questions.

Q. But isn't it a fact that you declined to state to him the things that you already had in mind at the time of making the inquiry?

A. No. I declined to make any statement with respect to any charges because I am not in position to make any charges.

Q. What do you mean by charges?

A. Well, charges are made only as the result of indictment.

Q. I don't know what you mean by the word "charges."

A. Well, that is the word that Mr. Thatcher used. I presume [2185] he meant legal charges. We can not make any charges against any one.

Q. Is it customary, during the course of the investigations which you have made, to discuss with the taxpayer or his representatives the particular issues of the case as you see them and to state to them the things that you consider to be incorrect in

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(Testimony of Ray Weaver.)

the treatment which the taxpayer or his representatives gave to those items, in the preparation of tax returns?

Mr. Campbell: Objected to, what is customary; we are concerned with what is done.

Mr. Avakian: Customary in his investigations, your Honor.

The Court: Objection sustained.

Q. In the course of this investigation, you obtained various records of these businesses from a number of representatives of the particular businesses that you were investigating, isn't that right?

A. Yes, that's right.

Q. You and the other people working under you? A. Yes.

Q. You obtained information from Mr. Kyne, did you not, you and your staff? A. Yes.

Q. And Mr. Maundrell?

A. That is right.

Q. And Mr. Slater? [2186] A. Yes.

Q. And Mr. Ayton? A. Yes.

Q. Any other representatives of these businesses from which you or your associates obtained records or information?

A. Yes, we interviewed quite a number of employees.

Q. Now, in the course of this investigation did you, or any other member of your staff, at any time state to any of these representatives, with whom you dealt, that there was some particular

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(Testimony of Ray Weaver.)

item that you thought had not been treated correctly?

Mr. Campbell: Objected to as immaterial and incompetent, what might have been stated or not stated to some third party.

The Court: Let me have the question.

(Question read.)

The Court: Objection overruled. Answer the question. Do you understand the question? Read the question.

(Question read.)

A. I am sure we must have mentioned repeatedly the inadequacy of the records.

Q. Perhaps you didn't understand the question. Would you like to have it read again?

Mr. Campbell: I submit that is answered.

The Court: If the witness wants it read again, he may have it read. Do you want it read again?

A. No, I don't believe so. [2187]

Q. Do you understand the question? Did you or your staff state to any of these representatives, with whom you dealt, that there was any particular matter which you thought had been treated improperly in the preparation of tax returns?

Mr. Campbell: Objected to as asked and answered.

The Court: You may answer.

A. The matter of the adequacy of the records, or inadequacy rather, I am sure was repeatedly mentioned to the representatives. Normally we

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(Testimony of Ray Weaver.)

wouldn't mention any item on Mr. Remmer's personal returns to a third party. It would be highly improper.

Q. Take the Menlo Club as an example. You knew, did you not, that one of the partners, Mr. Maundrell, was the person who kept the books of the Menlo Club? A. Yes.

Q. Did you at any time, you or any of your representatives, state to Mr. Maundrell that any particular item in the affairs of the Menlo Club had been treated improperly from a tax accounting point of view in the preparation of the Menlo Club return by Mr. Maundrell or Mr. Ayton?

Mr. Campbell: Objected to as immaterial what he told or failed to tell Mr. Maundrell.

The Court: I think it is. Objection sustained.

Q. Well, let us take the Day-Night Cigar Store. You knew, did you not, that Mr. Maundrell was bookkeeper for that concern during the time he was employed? [2188]

A. Mr. Slater was the bookkeeper for most of the period covered here.

Q. Mr. Slater first and later Mr. Maundrell, is that right? A. Yes, that is right.

Q. Did you discuss the affairs of the Day-Night Cigar Store with either of those men?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Do you know who the bookkeeper was for 110 Eddy Street?

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(Testimony of Ray Weaver.)

A. Mr. Slater during most of the period covered here and then I believe Mr. Maundrell.

Q. Did Mr. Slater and Mr. Maundrell sit down with you and your representatives and discuss matters of the 110 Eddy Club every time that you requested them?

A. I have no recollection of their refusing.

Q. They gave you every possible cooperation, did they not? A. Yes.

Q. And they turned over to you all the records they had, so far as you know?

A. So far as I know, they did.

Q. And they turned over promptly when requested? A. Yes.

Q. Was that also true of Mr. Kyne?

A. Yes sir.

Q. And was that also true of Mr. Ayton? [2189]

A. Yes it was.

Q. Was that also true of the other representatives of these concerns that you said that you talked to?

A. That is true. Of course, none of them had any knowledge of the cash on hand or Mr. Remmer's personal finances.

Q. By cash on hand you are referring to cash that might have been on box No. 48 in the safety deposit box? A. Yes, or in any of the safes.

Q. And you know, do you not, that Willie Kyne had access to box 48 in the safe deposit box of the Bank of America?

A. Yes, but he could give no information as to cash on hand at any particular date.

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(Testimony of Ray Weaver.)

Q. The fact is he told you there was no record which would show that?

A. Yes, and he refused us access to the box also.

Q. When was that? Was that after 1946?

A. Yes.

Q. So that looking at the box after 1946 you wouldn't be able to determine how much was there during any of this indictment period?

A. No, unless the amount remained constant and some record was there.

Q. And you know, do you not, that Mr. Kyne made frequent entries into that box during the entire period covered by this indictment? [2190]

A. I don't know how frequent they were.

Q. You examined those records, did you not?

A. I don't recall whether any records of entries were examined or not.

Q. You don't know what records of entries of the bank were *you* examined by your staff?

A. I do not recall that.

The Court: We will take our recess now for 10 minutes.

(Jury and alternate jurors admonished and recess taken at 11:00 a.m.)

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, the date of this conference in Mr. Thatcher's office has slipped my mind. It was in 1948, I believe. Will you give us again the date?

A. April 8, 1948.

Q. And that conference had been arranged pursuant to prior communications between you and Mr. Thatcher?

A. I believe it was between myself and Mr. Kyne.

Q. And then pursuant to the communications between you and Mr. Kyne, you and your associates appeared in Mr. Thatcher's office, is that [2191] right? A. Yes, that is right.

Q. Do you remember what time of the day this was?

A. I believe it was in the morning. I have a memorandum of the time somewhere in my papers.

Q. Would you get that?

Mr. Campbell: I suggest it is immaterial.

Mr. Avakian: If he can refresh his recollection, I think it is proper for him to refer to it.

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(Testimony of Ray Weaver.)

The Court: Suppose we postpone that for the time being. He can get it during the recess, will that be satisfactory?

Mr. Avakian: Yes, surely, if it will take some time, we can defer it.

A. I believe it is upstairs.

Mr. Avakian: Very well.

Q. You say there was a stenographer, member of the Reno office of the Bureau of Internal Revenue there also? A. Yes, that is right.

Q. Did she transcript the meeting?

A. No, Mr. Thatcher would not permit her to take notes.

Q. She took no notes? A. No.

Q. You and your men also took notes?

A. I made a memorandum of the interview afterward.

Q. How long did this interview last? [2192]

A. I would say approximately 15 or 20 minutes.

Q. Do you remember in what particular building that took place? Let me ask—was it the building in which Mr. Thatcher had his offices?

A. Yes.

Q. And it was in one of the private offices in that suite of offices? A. That is right.

Q. Was it Mr. Thatcher's office, do you know?

A. I believe it was.

Q. Was he the only member of the firm who was present there? A. Yes.

Q. Mr. Woodburn was not present?

A. No sir.

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(Testimony of Ray Weaver.)

Q. Was Mr. Remmer present in the room when you and your associates entered Mr. Thatcher's office? A. Yes.

Q. Was any one else beside himself and Mr. Thatcher present? A. Not that I recall.

Q. Will you state again who was with you beside the stenographer, what other agents?

A. Mr. Morgan, Mr. Harkness and myself.

Q. The three of you? A. Yes.

Q. And you entered the room together, I take it? [2193] A. Yes, that is right.

Q. And then you were all present during this entire conversation? A. Yes.

Q. Do you recall specifically that Mr. Remmer was there when you entered?

A. That is my present recollection, yes.

Q. Do you remember where he was sitting?

A. I believe he was sitting to the right of the room. I remember him distinctly because he was wearing Western boots.

Q. You are quite positive, are you, Mr. Weaver, that Mr. Remmer was there during that conversation that you had? A. I spoke to him.

Q. You are quite positive he was there?

A. Yes.

Q. You are sure you are not mistaken about that? A. Absolutely.

Q. Isn't it a fact that Mr. Thatcher met with you in the absence of Mr. Remmer and had some discussion with you about the case without Mr. Remmer being present in the same room?

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(Testimony of Ray Weaver.)

Mr. Campbell: On this same occasion?

Q. On this occasion? A. Not that I recall.

Q. Isn't it a fact that Mr. Thatcher told you before he called Mr. Remmer into the room he wanted to get some idea of [2194] what the case was about? A. I don't recall that at all.

Q. You say that isn't a fact?

A. I don't recall that. I wouldn't say you were misstating facts.

Q. Isn't it a fact that Mr. Remmer was never in that conference room on that occasion?

Mr. Campbell: Objected to as argumentative, asked and answered.

The Court: Objection sustained.

Mr. Avakian: Your Honor, I can't ask if something isn't a fact?

The Court: You already asked and he said he was.

Mr. Avakian: Isn't it proper to refresh his recollection by asking if something else isn't true? That is proper cross-examination.

The Court: The ruling will stand.

Q. Were you introduced to Mr. Remmer at that time? A. Yes.

Q. Who introduced you?

A. Mr. Thatcher, as I recall.

Q. Well, are you sure of that now?

A. I don't know who else could.

Q. Are you guessing or do you have a definite recollection?

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(Testimony of Ray Weaver.)

A. Well, he is the only one there that knew Mr. Remmer before. [2195]

Q. I am trying to find out whether you are guessing or specifically remember. Which is it?

Mr. Campbell: Oh, I object.

The Court: Objection sustained.

Q. Isn't it a fact that you never met Mr. Remmer prior to the start of this trial?

A. Prior to——

Q. The commencement of the trial of this case?

A. No, that is not a fact.

Q. That is not a fact? A. That's right.

Q. Did you ever meet Mr. Remmer on any other occasion beside this conference in Mr. Thatcher's office? A. I tried to without success.

Q. You never did?

A. No, I could never reach him.

Q. You never met him except that one occasion?

A. That is right. Letters to him were unanswered.

Mr. Golden: The witness doesn't have to volunteer. That is not responsive and I ask it go out.

The Court: That latter part may go out.

Mr. Avakian: May we ask your Honor to instruct the witness to answer questions and not volunteer?

The Court: No, I will not ask any such thing. We will proceed. We will take each situation as it appears. [2196]

Mr. Avakian: I think it is quite evident he volunteers——

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(Testimony of Ray Weaver.)

The Court (Interceding): I don't make rulings—I don't know just how to express my thoughts —I don't make wholesale rulings. I make rulings as situations come on.

Q. Now, would you state the names of the revenue agents who worked with you in connection with the investigation of this case?

A. Excluding Mr. Ezralow, who was assigned to the case before it was received in our office, first there was Mr. Morgan and Mr. Peel.

Q. Pardon me—would you state the assignment of the particular businesses which each of these was assigned to investigate as you go along?

A. There was no particular assignment. Each one worked wherever the occasion demanded.

Q. Was that under your general supervision?

A. Yes.

Q. Would you go ahead and name the rest of the revenue agents?

A. After Mr. Peel went to Korea he was replaced by Mr. Harkness, who continued until the end of the investigation.

Q. Were any other revenue agents assigned to this investigation besides those you have named?

A. No, those were the only ones assigned to it.

Q. And then I believe you stated in direct examination that [2197] special agents worked with you—correct me if I am wrong—were Mr. Whitside, Mr. Miner and Mr. Hemphill?

A. Yes, that is correct.

Q. Were they assigned to this case with you?

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(Testimony of Ray Weaver.)

A. Mr. Whitside was assigned. The others were assigned for particular parts of the case.

Q. Were any other special agents assigned to work with you in connection with any phase of the investigation?

A. That is rather a difficult question to answer because we had collateral investigations in other parts of the country, to which other special agents were assigned, and——

Q. By that, you mean, if you had an inquiry to make in New York, you would request that New York office to assign an agent to develop some information for you?

A. That is right and occasionally we might have minor inquiries to make in the Bay Area and an agent would be assigned for temporary duty.

Q. Aside from that particular type of thing, I take it then there were no other special agents on the case? A. That's right.

Q. Now, you said that the revenue agents and these special agents, whom you have named, worked with you in this investigation under your general supervision. Is it true, Mr. Weaver, that revenue agents concern themselves primarily with the question of the amount of the income and tax liability? [2198]

Mr. Campbell: Objected to as immaterial, what the general practice is.

The Court: Are you talking about this particular investigation?

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(Testimony of Ray Weaver.)

Q. Yes, in this particular investigation, was under his supervision.

The Court: Very well, objection overruled.

A. Yes, that was the primary concern; not the exclusive concern.

Q. I understand that. And the primary concern of the special agents of the Intelligence Division who worked on this case was the matter of determining whether or not there was any intentional fraud, in the event of any tax deficiency that might be found to be due, is that correct?

A. Yes, that is right.

Q. And that is also the general practice in conducting such investigations, is it not? A. Yes.

Q. And did the revenue agents who worked on this case write up reports of the results of their investigation? A. Yes, they did.

Q. Do you know how the revenue agents made that report? Was it a report signed by all, or was it a report they made separately, separate reports?

A. I believe Mr. Morgan and Mr. Harkness combined in working [2199] on all their reports.

Q. They made a joint report then?

A. Yes.

Q. And that report was made to their superiors in the Internal Revenue Agent's office?

A. Yes, that is right.

Q. And copy was furnished to you?

A. Yes.

Q. And that likewise is the regular custom, is it not? A. Yes, that is right.

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(Testimony of Ray Weaver.)

Q. Do you know the approximate date on which Mr. Morgan and Mr. Harkness submitted their report?

Mr. Campbell: Which report are you referring to?

Mr. Avakian: The report that he says they wrote together.

A. I might have a notation of it here.

Q. Are you referring to a document marked for identification?

A. No, this is another memorandum that I have prepared. Their reports were received in our office on August 29, 1949.

Q. You use that document in your hand to refresh your recollection on that? A. Yes.

Q. May I see it please? A. Surely.

Mr. Campbell: May it be marked for identification government's next number in order for identification? [2200]

Clerk: 179 for identification.

Q. Now, you stated, Mr. Weaver, that the revenue agents' report was received in your office on August 29, 1949. Can you tell me the date on which the revenue agents actually made their report?

Mr. Campbell: Objected to as immaterial, if the Court please.

Mr. Avakian: Your Honor, there has been extensive questioning on direct examination as to the scope of this investigation.

The Court: Oh, he may answer the question if he can.

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(Testimony of Ray Weaver.)

A. I presume, due to the fact——

Q. Can you, by referring to prosecution's exhibit 179 for identification, refresh your recollection on that, so you can give it accurate?

A. Yes. The date of the confidential report is April 1, 1949, and of the technical report March 2, 1949. That would be the date the transcript would be submitted for review and typing.

Q. Now, then at the conclusion of your investigation did you likewise submit a report.

A. Yes.

Mr. Campbell: Objected to as immaterial and not within the issues, so incompetent.

The Court: Objection overruled. Answer the question. A. Yes, I did.

Q. And can you refresh your recollection from prosecution's [2201] Exhibit 179 for identification as to the date on which you made your report?

A. Yes, November 10, 1949.

Q. And at that time, or shortly thereafter, the file in the matter was referred to another office, was it not? A. Yes.

Q. And that was the office of Mr. Campbell?

A. That's right.

Q. On what date, if you can give the date to us?

Mr. Campbell: I object to this line of questioning as being immaterial.

The Court: I don't see where it is material. Objection sustained.

Mr. Avakian: Your Honor, we would like to

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(Testimony of Ray Weaver.)

probe further into the scope and what is involved in this examination.

The Court: I can't see where that was covered by direct. The ruling will stand.

Mr. Avakian: May I refer on that——

The Court: (Interceding): The ruling will stand.

Mr. Avakian: Your Honor permitted the prosecution to go at great length into this.

The Court: I said the ruling will stand.

Mr. Avakian: And I won't be permitted to express myself?

The Court: I told you three times no.

Q. After the file was submitted to Mr. Campbell's office, did [2202] you make any further investigation?

Mr. Campbell: Objected to as immaterial.

The Court: Objection overruled.

A. Yes, I did.

Q. And your further investigation commenced approximately when and continued until approximately when?

A. It commenced probably as soon as the first report was submitted and continued until this date.

Q. When you say as soon as the first report was submitted, you mean the report was submitted to Mr. Campbell? A. Yes.

Q. And shortly thereafter you commenced additional investigations?

A. Yes, and continued until the present time.

Q. And actively so?

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(Testimony of Ray Weaver.)

A. Well, not exclusively.

Q. I mean it isn't just a formal matter of investigation pending but you and your associates were actively engaged in working on the case between that time and the present time?

A. That's right. Just the other day we got information——

Mr. Campbell (Interrupting): Never mind. I think you are going into matters not proper. Of course, if counsel wants that, you can answer.

Mr. Golden: I object to that statement. Even Mr. Campbell recognizes——

The Court: I don't know any necessity for the statement. [2203]

Mr. Golden: I object to Mr. Campbell saying, "of course if counsel wants it," words to that effect.

The Court: The jury will not regard these exchanges. I think I have told the jury many times and I think they are only interested in the evidence that goes in here and is submitted.

Q. You listed, Mr. Weaver, a number of particular enterprises and transactions which you and your staff investigated in connection with this case, and in connection with that I believe you referred to refresh your recollection to a 9-page memorandum which has been marked for identification as prosecution's Exhibit 178. So far as you know, have you stated all of the transactions which you and your staff investigated in connection with this case?

A. No, there are probably many others which have not been noted in the files. In other words,

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(Testimony of Ray Weaver.)

we make any inquiries and due to the pressure of other work, we make no notations in the file.

Q. But insofar as matters that you considered material where the case was concerned, have you, to the best of your recollection, listed all the transactions and matters which your staff investigated?

Mr. Campbell: Objected to as referring to something not in evidence. If it is offered in evidence, it is a different situation. [2204]

(Question read.)

Mr. Avakian: I will withdraw that question.

Q. Insofar as the various matters and transactions, concerning which testimony has been presented in this case are concerned, did you list, to the best of your recollection, the transactions and matters which you investigated?

Mr. Campbell: Objected to as referring to a list which is not in evidence. Further, calling for his conclusion as to what is or is not material.

The Court: It seems to me that this question has to do with the make-up, say, of this Exhibit 178.

Mr. Avakian: No, I am not referring to that, your Honor, now.

The Court: Let us have the question. Read it.

Mr. Avakian: Let me withdraw it and state it another way.

Q. I didn't hear you make any statement—and if I am incorrect, correct me—to the effect that you had made any investigation of a loan transaction

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(Testimony of Ray Weaver.)

between Mr. Remmer and Mr. Jeffers. Did you make an investigation of that matter?

A. Yes, I did.

Q. And you recall the testimony of Mr. Maundrell in this case to the effect that he prepared a fifty thousand dollar note from Mr. Remmer to Mr. Jeffers on September 27, 1946?

A. I do not remember the date. I remember he said he prepared such a note, that he didn't know whether or not it had been [2205] repaid.

Q. While we are getting the note so you may examine the note, I will ask you this question—do you recall whether on direct examination you stated whether or not you had investigated that?

Mr. Campbell: That is objected to as——

The Court (Interceding): Objection sustained.

Q. I will hand you defendant's Exhibit A-1, a promissory note dated September 27, 1946, from Elmer L. Remmer to Robert L. Jeffers, in amount of fifty thousand dollars. You saw that note during the course of this trial, did you not? A. Yes.

Q. Do you recall Mr. Maundrell's testimony regarding it?

Mr. Campbell: Objected to as incompetent whether or not he recalls Mr. Maundrell's testimony.

The Court: He has already stated he does, I think.

A. I recall the testimony where he said he prepared this note and didn't know whether or not it had been repaid.

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(Testimony of Ray Weaver.)

Q. In making computation of income for the year 1946, income of Mr. and Mrs. Remmer, on the net worth method, is it not true, Mr. Weaver, that it would be material to know whether or not that note had been repaid by the end of 1946?

Mr. Campbell: Objected to as not within the scope of direct examination, that he made any computation of income on that basis or any other basis. [2206]

Mr. Avakian: This witness has been offered as an expert.

The Court: Objection will be sustained.

Mr. Avakian: Your Honor, I would like to answer the argument.

The Court: Well, I have ruled.

Mr. Avakian: Very well.

Q. Did you, or any member of your staff, make any investigation of that matter prior to the commencement of the trial of this action?

Mr. Campbell: Object to the question as incomprehensible. I don't know to what counsel refers.

The Court: Would you state please to just what you refer?

Mr. Avakian: This transaction between Mr. Jeffers and Mr. Remmer, as evidenced by the note which is in evidence as defendant's A-1 and which the witness holds in his hand.

A. Before the trial if we had any evidence of this fifty thousand dollars——

Mr. Campbell: Just a moment——

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(Testimony of Ray Weaver.)

The Court: The question can be answered yes or no.

Q. Did you make investigation of that matter prior to the commencement of the trial of this case?

A. Well, the investigation led into this matter.

Q. Well, was this matter covered by your investigation prior to the commencement of the trial of this action? A. Yes. [2207]

Q. Can you tell me approximately when?

A. If you will give me the letters from Mr. Semenza introduced here yesterday, I can tell you.

Q. I hand your prosecution's Exhibit 173. Will that refresh your recollection?

A. Yes, it was about November 11, 1949.

Q. And then did your investigations on that particular matter continue over a period of time?

A. Yes, it wasn't continuous.

Q. But over a period of time at various intervals you and your staff made investigation regarding that transaction? A. Yes.

Q. And until what time did that continue?

Mr. Campbell: Objected to as immaterial and incompetent, if the Court please.

The Court: You may answer the question.

A. Well, up to a week or two ago.

Q. In that connection, that is, in connection with that investigation, did you examine the records of the Day and Night office of the Bank of America in San Francisco, with respect to a bank account of Robert Jeffers? A. Yes, I did.

Q. And did you examine particularly the ledger

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(Testimony of Ray Weaver.)

card of his account with respect to the month of September, 1946?

Mr. Campbell: Is the matter in evidence to which [2208] reference is made?

Mr. Avakian: I am asking if he examined the card for that month.

Mr. Campbell: Then I object on the ground not calling for the best evidence. The record of the account is the best evidence.

The Court: You may answer the question.

A. Yes, I did.

Mr. Avakian: I will ask that this document be marked for identification as defendant's Exhibit next in order.

Clerk: C-1.

Q. I will hand you document marked for identification as defendant's C-1, and ask you whether that is a photostatic copy of the document which you examined?

Mr. Campbell: Objected to as no proper foundation laid, calling for his conclusion and not the best evidence.

The Court: May I have the question?

(Question read.)

Mr. Campbell: I submit the original document is the best evidence. He asked if he examined from any record and that is obviously available.

Mr. Golden: Of course, there is no question that the original ledger sheet is better evidence than photostat of it, but all along here, your Honor, we

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(Testimony of Ray Weaver.)

have been stipulating to the use of photostats and unless counsel has some——[2209]

The Court: Objection overruled. He may answer the question.

A. This doesn't seem to have all the figures on it as the one I looked at. Whether this is just a copy of a portion or not, I can't say.

Mr. Campbell: That is the basis of my objection, if the Court please, to the use of that document.

Q. Do you have in your possession here in Carson City a copy of the bank statement which you examined?

Mr. Campbell: Objected to as incompetent.

The Court: Objection overruled.

A. I believe we have the pencilled transcript of a portion of the account.

Q. And could you, by referring to that during the recess, refresh your recollection as to whether or not the photostat before you is a copy of the original document?

Mr. Campbell: I submit this is improper cross-examination, to refresh as to secondary evidence from other secondary evidence.

Mr. Avakian: Of course we can bring the bank people up if necessary, if there is any question——

The Court: You are asking him to do something during recess?

Mr. Avakian: Yes.

The Court: Very well; so there is nothing really before [2210] the Court.

Mr. Avakian: Will you do that during the re-

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(Testimony of Ray Weaver.)

cess, and may the document be released to the witness during the recess for that purpose?

The Court: It may be released to the witness. We will take our recess.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

January 29, 1952, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Campbell: If the Court please, while we are waiting to get started, I would like to inquire—counsel previously stated that they desired to recall Mr. Schriber for further cross-examination and I understand that this is their present intention. I wonder if that could be arranged so he could be called following this witness?

Mr. Golden: We sent word and as a matter of fact I thought he would be here today and I can't control him any more than you can, but he should be here tomorrow.

Q. Mr. Weaver, did you, during the noon recess, examine the files with respect to the photostatic

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(Testimony of Ray Weaver.)

copy of the bank statement [2211] that you have in your possession? A. Yes, I did.

Q. And have you been able to determine whether or not that is a correct copy of the document which you examined?

A. Yes, it is a correct copy of this particular portion. It does not cover all of the elements involved in this particular transaction.

Q. Is it a correct copy of the ledger card for that month? A. It only covers two days.

Q. Did the document which you saw contain any other entries on that same document?

A. Not on those two days.

Mr. Campbell: May I ask a question on voir dire, if the Court please?

The Court: Yes.

Q. (By Mr. Campbell): Mr. Weaver, did you find in your working papers a complete transcript of that bank account? A. Yes, I did.

Q. And calling your attention to the fact that the document which is marked defendant's C-1 for identification refers to a transaction only on the date of September 27, 1946, does the transcription of the bank account which you found contain record of other transactions in September of 1946?

A. Yes.

Mr. Campbell: Now, I will ask to have marked for [2212] identification transcript which you have produced—and, incidentally, does this purport to be a complete transcript of that account from on or about November 25, 1941 to December 17, 1947?

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(Testimony of Ray Weaver.)

A. Yes, it does.

Mr. Campbell: I ask to have this marked for identification.

Clerk: 180.

Mr. Campbell: It may be if counsel had the complete—of course, the photostat of that bank account, my objection is not to the use of the photostat so much as to the completeness of the record even for that month, which merely purports to set forth one or two transactions on the same day.

Mr. Avakian: I might say, your Honor, that the bank has mailed to us, at our request, photostats of Mr. Jeffers' account for a period of several years and the only reason I limited it to the one I produced, to Defendant's C-1, was that the particular ledger card has the transaction that we considered material. We have no objection at all if counsel feels that there are other ledger cards from this account that are material, to allowing them to put in evidence from our supply the bank has given us whatever additional ledger cards they want. I have no objection to that at all, if that is what Mr. Campbell has in mind.

Mr. Campbell: I don't necessarily have anything in mind at this time. [2213]

The Court: There isn't really anything before the Court.

Mr. Avakian: This was precipitated by Mr. Campbell's objection to the use of the photostat and there was some indication from Mr. Campbell that he was not satisfied that this was a full and correct

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(Testimony of Ray Weaver.)

copy and that is why Mr. Weaver was checking his files to see whether there was any inaccuracy that we presented. I don't know what else Mr. Campbell has in mind. If there is any particular thing we can meet—so far as we know, the only thing material in this account in respect to the note from Mr. Remmer to Mr. Jeffers is the record showing withdrawal from Mr. Jeffer's bank account that same day. That was the purpose of our beginning to lay the foundation for this particular document, to show that on the same day of the note, some transaction occurred in Mr. Jeffer's bank account that would have bearing on it.

Q. (By Mr. Avakian): Let me ask you this, Mr. Weaver, with respect to the entries that are shown on this photostat that has been marked defendant's C-1, are you satisfied, from the examination of your own files, that those particular entries are the entries shown on the original card when you examined them? A. Yes.

Mr. Campbell: I will stipulate those entries are shown on the original record of the bank.

Mr. Avakian: Then we will offer defendant's C-1 in evidence. [2214]

Mr. Campbell: To which I object to the materiality at this time.

Mr. Avakian: I will be glad to go into the materiality, if your Honor wants to hear.

Mr. Campbell: No foundation laid as to materiality.

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(Testimony of Ray Weaver.)

The Court: Objection overruled. It may be admitted in evidence.

Mr. Avakian: I would like to read to the jury from defendant's C-1, which is a photostat of ledger sheet account of Robert Jeffers, 672 Eleventh Avenue, San Francisco, California, in Day and Night office, Bank of America, San Francisco, California. The ledger card shows, under date of September 26, 1946, a balance of $32,955.58. On September 27, 1946, there is shown a deposit of $20,000 and on the same date, September 27, 1946, there is shown a withdrawal in amount of $50,000, with a resulting balance of $2,955.58.

Q. Now, did you also obtain, during the noon recess, Mr. Weaver, the memorandum of your conference in Mr. Thatcher's office?

A. No, I wasn't able to locate that. I did refresh my memory by discussion with the other agents present at the time.

Q. You were not able to find the memorandum?

A. No, sir.

Q. Do you wish to change your testimony in any respect? A. I don't believe so.

Q. Do you know where that memorandum is? [2215] A. No, I don't.

Q. Did you make a memorandum at the time?

A. As I recall now, I did, yes.

Q. Do you have any index of your files of any kind that indicates what you did with the memorandum?

Mr. Campbell: Objected to as incompetent.

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(Testimony of Ray Weaver.)

The Court: You may answer the question.

A. Yes, but during the course of the trial there was so much information it was rather difficult to keep track of by indexes.

Q. So you couldn't find it?

A. That is right.

Q. Are you satisfied the search you have made is sufficient, or are there other places where you could look?

A. I am satisfied of my recollection what took place is refreshed.

Q. That wasn't my question. Are you satisfied you have looked for that memorandum as exhaustively as you can, or do you feel it might be helpful for you to make further search for it?

A. That I could not say without searching more.

Q. Then will you search further over night, Mr. Weaver, and give us a report tomorrow if you are able to find that memorandum?

A. Yes, sure. [2216]

Q. Mr. Weaver, in preparing the balance sheet for a business organization, that is a partnership, in order to arrive at the net worth of the partnership, you subtract the total liabilities from the total assets, is that correct?

Mr. Campbell: Objected to as incompetent and not within the scope of direct examination.

The Court: Objection overruled. Answer the question.

(Question read.)

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(Testimony of Ray Weaver.)

A. Yes. You refer in each case to the assets for the partnership and the liabilities of the partnership.

Q. And that computation, however, should be confined to the assets of the partnership and liabilities of the partnership, is that right?

A. That's right.

Q. And when you are computing increase in net worth of a partnership, as a part of the process of computing the increase in net worth of any of the partners of the partnership, should the assets of the partnership be listed at their cost to the partnership?

A. It all depends. If there is a predecessor partnership, in which the same partner was a member at the time of acquisition, that particular cost should be used. If you are a successor of partnership——

Q. Let us assume a newly formed partnership.

A. Yes, then it would be taken at the cost to the partnership. [2217]

Q. And the net worth of the partnership represents the total of the equities of the various partners, does it not?

A. Yes, if by equities you mean their interest in the net assets.

Q. In other words, the dollar value of their equity or investment in the business, is that correct?

A. No, it is not correct, because in a net worth computation there is used to determine the income the assets and value of cost, whereas actually the

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(Testimony of Ray Weaver.)

real value of the assets may be considerably more, particularly during a period of inflation.

Q. Let me qualify my question then. The net worth of a partnership, computed on the basis of assets at cost to the partnership, minus liabilities, represents the investment of the partners' value in dollars cost, isn't that correct?

Mr. Campbell: I am going to object to that question as non-comprehensive, in that it does not even purport to include all the factors which must be taken into consideration in such a matter. May the question be read?

(Question read.)

Mr. Campbell: In other words, investment could mean a variety of things. It could mean initial investment or could include accumulated profits.

The Court: Can you make that a little more specific.

Mr. Avakian: I want the question understood exactly the way Mr. Campbell understands it. It represents the amount of money that the partners have invested in that business, either [2218] through initial investment or through accumulation of profits which have not been withdrawn.

The Court: You may answer the question.

(Question read.)

A. Yes, that is correct.

Q. And if the net worth statement of a partnership is properly and accurately prepared, the

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(Testimony of Ray Weaver.)

amount of the net worth, computing assets at cost, should be equal to the total of the capital accounts of the partners, should it not?

Mr. Campbell: I object to this line of questioning. While interesting in an academic sense, I think it has no competency or relevancy here, where we are seeking to determine specific matters with regard to specific taxpayers and specific partnerships.

Mr. Avakian: Does your Honor care to hear——

The Court (Interceding): The latter part of the question as to capital accounts——

Mr. Avakian: Perhaps I could get that explained first and then go back. May I withdraw the question for the moment.

Q. In partnership accounting, Mr. Weaver, the capital account of a partner is the accounting medium for recording his interest in dollars in that business, is that correct?

Mr. Campbell: Objected to as immaterial to our issues here.

The Court: He may answer the question. [2219]

A. That is correct as far as it goes.

Q. Would you like to add something to it?

A. It doesn't exactly mean that the converse would represent the actual cost of all of the assets of the partnership. One partner might come in being more than the actual original cost of the assets for his share, in which case there would be an element of good will or bonus of a previous partner.

Q. And that would be reflected somewhere in the accounts, would it not?

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(Testimony of Ray Weaver.)

A. Well, it might be reflected in the partnership accounts or partner's accounts of the partners receiving the bonus. It wouldn't necessarily be reflected in the partnership accounts.

Q. With respect to a newly formed partnership, the capital account set up for each partner would be the means of recording the credit that had been given to him for what he had put in the business, if anything, am I correct so far?

Mr. Campbell: Objected to as immaterial to the issues in this case.

The Court: Let him finish the question.

Mr. Avakian: I am asking it piecemeal. The question was completed for this purpose.

(Question read.)

Mr. Campbell: My point is this—it is true this witness is qualified as a certified public accountant. We are here—— [2220]

The Court (Interceding): That is one of the thoughts I had in mind in deciding these questions on your objections. These questions may or may not go to test the knowledge, experience, or efficiency of this witness as an accountant.

Mr. Campbell: Are they directed to his qualifications?

The Court: I don't know. They might all enter into the picture. That is the idea I have in mind.

Mr. Campbell: If they are directed supposedly to the evidence in this case, I submit they are irrelevant and immaterial.

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(Testimony of Ray Weaver.)

The Court: They probably could apply to both. Objection will be overruled.

(Question read.)

A. Well, since you added "if anything" was put in the business, sometimes a credit is given to a man merely for his entrance into the partnership, not for any actual investment. Since you say for his actual investment, if anything, yes, I would.

Q. Then the capital account of the partner is also used, is it not, to show that the partner's share of the income for each as to each year includes the income or loss? A. Yes, that is right.

Q. And that capital account is also used, is it not, to reflect the amount of any drawings which the partner might make [2221] from time to time of that account?

Mr. Campbell: I understand questions of a hypothetical and general nature have no application of what the books and records show here, if I might make that inquiry to the Court?

The Court: Well, I don't know that we have to stop at this time to determine that question. Objection will be overruled.

Mr. Campbell: I renew my objection as to being immaterial and irrelevant.

The Court: Objection overruled.

(Question read.)

A. Yes, that is right.

Q. And then it would be proper accounting pro-

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(Testimony of Ray Weaver.)

cedure, would it not, to show the balance in that account from time to time as either credits or debits were made to him? A. Yes.

Q. In preparing the income tax return of the partnership, is it proper accounting to show on the return each partner's share of the profit of the partnership for that year?

A. Yes, if it is a partnership.

Q. I am asking you assuming a newly organized partnership in these questions. Now then, Mr. Weaver, in the case of a partnership which has a net income, is it proper accounting, in the preparation of the individual return of each particular partner, to show, as his taxable income from that partnership, his [2222] share of the profits for that year, or is it proper to show the amount that he actually withdrew from the business that year?

A. No, if it is a true partnership, it should show his actual share of the profits.

Q. And the amount of his drawings would be immaterial for that purpose?

A. That is right.

Q. It wouldn't matter whether he drew less or he drew more than his share? A. That's right.

Q. Now, Mr. Weaver, so that we can get a clear picture of how these accounting procedures should be applied, I am going to ask you to answer the following series of questions with respect to this statement of facts that I am now about to make to you.

Let us suppose that on May 1, 1945, a man by the

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(Testimony of Ray Weaver.)

name of Remmer, whom we shall call Mr. R, a man by the name of Kyne, whom we shall call Mr. K, a man by the name of Ditto, whom we shall call Mr. D, a man by the name of Nelson, whom we shall call Mr. N, a man by the name of Maundrell, whom we shall call Mr. M, a man by the name of Fricker, whom we shall call Mr. F, and a man by the name of Turner, whom we shall call Mr. T, enter into a partnership for the purpose of operating a business, which had just been purchased by Mr. R. Let us assume further [2223] that Mr. R purchased that business at a price of 175 thousand dollars, which he paid partly in cash and partly in notes, payable at various times in the future. Let us assume further that Mr. R agrees with these other partners to put that business into the partnership. Let us assume further that the other partners do not put up any money or property of their own as a contribution to the partnership. Let us assume further that under the agreement Mr. R is to have a 40 per cent interest in the profits, Mr. K is to have a 15 per cent interest in the profits, Mr. D is to have a 10 per cent interest in the profits, Mr. N is to have a 10 per cent interest in the profits, Mr. M is also to have a 10 per cent interest in the profits, Mr. F is to have a 10 per cent interets in the profits, and Mr. T is to have a 5 per cent interest in the profits. Let us assume further that under the agreement between these various partners, Mr. R is to withdraw 175 thousand dollars before the other partners withdraw any money from the business, and let

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(Testimony of Ray Weaver.)

us assume further that the agreement between these partners is that as to the other six partners, that is, other than Mr. R, each partner agrees to let his share of the profits accumulate in the business, for the purpose of paying for his respective percentage interest in the assets of the business. Now, I realize that is a very lengthy statement and with the Court's permission, I am going to put some notations on the blackboard. [2224]

Mr. Campbell: May we have the question before that is done?

The Court: Finish the question.

Mr. Avakian: I thought before I put the specific question——

The Court (Interceding): I think we had better dispose of the question.

Q. The first question, Mr. Weaver, is this—in setting up the capital accounts of the partners of that business, would it be proper accounting procedure to enter in Mr. R's capital account a credit in the amount of 175 thousand dollars, representing the cost of the business which he was contributing to the partnership?

Mr. Campbell: Objected to as assuming facts not in evidence, not containing, in other words, a proper statement of the evidence as it is presently before the Court; third, it is not proper cross-examination and not within the scope of the direct examination.

The Court: Objection sustained on the latter ground.

Mr. Avakian: Not within the scope of direct?

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(Testimony of Ray Weaver.)

The Court: Yes, sir.

Mr. Avakian: May I call to your Honor's attention that Mr. Weaver——

Mr. Campbell: May I suggest the jury be excused?

The Court: Yes, we will excuse the jury. [2225]

(Jury and alternate jurors admonished and excused at 2:00 p.m.)

(In the absence of the jury. NB 336, pp. 48-63.)

2:50 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Campbell: I think the record, at the time the jury left, showed a question having been asked and objection interposed in behalf of the government. May the ruling be made in the presence of the jury?

The Court: Yes, objection sustained.

Q. Mr. Weaver, I will call your attention to prosecution's Exhibit 165, and perhaps it will be

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(Testimony of Ray Weaver.)

well if I hand that to the witness, if I may, your Honor?

The Court: Yes, sir.

Q. That is the exhibit which you prepared and submitted here as statement of assets, liabilities, net worth and capital accounts of partners in the Menlo Club, is that correct?

Mr. Campbell: Objected to as assuming a fact not in evidence. That was not the evidence.

The Court: Isn't there a title, heading on that?

Mr. Avakian: I was reading the various captions but it [2226] is entitled "Menlo Club, Assets and Liabilities December 31, 1945, to December 31, 1946." You prepared that yourself, did you not?

A. Yes. The capital accounts, however, are per books.

Q. Now, in preparing that exhibit you used various testimony and exhibits which were presented in this case, did you not? A. Yes.

Q. And then in addition, as to certain items, did you exercise your judgment as an accountant to make certain adjustments? I will go into it later if you answer this yes. Answer that yes or no.

A. I couldn't very well answer that without going over each item individually.

Q. Refresh your recollection by looking at the exhibit and then answer the question.

The Court: Let me have the question again.

(Question read.)

A. I believe all the items are based on the ex-

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(Testimony of Ray Weaver.)

hibits and testimony, with the exception of the computation of depreciation.

Q. You also capitalized certain items that were deducted in the returns as current expenditures?

A. Deducted in the returns or the books?

Q. In the books.

A. May I see where they were deducted?

Q. You are unable to answer my question, is that what you [2227] wish to say?

Mr. Campbell: If the Court please——

The Court: Objection sustained.

A. I do not know what improvements you are referring to.

Q. Were there any improvements which you found in evidence in this case which you decided in preparing Exhibit 165 to capitalize as capital items?

A. Only those which were characterized as capital items by Mr. Maundrell's testimony.

Q. I do not recall that Mr. Maundrell characterized anything as a capital item or not. Do you recall that he did? Is that what you base your exhibit on? A. That is correct.

Q. Well, are there figures in Exhibit 165 which represent your own computation based on capitalizing certain items which were not capitalized in the books?

A. The books had no ledger accounts whatsoever for any capital items or for any——

The Court: Will you pardon a suggestion. Suppose you take Exhibit 165 and point out to him

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(Testimony of Ray Weaver.)

those matters which you think were to be exercise of his judgment as an accountant.

Mr. Avakian: I intend to do that, but I wanted preliminarily to get a statement that he had exercised judgment I will defer to your Honor's suggestion. [2228]

The Court: No, it is just a suggestion.

Mr. Avakian: I wanted to get preliminarily in response to my question as to whether or not he had in certain instances exercised his judgment.

Mr. Campbell: May the witness finish the answer?

(Question and answer read.)

A. They contain only capital accounts for some of the partners and therefore I can't quite understand your statement of items that were not capitalized in the books.

Q. You do not understand my question?

A. Because actually nothing was capitalized in the books.

Q. But you did, in preparing your books, capitalize certain items, did you not? A. Yes.

Q. And that was based on your analysis and judgment as an accountant, isn't that correct?

A. Well, I based it on, I believe, Mr. Maundrell's testimony as to what the items represented.

Q. But Mr. Maundrell simply stated what the items were. He did not state they were capitalized or current?

A. Perhaps my idea what it represents and

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(Testimony of Ray Weaver.)

yours is different. If some one tells something is capitalized, I would exercise my judgment.

Q. What I am getting at is this—there are, are there not, on your Exhibit 165, certain figures which represent your own [2229] computations as to what should be shown as correct asset figure for those particular items?

A. Well, I still think I based on Mr. Maundrell's testimony as to what they represent.

Q. Do you agree with that?

Mr. Campbell: I object to that.

Q. What is your judgment on it?

The Court: Objection sustained.

Mr. Campbell: I object to that.

The Court: Objection sustained.

Q. Then you omitted from liability a liability shown in the books of the Menlo Club to one Frank Schriber, did you not? A. Yes, that is right.

Q. And I believe you testified that you omitted that liability on instructions of Mr. Campbell?

A. That is correct.

Q. When did Mr. Campbell give you that instruction?

A. During the course of the preparation of this statement.

Q. Well, to refresh your recollection, this was offered, I believe, on January 11th when you were on the witness stand.

Mr. Campbell: I submit it is immaterial as to the exact date when he got such instructions.

The Court: You may proceed.

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(Testimony of Ray Weaver.)

A. It was during the week preceding the presentation of the statement. I can't recall exactly. [2230]

Q. The preceding week-end. Do you recall whether that instruction from Mr. Campbell was given to you before or after Mr. Schriber testified in this case?

Mr. Campbell: Objected to as immaterial, if the Court please.

The Court: Objection overruled. Answer the question.

A. I can't exactly recall when Mr. Schriber testified here.

Q. I believe it was before Christmas. Would that aid you in your recollection?

A. Then it was probably after.

Q. And was it before or after Mr. Maundrell testified in this case?

Mr. Campbell: Object to this as immaterial.

The Court: Objection overruled. Answer the question.

A. It may have been after. As I recall, he was still here after the Christmas recess.

Q. He was here between Christmas and New Years.

A. However, the fact as to the statement is immaterial.

Mr. Avakian: I ask that be stricken.

The Court: It may go out.

Mr. Avakian: Would you confine yourself to answering questions, Mr. Weaver?

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(Testimony of Ray Weaver.)

Q. Were there any other persons present at the time Mr. Campbell gave you that instruction?

A. There are usually other people present. Who they are at [2231] any particular time, I can't recall.

Q. Did Mr. Campbell give you this instruction following an inquiry from you to him as to what you should do with respect to that liability item?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Did you go to Mr. Campbell and tell him that you didn't know how to treat this and ask his advice?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Mr. Avakian: Your Honor, here is an adjustment made by an expert witness——

The Court: The ruling will stand on that question.

Q. At the time Mr. Campbell gave you this instruction, did you make any statement to him as to whether or not the manner of treatment of this liability that he instructed you to use was correct from an accounting sense?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: Objection sustained.

Q. At the time Mr. Campbell gave you this instruction, did you make any statement to him to the effect that if you did make the adjustment that he instructed you to make, then proper accounting

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(Testimony of Ray Weaver.)

procedure would call for making of certain other adjustments?

Mr. Campbell: Same objection. [2232]

The Court: Same ruling.

Q. Is it customary accounting procedure for an accountant, who is preparing a net worth statement of a partnership, to take instructions from non-accountants as to the manner in which they should prepare the net worth statement?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Avakian: Your Honor, I should like to show the proper accounting procedure was not followed in this instance.

The Court: The objection is sustained.

Q. Now, you stated on direct examination that an accounting justification for omitting the liability to Gene Schriber from the net worth statement of the Menlo Club was that the transaction, by which the Menlo Club was purchased from Mr. Schriber, was one entered into by Mr. Remmer personally and the liability should be by him personally, do you recall that testimony?

A. Yes. I do not believe I stated that as an accounting justification. It seems to me it would be a legal interpretation.

Q. You thought that was a legal rather than an accounting justification? A. Yes.

Q. I call your attention to this testimony from your direct examination on January 11th, page 2092, and ask you if you recall these questions and answers—question by Mr. Campbell:

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(Testimony of Ray Weaver.)

"Q. All right, we will come to that in a moment. [2233]

"Now, Mr. Weaver, as an expert accountant, will you state the reason why the theory for the elimination from the schedule of assets and liabilities of the Menlo Club of the liability to Gen. Schriber?

"A. The liability was eliminated from the Menlo Club because the testimony of Mr. Schriber indicated all his dealings were with Mr. Remmer personally and that Mr. Remmer had in fact pledged or deeded over on a trust deed to Mr. Schriber as security for the liability some of his personally-owned real estate."

Do you recall that question of Mr. Campbell's and your answer? A. Yes.

Q. But it is your present recollection that you thought you were not testifying as an expert accountant, but were merely stating a legal justification for that?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Let me ask you this—was the explanation which you gave in answer to that question on January 11th given by you as an accounting explanation or as a legal explanation?

Mr. Campbell: Objected to as incompetent, the explanation which he gave.

Mr. Avakian: It is testing the correctness of the accounting of this exhibit.

Mr. Campbell: It is an attempt to have the witness [2234] characterize his answer.

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(Testimony of Ray Weaver.)

The Court: Objection sustained.

Mr. Avakian: I will read to you the next two questions and two answers, on pages 2092 and 2093 of the transcript. Question again by Mr. Campbell:

"Q. So that accountingwise it was treated as a personal liability of Elmer?

"A. That is correct.

"Q. Rather than of the Menlo Club, for that purpose? A. That's right."

Do you recall those questions and answers?

A. Yes.

Q. And do you wish at this time to change either of those answers?

A. No. The accounting treatment is as stated there. Every accounting treatment must, to some extent, be based upon a legal interpretation. I do not see where you can make a distinct dividing line between law and accounting, because accounting treatment necessarily rests on the proper interrelations which are legal matters and as accountants, the accounting treatment must follow whatever legal interpretation they give to certain facts.

Q. So that when Mr. Campbell asked you to give an explanation as an expert accountant, you were really not stating an accounting answer, but rather a legal answer? [2235]

Mr. Campbell: Objected to as argumentative and incompetent.

The Court: Objection sustained.

Q. If the Menlo Club was acquired by Mr. Rem-

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(Testimony of Ray Weaver.)

mer from Mr. Schriber in a transaction which was personal to Mr. Remmer and which was not a transaction of the Menlo Club, then will you state, as an accountant, what should be shown as the cost to the Menlo Club of that asset, the Menlo partnership?

A. That depends entirely upon the agreement between the partners, if any, as to what acquisition of cost should be to the partnership.

Q. I notice in Exhibit 165 you show the cost of the business to the Menlo Club partnership as 175 thousand dollars. Would you explain why you treated the cost of the Menlo Club to the partnership as 175 thousand dollars, in view of your statement that you considered the transaction with Mr. Schriber as a transaction with Mr. Remmer personally, not a partnership?

A. Because as a matter of fact we do not consider this as a true partnership in every sense. Therefore, it did not make actually any difference, from the standpoint of computation of the correct income, whether the liability was treated as part of the Menlo Club liability or part of Mr. Remmer's personal liability.

Q. Now, in representing to the Court and the jury here that you have prepared in Exhibit 165 a net worth statement of the [2236] Menlo Club, partnership, you assumed, at least for that purpose, did you not, the Menlo Club was a partnership?

A. No, sir. This says Menlo Club assets and liabilities.

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(Testimony of Ray Weaver.)

Q. Did you represent this as a net worth statement of the partnership? A. I——

Mr. Campbell: Just a minute—I object to that as incompetent.

The Court: Objection sustained.

Q. Whose net worth does Exhibit 165 represent?

Mr. Campbell: Objected to—the document speaks for itself as to what it is.

The Court: He may answer the question.

A. I believe it represents Mr. Remmer's.

Q. But you characterize it as the Menlo Club, is that right?

A. Businesses are often carried on under fictitious names, yes.

Q. Now, then, if this Exhibit 165 represents the net worth of Mr. Remmer individually rather than any partnership, will you tell us why you did not list the liability to Mr. Schriber, which you said was a personal liability of Mr. Remmer, as a liability on this exhibit?

A. Because it made no difference whether it was listed here or in his personal net worth. It didn't make a cent of difference because whether or not you want to enter on this sheet, on the sheet containing his personal assets and liabilities, [2237] makes no difference in the result.

Q. As I understand it—correct me if I am wrong—the reason you treated this Exhibit 165 as Menlo Club assets and liabilities, was that you were taking a particular business of Mr. Remmer's which

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(Testimony of Ray Weaver.)

you considered solely his business, and setting up assts and liabilities of that particular business, is that right? A. That is right.

Q. Now, in preparing a net worth statement, that is a statement of assets and liabilities, of a particular business of an individual, is it not proper accounting procedure to list in that statement all of the liabilities that relate to that business?

A. It depends somewhat on facts. It depends whether or not they actually are liabilities relating directly to the business or liabilties only of the individual. As far as this is concerned, I would be very happy to put that in here and take it off the personal liabilities, because it really is just an academic matter.

Q. You have not presented here any exhibit of personal liabilities and assets of Mr. Remmer?

A. No, that is correct.

Q. So you can't change in the other exhibit?

A. I believe it could be arranged.

Q. I mean there is none in evidence?

A. No, not yet.

Q. Now, if you listed on Exhibit 165 the liability to Mr. [2238] Schriber at the end of 1945 and also at the end of 1946, the net worth figure shown on Exhibit 165 would be reduced by the amount of the liability on those respective dates, would it not?

A. Yes, but I would also remove it from his personal net worth and therefore increase the net worth by precisely the same amount.

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(Testimony of Ray Weaver.)

Q. Let us not talk about an exhibit not in evidence. A. You can't avoid it.

Mr. Golden: You can avoid it all right, your Honor.

The Court: There is no question before the Court.

Mr. Golden: It is very easy to avoid.

The Court: He has answered the question.

Mr. Golden: I ask his remark, "You can't avoid it," go out as not responsive.

The Court: It will stand.

Mr. Golden: I will assign it as error.

Q. Mr. Weaver, did you hear Mr. Schriber's testimony in the court room that at the end of 1945 there was still due and owing to him from Mr. Remmer, on account of the purchase of the Menlo Club, the amount of $125,000? A. Yes.

Q. Would you tell us, then, what the net worth of the Menlo Club would be at December 31, 1945, if you adjusted your Exhibit 165 by showing that liability of $125,000 to Mr. Schriber on that [2239] date?

A. It would be 125 thousand dollars less than shown here.

Q. And you have shown what figure as the net worth on that date? A. $183,647.94.

Q. So that would be reduced then, would it not, to the figure of $58,647.94?

A. That is right.

Q. And did you hear Mr. Schriber's testimony that at the end of 1946 there was still due and

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(Testimony of Ray Weaver.)

owing to him from Mr. Remmer on account of the purchase of the Menlo Club the sum of 75 thousand dollars? A. Yes.

Q. And would you tell us, then, what the net worth of the Menlo Club would be on Exhibit 165 if you subtracted from the net worth figure of $192,-836.47 shown thereon that liability of 75 thousand dollars?

A. It would be 75 thousand dollars less.

Q. Can you give us the figure? It would be $117,836.47, would it not?

Mr. Campbell: We will accept counsel's statement.

A. That is right.

Q. In computing net income on the net worth method, Mr. Weaver, it is true, is it not, that you ignore any expenditures which are deductible as deductions under the income tax law?

Mr. Campbell: I object to that as not proper cross-examination. [2240]

The Court: I don't know. You talked on direct examination about investigations he made in different phases. Objection will be overruled.

A. I wouldn't say—there are two general methods by which you can take into account the increase in net worth in determining income. One is to add to the increase of net worth federal income taxes paid, living expenses and any other non-deductible expenditures, in order to arrive at the correct income for purposes of return. You might also add thereto all of the deductible expenditures

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(Testimony of Ray Weaver.)

and then deduct them again and you arrive at the same result.

Q. That is what I say, in computing the net income any expenditures which are deductible are immaterial, isn't that correct?

A. That's right.

Q. In computing net income on net worth method, is it important to determine whether you are using the cash receipts and disbursements method of accounting rather than the accrual method of accounting? A. Yes.

Q. So that we may all understand those terms, under the cash receipts and disbursements method, income is considered to have been received at the time that the money actually comes to the taxpayer, isn't that correct, at the time he actually receives it? [2241]

A. Generally, yes.

Q. And expenses are considered to be actual expenses at the time they are actually paid, isn't that correct? A. Generally speaking, yes.

Q. Under the accrual method of accounting, income is considered to have been received by the taxpayer at the time that he acquires a legal right to receive it, isn't that true?

A. Well, generally speaking, yes.

Q. In other words, then, to use an example to clarify that—if I sell a particular item as personal property, let us say, to you in December of 1951 and you agree at that time to pay me a thousand dollars for it and then you actually paid me the fol-

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(Testimony of Ray Weaver.)

lowing January in 1952, under the cash receipts and disbursements method, I would be considered to have received that money in January, 1952, would I not?

A. If you are speaking of the sale of personal property, there might be some distinction there, because sales of capital assets wouldn't necessarily come under cash and accrual methods.

Q. With that clarification, that would be true; I would be considered to have received that money from you on cash receipts and disbursements method in January, when you actually paid it?

A. Yes.

Q. If instead I was on the accrual method of accounting, I would be considered to have received that money in December of [2242] 1951 when you agreed to pay it, isn't that right?

A. Well, there is sometimes a slight distinction between the legal and accounting usage. For example, you might actually receive legal title by purchasing some goods FOB shipping point, which would actually be received the following year. Actually your legal title arose from the preceding year, but from accounting standpoint it would not be recorded until the receipt of the goods in the following year, so, with some exceptions like that, generally speaking that is right.

Q. Let us assume I deliver in December and you agree to pay for the purchase but do not actually pay until the following January, under the ac-

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(Testimony of Ray Weaver.)

crual method I would be considered to receive that money in December, would I not?

Mr. Campbell: Objected to as incompetent. There are so many elements to be considered and I think they are not within the issues here.

The Court: He may answer this question.

A. If you take the matter of personal property, you get no question of personal assets. If you restrict your statements to sales of retail sales, that would be something to which hardly any exception could be taken.

Q. Let us take a retail store as an example first. A merchant who sells merchandise in a retail store to a customer on a charge account basis, shall we say, and delivers merchandise to the customer in December, 1951, enters it in the charge [2243] account and then the customer comes in in January and pays the bill. If that merchant were on a cash receipts and disbursements basis, he would not treat that money as income until he received it in January?

Mr. Campbell: I object to the question in that form because it is obvious a merchant could not be on a cash receipts and disbursements basis.

The Court: You may answer the question.

A. Well, if it is on cash basis, that is the time it would be taken into income, yes.

Q. If he were on an accrual basis, he would take it into income in December, at the time he made the sale, isn't that right? A. That is right.

Q. And he would have to report it as income

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(Testimony of Ray Weaver.)

in December even though he didn't get it until the next year? A. Yes, that is correct.

Q. And when he got it the next year, being on accrual basis, he wouldn't report it again the next year, he would already have reported it?

A. That is right.

Q. With that preliminary explanation as to the distinction between cash receipts and disbursements basis and accrual basis, the question is, in computing income on net worth method it is important, is it not, in setting up the assets [2244] and liabilities to determine whether you are setting them up on a cash method or on accrual? Do you understand the question?

A. It is impossible to set up—well, let us have your question again.

Mr. Avakian: I will reframe it.

Q. In computing the net income of a taxpayer on net worth method, if there was money owed to him on account of business transactions which he had had at the end of the period covered by your net worth computation, the result which you would reach would be different if you used the cash method than if you used the accrual method, would it not?

A. Yes, the result in the two methods should be different. It might turn out to be the same in some instances.

Q. Let us go back to this illustration that you suggested of the merchant. If you were computing the income of that merchant on net worth method

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(Testimony of Ray Weaver.)

as of say December 31, 1946, and if on December 31, 1946, that merchant had come to him on charge account sales ten thousand dollars in money, if you were using the accrual method in your net worth computation, you would set up that ten thousand dollars accounts receivable as an asset, would you not?

Mr. Campbell: Objected to as assuming facts not in evidence, incompetent and immaterial.

The Court: You may answer the question.

A. If he were on accrual basis? [2245]

Q. Yes.

A. You would set up accounts receivable as an asset?

Q. Yes. A. At the end of the year?

Q. That is my question.

A. That is true, of course, if that is not considered in any preceding year when you may have accounts receivable precisely the same amount, which might offset those, so I say there could be a situation where there would be no difference in income under any method.

Q. As to any particular time that you were making net worth computation, you would include the accounts receivable if the taxpayer were on accrual method? A. Yes.

Q. But you exclude accounts receivable if the taxpayer were on the cash method, would you not?

A. Not necessarily. It depends what the accounts receivable arose from.

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(Testimony of Ray Weaver.)

Q. I am talking about this merchant who has sold this merchandise on credit.

Mr. Campbell: That is the basis upon which I make my objection—it is immaterial and incompetent.

The Court: I think so.

Mr. Avakian: We are using an example exactly parallel as to the testimony of this [2246] witness

The Court: He is about to answer the question.

(Question read.)

The Court: Let him complete the answer.

A. For example, if accounts receivable arose from the assets purchased by a related business, it would be improper to exclude the accounts receivable from the balance of the related business. Do you understand my statement?

Q. If accounts receivable arose from the credit extended to customers in the course of a business, then on the cash method you would exclude those accounts receivable in computing the net worth as of that time?

A. If they arose from extension of credit for the sale of merchandise. If they arose from the extension of cash loans, the situation would be different.

Q. What is your answer as to the first view that you stated?

A. If they arose from the sale of merchandise, then the accounts receivable would not be set up.

Q. Now, in preparing Exhibit 165, the assets

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(Testimony of Ray Weaver.)

and liabilities of the Menlo Club, did you use the cash receipts and disbursements method or did you use the accrual method?

A. Mostly the cash receipts and disbursements method. It is impossible to secure an accurate picture by sticking to any one particular method specifically.

Q. As to which items did you use the cash receipts and disbursements method and as to which items did you use the accrual [2247] method in preparing Exhibit 165? Go down each of the items in the exhibit and give us your answer.

A. I can't do it just like that. Some of these items are composed of a number of different elements.

Q. Would it take you some time to work that out, Mr. Weaver? If so, I will pass that.

A. Yes.

Q. Let me ask you this—I call your attention to prosecution's Exhibit 89 for identification, which is the original partnership return of the income of the Menlo Club for the year 1945, and I call your attention particularly to item 4 on the 4th page, which states, "check here this return was prepared on cash or accrual basis." Did you notice that particular item in the course of your examination?

A. Yes, I did.

Q. And the check there is that that was prepared on the cash basis, is that correct?

A. That is where the check is. It is not strictly accurate.

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(Testimony of Ray Weaver.)

Q. That is what the check is on the return?

A. Yes.

Q. And I call your attention to prosecution's Exhibit 90, which is the original partnership return of income of the Menlo Club for the year 1946, and I call your attention to item No. 5 on the third page, "check whether this return is prepared on cash or accrual basis," and ask you whether that likewise [2248] shows it was prepared on cash basis?

A. That is what the check shows, yes.

Q. And then I will show you defendant's Exhibit "Y," which is amended partnership income return of the Menlo Club for the year 1945, and ask you whether on question 4 on page 4 there is likewise a check mark indicating that the return was prepared on the cash basis?

A. That is what the check mark states, yes.

Q. And I show you prosecution's Exhibit 91, which is amended partnership return of income of the Menlo Club for the year 1946, and ask you whether question No. 5 on page 3 has check mark indicating that that return was prepared on the cash basis?

A. That is what the check mark shows.

Q. Is it your opinion, as an accountant, that the returns of the Menlo Club should have been prepared on some other basis than cash basis?

Mr. Campbell: Objected to as incompetent, not within the scope of direct examination.

The Court: Objection sustained.

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(Testimony of Ray Weaver.)

Mr. Avakian: Your Honor, he has testified he used accrual basis in part in preparing Exhibit 165 and in view of the fact——

The Court: You may answer the question.

A. The return states it was determined on cash basis which is inaccurate. It was not prepared wholly on cash basis, since it includes [2249] inventories.

Q. Did you, or any of the members of your staff, in any of your discussions with either Mr. Ayton, the public accountant, or Mr. Maundrell, state to them that in your opinion the return of the Menlo Club should be prepared on some basis other than the cash basis?

Mr. Campbell: Objected to as calling for a purported conversation after the fact; has no materiality here whether they did or did not make such statement?

The Court: Objection sustained.

Mr. Avakian: Your Honor, there has been extensive examination, inquiries made, talks had, subjects covered, in their examination and we would like to show that the things that are being charged here as fraudulent——

The Court: The ruling may stand.

Q. I will call your attention to Exhibit 165, the first item is designated "Cash on hand bank roll, poker sheets Exhibit 114A," and for December 31, 1946, you have the item of $10,003. Would you show me the particular sheet, preliminarily, of Exhibit 114A on which that item appears, and then I

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(Testimony of Ray Weaver.)

will ask you a question. You are referring to page 2 and you are referring to the item of "New Top, $10,003," is that correct?

A. Yes, that is right.

Q. And that is the basis for the entry on Exhibit 165 that cash on hand bank roll on December 31, 1946, was $10,003, is that correct? [2250]

A. That is right.

Q. Did you hear the testimony of Mr. Maundrell in this case that the bank roll figures shown on Exhibit 114A included the amount of money which was owed to the Menlo Club on markers?

A. Yes; he also has testimony that the markers represented advances in cash.

Q. And did you recall his testimony that the names and amounts in the lower right-hand corner of these poker sheets, which are in evidence as Exhibits 114, 114A and 114B, represent the markers owing to the Menlo Club?

A. Yes; and also his testimony that they were considered to be cash and part of the bank roll.

Q. And the amount shown as the total of the markers due the Menlo Club on December 31, 1946, according to page 2 of Exhibit 114A, is $6,770, is that correct?

A. That is on the sheet, yes.

Q. So then, would it not be correct to say, Mr. Weaver, that on December 31, 1946, the bank roll of the Menlo Club consisted of $6,770 in markers and $3,233 in cash?

A. If you want to say that way, it really doesn't

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(Testimony of Ray Weaver.)

make any difference. They have testified that the markers were treated as part of the bank roll and we tried to follow that determination rather than change it.

Q. But the bank roll figure you have designated as cash consisted then part of cash and part markers, is that correct? [2251]

A. That is right.

Q. And if you have markers in amount of $6,770, treated as accounts receivable of the Menlo Club, arising in the course of its business dealings with its customers, then on the cash method of accounting, would you not, as a matter of proper accounting procedure, exclude those accounts receivable in computing the net worth of the Menlo Club, for the purpose of computing the net income?

A. No, sir.

Q. You would not?

A. The Menlo Club is not selling.

Q. The Menlo Club—you are aware of the fact that the Menlo Club was conducting a card room?

A. It was not selling any product. It was advancing cash for such markers.

Q. Can you answer my question?

Mr. Campbell: I submit he has answered it.

(Question read.)

Q. May we have that question answered?

The Court: Yes, you may answer that question.

A. That is a card room where people were charged for playing cards. It isn't selling.

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(Testimony of Ray Weaver.)

Q. Do you recall the testimony of Mr. Maundrell and Mr. Kyne that these markers represented obligations of players of the Club who played there, lost money, and were unable or unwilling [2252] to pay their losses and so they put in a marker with the Club instead?

Mr. Campbell: Objected to as assuming facts not in evidence.

The Court: Objection sustained.

Mr. Avakian: Is there any doubt, your Honor, that was their testimony?

The Court: Yes.

Mr. Campbell: That was my objection.

Mr. Avakian: May we have an opportunity tomorrow to show your Honor the testimony from the record?

The Court: Yes.

Mr. Avakian: We will defer this question until then.

Q. Now, you state in Exhibit 165 that the bank roll of the Menlo Club on December 31, 1945, was ten thousand dollars and the reference is Exhibit 114A. Will you show me the particular entry on Exhibit 114A which contains that figure?

A. Right there in their poker sheets in evidence.

Q. Not in Exhibit 114A?

A. I may have another exhibit.

Q. Yes, there are. I gave you that because that is what your Exhibit 165 said. I will hand you Exhibits 114 and 114B also.

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(Testimony of Ray Weaver.)

A. Apparently that was meant to refer to 114 and 114A.

Q. You are handing me Exhibit 114 as the exhibit which shows the amount of the bank roll, is that right? [2253] A. Yes.

Q. And which of the two sheets is the one that you used? A. The first sheet.

Q. Which is dated January 1, 1946, is that correct? A. That is right.

Q. And your Exhibit 165 is incorrect in designating 114A; should also designate 114?

Mr. Campbell: I think inspection of the exhibit shows 114 dash A and he has stated he meant to refer to 114 and 114A. I think the record is clear.

Mr. Avakian: Mr. Campbell's statement is incorrect. There is no dash there. It is 114 parenthesis A parenthesis. Do you stand corrected?

Mr. Campbell: No, I think the record speaks for itself.

The Court: Let us move along.

Q. Mr. Weaver, will you tell us is there any dash between 114 and the letter "A"?

A. I probably omitted it in the schedule.

Q. Is there one there?

A. No. Shall I add one?

Mr. Avakian: Your Honor, I think we should have it correct. Will it be all right for the witness to add the designation?

The Court: He may do so.

Q. Now, in Exhibit 114 there is shown as BR

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(Testimony of Ray Weaver.)

ten thousand dollars [2254] on 1-1-46 and I assume that was the amount on December 31, 1945?

A. We had no receipts in 1945. All the 1945 receipts were destroyed.

Q. So you used the same figure?

A. That is correct, beginning of the year.

Q. On that same exhibit also are markers in amount of $8,503?

A. That is the amount on the sheet, yes.

Q. So that the bank roll figure of ten thousand dollars really consists of $1497 in cash and $8503 in markers?

A. If those figures are right.

Q. Those are the figures you used, aren't they?

A. No, I used just the one figure.

Q. You stated in your direct examination, with regard to the improvements which you capitalized in Exhibit 165, that another agent had a schedule of the specific items that entered into that and you were going to produce it later. Do you have that now?

A. My recollection is that my testimony there referred to the detail of the accounts receivable.

Q. Which item is that?

A. That is the second item.

Q. That is "Accounts recivable and advances for purchase of equipment for Mr. Remmer's office, 50 Mason Street"? A. Yes.

Mr. Campbell: I think that schedule is in evidence. [2255]

Mr. Avakian: That is Exhibit 174, I believe.

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(Testimony of Ray Weaver.)

Q. Do you have a schedule showing the particular items that are included in improvements which you capitalized in the years 1945 and 1946 in preparing Exhibit 165?

Mr. Campbell: Just a minute—I object to the question in that form because there are two pages—are you referring to accounts receivable?

Mr. Avakian: No; could we have the question?

(Question read.)

A. I believe reference to the exhibits indicated along the side of each improvement would give us those amounts.

Q. What exhibits are you referring to in your statement?

A. 133K, 134, 135, 136 and 132C.

Q. Those are various cancelled checks and check stub books relating to payment for the particular expenditures, isn't that correct?

A. Yes, there might have been these few expenditures that a schedule might not have been prepared with reference to the exhibit.

Q. My question was, for the purpose of determining whether you are able now to tell us the specific improvements which you capitalized in preparing Exhibit 165?

Mr. Campbell: That has been answered. He referred to specific checks. He said the checks would show that, if they could be shown to him. [2256]

The Court: You may answer the question.

A. I have no schedule here. If I could see the checks I could tell you very shortly.

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(Testimony of Ray Weaver.)

Q. Very well. Let me ask you this—do you think it would speed up your testimony if you did this during recess? A. Yes.

Mr. Campbell: I suggest he has a number of things accumulated for Mr. Weaver to do.

The Court: Yes, let us get along with the checks.

Mr. Campbell: I have a schedule here prepared by one of the other agents, might expedite the matter. We can mark it.

Mr. Avakian: May I see that?

Mr. Campbell: May that be given a number for identification?

The Clerk: 181.

Q. I show you prosecution's Exhibit 181 for identification. Mr. Weaver, would you take a look at that and advise us whether that would assist you in expediting your testimony on this point?

A. Yes, it would.

Q. Now, referring first, Mr. Weaver, to the improvements which you capitalized for the year 1945, Exhibit 165 shows the amount as $920 and the reference is Exhibit 133K. Does your schedule before you show what that item consisted of?

A. Yes, 133K refers to check issued to H. C. Evans on November 26, 1945, for equipment for the Menlo Club, in amount of $920. [2257]

Q. Do you recall from the testimony in this case what kind of equipment that was?

A. I believe the testimony is simply that this equipment was for the Menlo Club.

Q. I beg your pardon?

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(Testimony of Ray Weaver.)

A. I believe the testimony is it was simply equipment for the Menlo Club.

Q. You do not know what kind of equipment?

Mr. Campbell: I submit it speaks for itself.

Mr. Avakian: I am asking if he recalls.

A. I can not recall all the words in the transcript, no.

Q. Of course, the question whether that should be treated as current business expenditure rather than being capitalized as a depreciable asset, would depend in part at least on the nature of the property, would it not?

A. If it is testified to as equipment, that in itself characterized it as something having a long term of life. Otherwise it would have been characterized as an expense.

Q. How was it treated on the books of the Menlo Club?

A. We have no regular accounts.

Q. You made an analysis of the disbursements and expenses of the Menlo Club, did you not, you or the men on your staff?

A. Yes. To reply to this particular item, how it is treated, I would have to see the book.

Q. Would you like to look at any particular book? [2258]

A. Yes, I would like to look at the cash receipts and disbursements for 1945.

Q. I will hand you prosecution's Exhibit 128. Is that the book which will assist you? You want reference to the check number?

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(Testimony of Ray Weaver.)

A. No, I see the check right here.

Q. You are referring to what page of that exhibit? A. D-27.

Q. D-27 of Exhibit 128. And how is that entered in the books?

A. This is simply record of checks issued with various account headings for expenses and a general column heading for their payments, which in normal accounting practice——

Mr. Avakian: Just a moment—let us not get into normal accounting practice. How is it entered in this book?

A. Without studying the accounting practice, this column is treated——

Mr. Avakian: Just a moment—if you can not tell me, say so. If you can, will you tell me how it is entered in this particular book of the Menlo Club?

Mr. Campbell: You are asking his opinion—are you asking him to read the entries?

Mr. Avakian: Read the entries, surely.

The Court: I thought that book was brought out for a certain purpose. We have four or five questions. It was brought out for the purpose of aiding this [2259] witness in answering some previous questions, but now it is the subject matter of several questions.

Mr. Avakian: The same question was asked, only he wants to talk about normal accounting practice. My question to him is, can he tell me

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(Testimony of Ray Weaver.)

how this particular expenditure was entered in the books of the Menlo Club?

Mr. Campbell: I submit the answer calls for the opinion of the witness.

The Court: Let the witness answer the question.

A. It was entered in a column which would indicate it to be a capital——

Q. Would you tell us what the column is?

A. Under payments.

Q. Is there anything in that column that says capital expenditures?

A. That is the reason I said you have to understand normal accounting practice to get that.

The Court: We will take a recess.

(Jury and alternate jurors admonished and recess taken at 4:00 p.m.) [2260]

Wednesday, January 30, 1952—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumed the witness stand on further

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, since we adjourned yesterday, did you make a further search of your records and files upstairs in this building for a memorandum

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(Testimony of Ray Weaver.)

of your meeting in Mr. Thatcher's office April 8, 1948?

A. Yes, I did. I was not able to find it.

Q. Are you satisfied now that you looked as much as you can and further search would be pointless? A. Yes, that is right.

Q. When is the last time you saw that memorandum? A. It was at least a year ago.

Q. You don't know whether it became lost before you brought those records here or after?

Mr. Campbell: Objected to as immaterial. He has testified concerning it.

(Question read.)

The Court: You may answer the question.

A. No.

Q. Yesterday, at the close of testimony, Mr. Weaver, we were talking about Exhibit 165 and particularly certain items there on [2261] which you had capitalized. Do you have before you the exhibits that you were reading yesterday?

A. No, I do not have them.

Q. I will get them from the clerk. I will hand you Exhibit 165. We were talking particularly about the item of $920 in 1945 which you capitalized and which you designated in Exhibit 165 as improvements in 1945 Exhibit 133K.

A. Yes.

Q. And I show you the cancelled check, which is in evidence, Exhibit 133K, payable to H. C. Evans & Company on November 26, 1945, in amount of

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(Testimony of Ray Weaver.)

$920, signed Harold H. Maundrell and endorsed on the back, "Pay to First National Bank of Chicago or order H. C. Evans & Company." Does that check represent the particular expenditure which you capitalized in Exhibit 165?

A. Yes, it does.

Q. And I believe you testified that the basis upon which you determined that that particular check should be capitalized was the testimony of Mr. Maundrell, is that correct? A. Yes.

Q. I call your attention to the only testimony which I have been able to find in the record, Mr. Weaver——

A. And I might state the expenditure item in the Menlo Club records.

Q. The records in the Menlo Club do not indicate whether it was a capital or current expenses item, do they? [2262]

A. Yes, it did. The manner in which it was entered indicated that. That was what I was trying to tell you yesterday.

Q. Very well, let us get that exhibit. I hand you prosecution's Exhibit 128. I believe the particular page you were referring to yesterday was D-27, is that correct? A. Yes.

Q. Now, will you tell us what is entered there on that page with respect to this check?

A. Well, with respect to this check, under the date column is November 26 and under "Check No." 1569, under the column "Paid" to H. C. Evans & Company, under the column "Paid out by

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(Testimony of Ray Weaver.)

check" $920. Then there are a number of columns for various expenses and purchases of merchandise for resale.

Q. Is there any entry in those columns with respect to this entry?

A. And salary payments. No. Then there is a column headed under "Payments," name of town, E. R. equipment, and amount paid $920.

Q. Is that the total on that page?

A. Except as appears in the total of columns in which it is entered?

Q. $920 is included in the bottom of the column? A. Yes.

Q. Now, you were about to turn to another page. Is there an entry elsewhere in that book with respect to that item? A. No. [2263]

Q. Now, you capitalized that expenditure, $920, as an asset which should be deducted on a depreciation basis over a period of ten years, is that correct? A. That is right.

Q. Do you know what that equipment was that was purchased with that check?

A. Yes, I believe I do.

Q. What was that equipment?

A. Mr. Maundrell told me informally—not in his testimony here—that that represented 21 tables. He had intended setting up a gambling establishment on the second floor of the Menlo Club.

Q. Twenty-one tables, did you say?

A. Yes.

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(Testimony of Ray Weaver.)

Q. Did you check with the H. C. Evans & Company with respect to that?

A. No, I didn't see any need to.

Q. You did have inquiries made regarding this case in Chicago, did you not? A. Some, yes.

Q. And you knew H. C. Evans & Company was located in Chicago?

A. From the notation on the check, yes.

Q. You made no inquiry of the H. C. Evans & Company records to determine just exactly what was purchased with that check?

A. No, I had no reason to doubt Mr. Maundrell's statement.

Q. Apart from what Mr. Maundrell told you informally, did you [2264] base your decision to capitalize this item on any testimony that was given in this case?

A. Partly on Mr. Maundrell's testimony, I believe.

Q. I call your attention to Mr. Maundrell's testimony on this point at page 1222 of the transcript, the question by Mr. Campbell:

"Q. Let us withdraw that. That is 133J. Now as to the others?

"A. Check 1569 made to H. C. Evans & Company for $920, was for equipment to be used in the Menlo Club.

"Q. That is 133K."

Do you recall any testimony of Mr. Maundrell in this case, regarding this matter of $920 check, other than what I have read to you?

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(Testimony of Ray Weaver.)

Mr. Campbell: Objected to, the record speaks for itself.

The Court: Objection sustained.

Mr. Avakian: I want to find out whether he was relying in preparing this exhibit on any other testimony of Mr. Maundrell. That is all I have been able to find. That is what I am getting at.

The Court: You may answer the question.

A. I looked at Mr. Maundrell's testimony in detail. What there is in respect to this particular item, I wouldn't attempt to recall without again referring to the testimony. [2265]

Mr. Avakian: I would be glad to make this book available to you.

A. It might save considerable time. I might say this entry in the book is sufficient; it is a capital item.

Q. That is sufficient for you? A. Yes.

Q. Now, in respect to the 1946 item of expenditure which you capitalized in total amount of $2,355.16, I believe the total was set forth in the memorandum marked for identification yesterday. It is 181 for identification. Would you like to refer to this to refresh your recollection as you testify, Mr. Weaver? A. Yes, I would.

Q. Very well. Will you give me the first expenditure that enters into that total amount which you capitalized?

A. You are speaking of 1946 improvements?

Q. Yes, that is right. Could you give me the exhibit number of the check so I can find it here?

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(Testimony of Ray Weaver.)

A. Yes.

Mr. Campbell: I think that is set forth on Exhibit 165, 134-5-6.

Mr. Avakian: There are about 30 or 40 checks in that exhibit, Mr. Campbell. I want the particular one that refers to the first item.

A. 134-D. [2266]

Q. Will you tell us what that particular expenditure was as to amount and date and person to whom it was paid?

A. It was paid to Bernhards under date of February 15, 1946, in amount of $830.

Q. What was the next item?

Mr. Campbell: Do you have the check number on that?

Mr. Avakian: The check number, Mr. Campbell, is No. 1811.

A. The next item is 135-I, paid to S. Petersen & Son, under date of 5-10-46, in amount of $232.64.

Mr. Campbell: Check number?

Mr. Avakian: I am looking for it. The check number Mr. Campbell, is 2106.

Q. Do you know what that check was issued for?

A. That was for installation of lavatory at 18 Turk Street.

Q. And incidentally, the preceding check was for a carpet and booths at the Menlo Bar, is that correct? A. Yes, that is right.

Q. And what is the next one?

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(Testimony of Ray Weaver.)

A. 136-A to S. Petersen & Son on 6-15-46, in amount of $356.90.

Q. And that was for expenses in connection with the installation of a new bar at the Menlo Bar?

A. That was installation.

Q. Is that the total cost of it? [2267]

A. I don't know whether it was the total cost or not.

Mr. Campbell: What is the date of that?

A. 6-15-46.

Q. And what is the next item?

A. 136-B to United Studios on 6-24-46, in amount of $105.

Q. And do you know what that was for?

A. That was for installation of Neon tubing in the Menlo Bar.

Mr. Campbell: I didn't get the date or check number.

Mr. Avakian: Check No. 2251, dated June 24, 1946, in amount of $105, payable to United Studios, Exhibit 136-B.

Q. That you say was for Neon tubing?

A. Yes.

Q. Upon what do you base that answer, Mr. Weaver?

A. I believe it was in Mr. Maundrell's testimony. I will have to refer to it.

Q. Let me see if this will refresh your recollection. I will read you Mr. Maundrell's testimony on that point, page 1243 of the transcript—I will withdraw the question.

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(Testimony of Ray Weaver.)

Mr. Campbell: I am going to object to the last question. The matter is in evidence here in plaintiff's 136, which is in evidence, the check book of the company.

The Court: There is no question before the Court. He withdrew the question.

Q. Exhibit 136, which is the check stub book, contains an entry for that check, which states, "Installation of Neon tubing [2268] in bar," is that right? A. Yes.

Q. Will you give us the next item?

A. 136C payable to cash and cashed by Mr. Kyne under date of 7-18-46, in amount of $126.46.

Q. And do you know what that was for?

Mr. Campbell: What was the check number on that?

Mr. Avakian: 2311.

A. That was for purchase of an adding machine.

Q. And you included that in capitalizing here on a ten-year basis? A. Yes, that is right.

Q. What is the next one?

A. 136-D, United Studios.

Q. In amount of how much?

A. $105, on 8-30-46.

Q. And I call your attention to Mr. Maundrell's testimony on that question, page 1243 of the transcript.

"Q. I call your attention to plaintiff's Exhibit 136D, check No. 2426, dated August 30, 1946, payable to the United Studios in amount of $105, and

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(Testimony of Ray Weaver.)

ask you for what purpose that check was issued?

"A. That was for electrical work that was completed in the Menlo Bar on Turk Street." [2269] And that was from page 1243 of the transcript. Is it on the basis of that testimony that you decided to capitalize that item?

A. These were all capitalized either on the basis of Mr. Maundrell's testimony, on the basis of the entry in the check stub book or entry in the record. I can't remember in each instance which one I relied on or whether all were similar.

Q. What is the next item?

A. The next item is 136-E to B. & H. Refrigerator Service on 9-6-46, in amount of $276.89.

Mr. Avakian: Do you want that check number, Mr. Campbell?

Mr. Campbell: I have it, 2436.

Q. Does the check stub on that show for what purpose the check was issued?

A. Yes, it states "Monthly service charge and installation new unit ordered by Joe Silver."

Q. Do you know what portion of that charge was for monthly service charge?

A. No, I do not.

Q. To the extent that the charge was made to a monthly service charge, it would not be proper to capitalize that?

A. No, that is right. I wouldn't have included it if I knew the full amount.

Q. You did, however, include the full amount in capitalizing? A. I did. [2270]

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(Testimony of Ray Weaver.)

Q. Did you make any inquiry of the B. & H. Service Company to determine what was the monthly charge?

A. No, the amount was not great.

Q. That is why you did not make any inquiry?

A. That is right.

Q. What was the next expenditure which you capitalized?

A. 136-F to B. & H. Refrigeration Service on 9-12-46, in amount of $322.27.

Q. What is the number of that check? Do you have it there?

A. I do not have the check.

Q. It is 2465. Do you recall this testimony of Mr. Maundrell with regard to that check, and I am reading from pages 1245 and 1246 of the transcript:

"Q. I call your attention to plaintiff's Exhibit 136F, check dated September 12, 1946, check No. 2465, payable to B. & H. Refrigeration Service, in amount of $322.27, and ask you for what purpose that was issued?

"A. That was also for refrigeration service on the bar, Menlo Bar.

"Q. Wasn't that for a complete new unit?

"A. Well, it is a new unit. There are four or five bills for the new bar installation that we put into the bar.

"Q. Was that the purpose of that check? [2271]

"A. Yes, sir."

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(Testimony of Ray Weaver.)

And then after a few questions and answers on another matter, Mr. Maundrell said:

"May I see the last two checks, please?

"Q. I am handing to you government's Exhibits 136E and 136F.

"A. Check No. 2465, dated September 12th, was charged as repairs and replacements.

"Q. Yes. That is Exhibit 136F?

"A. That's right.

"Q. All right, sir."

Do you recall that testimony of Mr. Maundrell that that check in amount of $322.27 was charged as repairs and replacements?

A. Yes. A complete installation would be capitalized. The check stub itself shows complete new unit.

Q. You know, do you not, that was deducted on the 1946 Menlo Club return as repair and replacement expense?

A. I wouldn't know without checking the figures.

Q. Let me reframe the question. Do you have before you the book that would show how that was entered in the books of the Menlo Club?

A. No, I have not.

Q. Do you have Exhibit 128 before you, or is that for the wrong year?

A. It is not year. [2272]

Q. I show you prosecution's Exhibit 1296, the book of the Menlo Bar for the year 1946, and I call

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(Testimony of Ray Weaver.)

your attention particularly to the entry on a page headed "Payments September, 1946," the first entry on the page is September 12, check No. 2465, paid to B. & H. Refrigeration Service, $322.27, and I call your attention particularly that that amount is entered in column headed "Repairs and Replacements." Do you note that? A. Yes.

Q. Now, does that indicate to you, as an accountant, that Mr. Maundrell, in making the entry in the book, classified this particular expenditure as a repair and replacement expenditure?

A. That is right. I wouldn't necessarily follow that.

Q. Your opinion is that that was incorrect, that it should have been capitalized, is that right?

A. Yes, that is right.

Q. If it were treated as a repair and replacement item, it would not enter into the December 31, 1946, list of assets that you have computed on Exhibit 165, would it?

A. No, nor would depreciation be allowed?

Q. The distinction between a repair and replacement item and a capital item is, in the case of repair and replacement, that is deducted in the year of expenditure, whereas in the case of capital item, that is deducted over the life of the asset on depreciation basis, is that right?

A. Where repairs and replacements are of a minor nature, you [2273] wouldn't capitalize. The distinction between capital and major expenditures is one which would require rather detailed discus-

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(Testimony of Ray Weaver.)

sion. Any replacements which were of major nature, such as a new unit, should be capitalized.

Q. Accountants frequently disagree on the basis as to whether a particular repair item is sufficiently major in importance to be treated as capital rather than current expenditure, do they not?

Mr. Campbell: Objected to as argumentative, immaterial.

The Court: Objection sustained.

Q. Isn't it true, Mr. Weaver, that the determination of whether a particular expenditure is sufficiently large and important to be capitalized rather than being treated as current expense involves, to some extent, a matter of accounting?

A. Theoretically the nature of the item is the only determining factor. As a practical matter, it might be exercise of judgment.

Q. As a practical matter, accounting judgment is to be exercised?

A. I don't know whether you would call it accounting judgment or whether——

Q. Judgment as to the matter?

A. That is right.

Q. And it is true, is it not, and has it not been true in your long experience, that on many occasions the courts have disagreed [2274] with the Bureau of Internal Revenue as to whether a particular item should have been capitalized or not?

Mr. Campbell: Objected to as incompetent and immaterial.

The Court: Objection sustained.

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(Testimony of Ray Weaver.)

Q. Are there other items that enter into that group of expenditures which you capitalized?

A. To cover that neon sign?

Q. That is listed separately.

A. That is all in this particular group.

Q. Is the Neon sign included in the $322.27?

A. No, that is another item.

Q. That is the next one listed? A. Yes.

Q. And the Neon sign item to which you refer, $500 expenditure on July 10, 1945, from Exhibit 132C, is that right? A. Yes.

Q. And you decided to capitalize that item also?

A. It was capitalized. Whether it was solely my decision or whether based on Mr. Maundrell's testimony or entry in the check stub record or entry in the book, I can't recall at the moment.

Q. But in any event you did capitalize that in preparing Exhibit 165?

A. Yes, that is right.

Q. Now, as to any of these expenditures which you have capitalized [2275] in preparing Exhibit 165, as distinguished from treating them as current expense items, was there uncertainty at all with respect to any of those expenditures in your mind as to how they should be classified?

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: Objection sustained.

Mr. Avakian: Your Honor, I am trying to find out the basis for his classification and trying to determine whether he was convinced as to each item or whether there was some doubt about it.

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(Testimony of Ray Weaver.)

The Court: The ruling will stand.

Mr. Golden: As an expert, whether he is certain or not.

The Court: The ruling will stand.

Q. Let me ask you, with respect to this B. & H. Refrigeration Service item, where the checks show it was for monthly service charge as well as installation and you testified that to the extent that the expenditure represented a monthly service charge it should not have been capitalized, was there any question in your mind as to the propriety of capitalizing that portion of the charge in preparing Exhibit 165?

Mr. Campbell: Objected to as incompetent as to his state of mind.

The Court: Objection sustained.

Q. It is true, is it not, Mr. Weaver, that to the extent that you capitalized that portion of the expenditure which represented [2276] the monthly service charge, you increased the closing net worth of the Menlo Club as reflected in Exhibit 165 over what it would have been if you had not capitalized that portion of the charge?

A. I also increased the beginning net worth, so to that extent they are offsetting and have no effect.

Q. Suppose this was an expenditure that was made during the indictment period, it was, was it not?

A. Yes, if you are talking about one year.

Q. And it was during the year 1946, was it not?

A. That is right.

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(Testimony of Ray Weaver.)

Q. So that it did not increase the net worth at the beginning of 1946, did it? A. No.

Q. You were wrong in that statement?

A. Right.

Q. It affected the net worth only at the end of December 31, 1946?

A. Do you know what the service charge was?

Q. No, I don't, but to the extent then that you included that portion of the charge in capital assets, you have increased the amount of closing net worth, is that right?

A. Yes, I would be glad to remove it if you claim that.

Q. You are the gentleman that conducted this five-year investigation, Mr. Weaver, not I. As you know I did not even see this check until it was produced in court. [2277]

Mr. Campbell: Just a minute——

The Court: This is not a debating society.

Mr. Avakian: I would be glad to have the witness instructed to that effect.

The Court: Well, let us not have these side matters.

Q. Now, Mr. Weaver, in treating certain of these assets as capital rather than current items in Exhibit 165, can you refer me to the particular statute or regulation which you were applying?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

Mr. Avakian: Well, now, if your Honor please, I am trying to find out simply the provision of law

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(Testimony of Ray Weaver.)

that covers this situation in his mind. I am not asking him for his understanding, what that is, but simply how he——

The Court (Interceding): The ruling will stand.

Mr. Avakian: Your Honor will recall——

The Court (Interceding): The ruling will stand.

Mr. Avakian: Perhaps if you would permit me to be heard you might consider——

The Court (Interceding): The ruling will stand.

Q. I will ask you, Mr. Weaver, if you are familiar with Section 29.23(a)-1 of Regulations 111, issued by the Secretary of the Treasury?

Mr. Campbell: Objected to as [2278] incompetent.

The Court: Objection sustained.

Mr. Golden: Your Honor, may we be heard on that?

The Court: No.

Mr. Golden: May we be heard on it in the absence of the jury?

The Court: No, I am not going to stop now.

Mr. Golden: May I make an offer of proof?

The Court: You may make an offer of proof in the absence of the jury.

Mr. Golden: It is always proper to ask expert witnesses——

The Court (Interceding): I do not want any argument. I have ruled. I do not want any offer of proof made in the presence of the jury.

Mr. Golden: Then may the jury be excused?

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(Testimony of Ray Weaver.)

The Court: Yes.

Mr. Golden: We have to say something somehow to get it in the record.

The Court: I realize that.

(Jury and alternate jurors admonished and excused at 10:45.)

(In the absence of the jury.)

(NB 337 PP 3-20.)

11:25 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further [2279]

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, in determining to classify as capital assets the various expenditures shown on Exhibit 165 we have been talking about this morning, did you refer to or make use of your knowledge involving any provision of law or of regulations?

Mr. Campbell: Objected to as incompetent.

The Court: Answer the question.

A. Well, I presume I did. It is rather difficult to say exactly what you refer to. I did not refer to any particular book.

Q. Would you like to have me call your atten-

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(Testimony of Ray Weaver.)

tion to any particular provisions and ask you whether you considered those?

Mr. Campbell: Object to what he would like Mr. Avakian to do.

The Court: Objection sustained.

Mr. Avakian: I understood the witness wanted something specific.

The Court: I think you understand, but my thought was if there is anything here that is the result of an opinion, any item the result of opinion, you can ask concerning it, but to ask a general question like this, I can't see that we are getting anywhere with that.

Mr. Avakian: All right, I will reframe the question. [2280]

Q. Mr. Weaver, you testified earlier that the matter of deciding to classify certain expenditures as capital rather than current expenses, involved to some extent the exercise of judgment, is that correct? A. Yes.

Q. And in exercising that judgment, is it necessary, in order to exercise the judgment, to refer to any regulations of law or regulations applicable to the matter of capitalizing certain expenditures?

Mr. Campbell: Just a minute—I am going to object because it calls for——

The Court (Interceding): My idea was you might find some specific item here which is obviously a deduction or amounts to an expression of opinion.

Mr. Campbell: Further, your Honor, I wish to

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(Testimony of Ray Weaver.)

call attention to another aspect of my objection and that is calling for his conclusion as to what entered into the judgment of others in the determination of these items.

Mr. Avakian: Your Honor, I had referred to the specific matters in question, but let me do that again.

The Court: Very well.

Q. I am referring now specifically, Mr. Weaver, to the various improvements in 1946——

The Court: Pardon me—the response to your statement, the question before. It seems to me you should take a little [2281] broader view of it. Even if some of these, in the opinion of an expert account, it might appear some item listed as capital should not be listed as capital, I think it would then be the duty of the expert, such as Mr. Weaver, to put it in the proper place.

Mr. Avakian: That is right.

Q. I am referring specifically, Mr. Weaver, to the item on Exhibit 165 entitled, "For improvements in 1946, $2355.16." Now that represents a capitalization of the various expenditures which you testified to, which total that amount, does it not?

A. Yes.

Q. And in capitalizing those expenditures as capital expenses, you did, to some extent at least, exercise your judgment as an expert accountant, did you not?

A. Well, I relied in some cases on the testimony of Mr. Maundrell, in some instances on the en-

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(Testimony of Ray Weaver.)

tries in the check stubs, and some instances on the entry in the books. Now you might say I might have used my judgment to the extent that where those appeared to be incorrect, I would change them.

Q. And you did actually take one item, for example, entered on the books as repairs and replacements, and through the exercise of your judgment, you treated that as a capital expenditure, did you not? A. Yes. [2282]

Q. Now, in exercising your judgment, Mr. Weaver, in making the computations with regard to these capital items on Exhibit 165, did you draw to any extent upon your knowledge or understanding of any provision of law?

Mr. Campbell: Just a minute—I object to that as assuming a fact not in evidence in the first place.

The Court: It is going beyond the thought I had. You are referring to the whole sum total of this exhibit.

Mr. Avakian: As to any item in there, your Honor.

The Court: I think the question is too general and I think you should point out the specific item.

Mr. Avakian: All right.

Q. With respect to this three hundred twenty-two dollar expenditure, B. & H. Refrigeration Service, which was entered on the books as repairs and replacements and which you, in the exercise of your judgment, said that you capitalized as a capital asset, did you, in exercising your judgment on that

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(Testimony of Ray Weaver.)

particular matter, draw on your knowledge or understanding of the law? By law I am including regulations issued by the Treasury Department and any other form in which the law may be expressed.

Mr. Campbell: Objected to as incompetent.

The Court: Answer the question yes or no.

A. Well, in everything I do in an accounting sense, I can't see how I can avoid drawing on all my best experience and [2283] training. What particular part would come into play at the particular time would be a question very difficult to answer.

Q. Perhaps you did not understand my question. In doing that, did you draw, to any extent, upon your understanding of what the law provides with respect to capitalizing that type of expenditure?

A. If you mean did I refer to any particular provision, no.

Q. Did you draw on your understanding of the law?

Mr. Campbell: Objected to as asked and answered.

The Court: I think so.

Mr. Avakian: He said he did not draw on any particular provision. Now, I am making it broader than that.

Q. Did you draw upon your understanding of the law?

Mr. Campbell: I make the same objection, asked and answered.

The Court: He stated in his determination he

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(Testimony of Ray Weaver.)

relied upon training and experience and understanding what the law was.

Mr. Avakian: I do not think he included the latter. If he did, then my question is answered.

Q. Did you draw in part at least on your understanding of the law, Mr. Weaver?

A. I presume I must have. You see the difficulty arises in this respect, that in some instances accounting principles and tax law coincide. In that case where they do, it is difficult to tell which one you are drawing on. Where they do not [2284] coincide, there isn't much difficulty.

Q. I am asking you in respect to this particular $322.27 expenditure, which was entered on the books as repairs and replacements and which you treated in your Exhibit 165 as a capital expenditure. Now, do you know whether there is any provision of law applicable to that particular——

Mr. Campbell: I am going to object as incompetent and improper cross-examination

The Court: Yes, I suggest that you inquire on what he based his determination.

Mr. Avakian: I have been trying to find whether he based in part on his understanding of the law and I have not got an answer to that. I am trying, by pointing my questions up a little more, to get an answer to that question, which your Honor ruled a moment ago I could ask.

The Court: Of course, I have no right to dictate how to question the witness. Wherever it shows these matters are the result of exercise of judgment

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(Testimony of Ray Weaver.)

or opinion, you may ask him on what he bases it. If it develops he bases it on some law, then you may find out what law he bases it on.

Mr. Avakian: I am asking him specifically if he did base in part on his understanding of the law. That can be answered yes or not.

The Court: He may answer. [2285]

Q. Did you, or did you not, Mr. Weaver, base your judgment in that matter to any extent at all upon your understanding of what the law provides with respect to that asset?

A. Well, it was law or my understanding of the category.

Q. Can you refer me to what particular——

The Court: I am going to sustain the objection. That is not the understanding of the result of our conference. I thought you would accept it, but if you do not want to accept it you may not, but my thought was where we had a matter of opinion, an item which is a matter of opinion, you may ask him on what that is based and if it develops in his answer it is based on some provision of law, you may find out what it is.

Mr. Avakian: That is what I was asking him.

The Court: I can't see it that way. Objection sustained.

Mr. Avakian: Your Honor, he has stated——

The Court: I have ruled. I am not going to open it up again.

Mr. Avakian: I was half way in the question

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(Testimony of Ray Weaver.)

when your Honor sustained the objection and I have not heard an objection.

Mr. Campbell: I have objected.

The Court: Whatever is in that record will not be answered.

Q. Upon what did you base your judgment, Mr. Weaver, in treating [2286] as a capital expenditure the payment of 322 and some cents to the B. & H. Refrigeration Service, which was entered on the Menlo Club books as a repair and replacement expense? A. Do you have the check number?

Q. I can get it for you.

Mr. Golden: 2465.

A. It is based on notation on the check stub, where it states; "Complete new unit."

Q. Upon what did you base your judgment that an expenditure for a complete new unit should be treated as a capital rather than a current expense?

Mr. Campbell: Objected to as having been asked and answered.

The Court: This question is a little different. Let us have the question.

(Question read.)

The Court: Objection overruled. Let us have the question.

(Question read.)

A. My past experience and training.

Q. Can you refer me to anything more specific than a general statement?

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(Testimony of Ray Weaver.)

A. If you mean, did I go to any book and refer to any section of law or any discussion of accounting, no.

Q. What specifically did you base it on? You gave me the [2287] general statement, on your past experience, but can you be more specific? What, in your past experience, was the basis for that judgment?

A. From my past experience and training the acquisition of new assets of this character are capital items.

Q. Somewhere in your past training and experience you formed that opinion and judgment, is that it? A. Yes, that is right.

Q. Do you know just what in your past experience and training was the basis for that judgment that you formed?

Mr. Campbell: I am going to object——

The Court: Objection sustained.

Mr. Avakian: I am going to ask the Court's indulgence in this respect—Mr. Golden and I are not sure just what you stated we could ask.

The Court: I think it was stated two or three times. I do not like to make any more statements about it. I will just meet the situations as they arise. I will say—wherever it appears in this witness' answer there is an expression of opinion, you may ask what the source of that opinion is, and if he says it is based upon some law, you can ask him what section or what law it is. Where there is an item in an exhibit here which is not merely some

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(Testimony of Ray Weaver.)

copy of the record but is the result of [2288] deduction or expression of his opinion, you may ask him what the source of the deduction or opinion was, and if it develops it was a specific question of law or matter of law, you can ask him what law.

Mr. Avakian: To test the scope of his experience and education, may I, without reading anything, hand him a particular document, and ask him whether his knowledge and training and experience, including understanding of that particular section——

Mr. Campbell: There is no point in testing an expert——

The Court: Objection will be sustained. We will take a recess until 1:30.

(Jury and alternate jurors admonished and recess taken at 11:45 a.m.)

January 30, 1952, 1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumed the witness stand on further

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, I will hand you Exhibits 165 and 181 for identification. On Exhibit 165 you show an

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(Testimony of Ray Weaver.)

item, "Accounts Receivable. Advance for purchase of equipment for Mr. Remmer's office, 50 Mason Street," in amount of $7,489.76 at the end of 1945 and $8,600.20 at the end of 1946. Is the detail making up those amounts set forth on your Exhibit 174? [2289] A. Yes, it is.

Q. So that Exhibit 174 represents simply the detail of that item in 165 and the total on Exhibit 174 is a duplication of the total Exhibit 165, is that correct?

A. It is the same figure, yes, it is not a duplication.

Q. It represents the same items?

A. That is right, yes.

Q. So that in considering the net worth of Mr. Remmer from these exhibits, you would not use that same figure two times, would you? A. No.

Q. Now, the detail making up those amounts represented by the items set forth in Exhibit 174 is based, in part at least, on the cancelled checks which are indicated by the purported exhibit references in Exhibit 174? A. Yes, that's right.

Q. Let me refer you to the item on Exhibit 174, designated as "John Hagen, Carpenter work, $76.46." The reference to that is Exhibit 133M, is it not?

A. Yes, and to Mr. Maundrell's testimony on page 1223.

Q. And the number of that check is 1574, is that correct?

A. I do not have the check numbers on the list.

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(Testimony of Ray Weaver.)

Q. Exhibit 133M is check No. 1574?

A. Yes, that's right.

Q. Now, you said that you relied in part on Mr. Maundrell's [2290] testimony at page 1223, and I will read you Mr. Maundrell's testimony in that regard. Mr. Maundrell stated:

> "Check No. 1574, John Hagen, $76.46, was for further office repairs at 50 Mason Street."

Is that the testimony to which you refer?

A. Yes. However, it can't be read out of the context or it will convey the wrong meaning.

Q. Immediately before that he was questioned about checks in the sixty series.

A. I mean the context of these checks to John Hagen and the general construction of the office at 50 Mason that was being done at that time. Now, if he inadvertently used the word "further," I am sure he did not mean it in the sense——

Q. Let us not have your interpretation of Mr. Maundrell's testimony. Let us confine it to what was said rather than your interpretation.

A. I thought you asked me what my conclusion was.

Q. No, I asked you if that was the testimony of Mr. Maundrell to which you refer and I believe you answered that was in part, is that correct?

A. Yes.

Q. I have not asked you any further questions yet. Now, Mr. Weaver, it was your conclusion and judgment that that item of $76.46, which Mr. Maun-

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(Testimony of Ray Weaver.)

drell said was for further office repairs, should be capitalized as cost of the office at 50 Mason [2291] Street rather than being treated as a current deductible expense, is that right?

A. Yes, that's right.

Q. Now, I call your attention to the next item on Exhibit 174, which is designated as Exhibit 133-O, dated 11-28-45, a check to John Hagen, carpenter, in the amount of $65, with reference to the testimony on page 1223. Do you have Exhibit 133-O before you? A. What is the check number?

Mr. Campbell: 1576.

Q. I was going to ask you that. You have the check there. The exhibit numbers are on the backs of the checks, Mr. Weaver.

A. Yes, it is 133-O.

Q. I will ask you if the testimony of Mr. Maundrell, on which you rely in part, was this testimony from page 1223:

> "Check No. 1576 to John Hagen for $55.06 was for further office repairs. He worked around there for about three or four weeks."

Is that the testimony?

A. Yes. The fact he worked three or four weeks indicated it was under general construction.

Q. And it was your opinion and conclusion and judgment that that payment of $65 for further office repairs should be capitalized as capital expense rather than treated as currently deducted expenditure? [2292]

Mr. Campbell: Objected to as incompetent, as-

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(Testimony of Ray Weaver.)

suming a fact not in evidence. He stated only in part upon Mr. Maundrell's testimony that he passed the capitalization of that item.

Mr. Avakian: Let me rephrase the question.

Q. It was your conclusion and judgment, Mr. Weaver, that this expenditure of $55.06, which Mr. Maundrell testified was for further office repairs, should be treated as a capital asset rather than being treated as a current deductible expenditure?

A. The amount you said is not in agreement with the amount I have here.

Q. What is the amount you have there?

A. Are you referring to 133-O now?

Q. What is the check number? A. 1576.

Q. Well, I am reading Mr. Maundrell's testimony, which states that check 1576 to John Hagen for $55.06 was for further office repairs.

A. The amount is $65 in the check.

Q. Apparently an error was made in the transcript. The check shows $65? A. Yes.

Q. And that is what your Exhibit 174 shows?

A. Yes, that's right.

Q. With that change in the amount in my question—do you recall the question now? [2293]

A. No, I do not.

Q. Was it your opinion, judgment and conclusion that that expenditure of $65 to John Hagen for what Mr. Maundrell described as further office repairs, should be capitalized as a capital asset rather than being treated as a current business expenditure?

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(Testimony of Ray Weaver.)

A. I don't recall having any question raised in my mind about it at all.

Q. I simply ask if that was your opinion, judgment and conclusion?

A. Certainly it was my conclusion, yes.

Q. Now, you stated earlier in your cross-examination this morning that major items of repair are sometimes classified by accountants as capital expenditures rather than current deductible expenditures, is that correct? Do I recall your testimony correctly? A. Yes, that is right.

Q. And would the exercise of judgment as to whether these two expenditures of $76.46 and $65.00, which Mr. Maundrell in his testimony described as office repairs, should be capitalized rather than being treated as current repair items, be influenced in part by the decision as to whether those amounts were major or minor amounts, using your word?

A. They are influenced entirely by the fact that they are part of a major expenditure. A major expenditure is not necessarily [2294] one sum. If these were expenditures made apart from the general construction of the office, just for repairs, the size of it alone, since they are very immaterial, would influence me in classifying as expenses, simply made at the time and in connection with general construction, they are part of the major expenditure, so even though they are immaterial in amount, I classified them as capital items.

Q. In other words, if this particular carpenter

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(Testimony of Ray Weaver.)

work had been done in these amounts by Mr. Hagen independently of the reconstruction work at the office in general, then you might have classified them as current rather than capital, is that what you are saying?

A. Or if it had been done independently of any other major construction.

Q. You know, do you not, from Mr. Maundrell's testimony, that the reconstruction work was done by a contractor named Fred W. Shell? You may refer to 174 to refresh your recollection.

A. Yes, that was part of the reconstruction.

Q. Mr. Shell had the contract, did he not, to make the new office?

A. Yes. Just what contract, I do not know. Undoubtedly there was more than one contract because there was some electrical work done there.

Q. As far as Mr. Hagen, carpenter work was done, do you know from testimony in this case whether that was a part of the [2295] reconstruction work or whether, as Mr. Maundrell testified, it represented office repairs?

Mr. Campbell: Objected to as argumentative. The testimony in this case will speak for itself.

The Court: Objection sustained.

Q. Did you check with Mr. Shell in connection with this matter?

A. No, I had no reason to question the entries on the records and Mr. Maundrell's testimony.

Q. Did you talk to Mr. Hagen? Will you answer just yes or no? A. No.

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(Testimony of Ray Weaver.)

Q. And is there any testimony as to the nature of Mr. Hagen's work in this case that you relied upon in preparing 174, other than testimony on 1223 which you have designated in Exhibit 174?

A. You are relating only to testimony now, or are you also including exhibits?

Q. You have designated in Exhibit 174 that reference for these items of John Hagen is testimony on page 1223. Now, I am asking you, is there any testimony in this case, other than what is on that page, that you relied upon in making this adjustment?

Mr. Campbell: Objected to as assuming a fact not in evidence, that characterization. Exhibit 174 also refers to [2296] exhibits, also refers to testimony appearing at page 1218. The record shows on the face of 174.

Mr. Avakian: I stand corrected if that is true. My photostat does not show that. I call your attention to the items Hagen and ask you to look at it.

Mr. Campbell: Yes, and the reference 133M and 133-O both refer to testimony at page 1223 and below there is also stated: "Checks referred to above were identified by Mr. Maundrell as being drawn on the account of Harold H. Maundrell or Elmer Remmer at the Crocker First National Bank. (purpose—P. 1218.)

Q. Did you rely on the testimony on page 1218 also then? A. In part.

Q. The statement Mr. Campbell just read, referring to page 1218, appears below all these vari-

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(Testimony of Ray Weaver.)

ous items, does it not? A. Yes, that is right.

Q. Now, I am going to hand you page 1218 of the transcript and ask you whether on page 1218 you find any reference to these two checks that were paid to Mr. Hagen?

Mr. Campbell: Objected to—the record speaks for itself.

The Court: I think it does. I think he has already testified in the question you propounded you already read——

Mr. Avakian: Page 1223 was read, not 1218.

The Court: Very well, he may answer the question.

Q. Is there anything there that refers to these two payments [2297] to Mr. Hagen? I am going to object to your looking at another page.

Mr. Campbell: I object——

Mr. Avakian: He is looking at another page. I want him to answer first.

A. I can't understand page 1218 without looking at what precedes because the questioning and answering is continuous, it doesn't break off.

Q. Very well.

A. On page 1217 the question refers to construction of office at 50 Mason Street. Then the questioning continues, going into these other checks—"And as to those improvements upon what record or records of what enterprises was set up?" "A. Well, it was set up principally for Mr. Remmer's private office and also for the office of the Day-Night Cigar and 110 Eddy." Then it continues at

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(Testimony of Ray Weaver.)

the bottom of the page going to another check to Mr. Shell in connection with construction work here.

Q. What page are you on now?

A. 1219. Then on page 1221 there is reference to a check to John Hagen and in answer to the question, for what purpose, it says it was for carpenter work—"Carpenter work where? A. At the new office, 50 Mason Street. Q. That was part of the construction cost there? A. Yes, sir." Then it continues on to the other checks. That is why I say you can not read [2298] any one without the context. My reference in those pages did not intend to be so specific. I did not particularly intend to tie down to any one particular page.

Q. I just want to be sure what you are doing is being done soundly and accurately.

A. I hope it is.

Q. You notice on the dates as you have listed them in Exhibit 174 that checks to Shell designated as "Contractor, new office" are August 18, 1945; October 4, 1945, and November 12, 1945?

A. Yes, that is right.

Q. And that October 12, 1945, is the last check to Fred Shell, is it not? A. Yes, that is right.

Q. It is possible, is it not, Mr. Weaver, there might have been some damage at the office and as a result at some later date Mr. Hagen, the carpenter, was called in to make repairs to that?

A. Anything is possible, but not probable.

Q. Without checking with Mr. Hagen or Mr.

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(Testimony of Ray Weaver.)

Shell, you wouldn't know that? I believe you said you did not check with either of them.

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Now, on Exhibit 174 you have listed a check described as Exhibit 135D. I believe it is dated March 31, 1946, United Studios electrical [2299] work, testimony page 1235, in amount of $79.60. Do you see that item? A. Yes.

Q. Do you have the check before you, 135D?

A. No, these are all in 1945.

Mr. Campbell: Check 1981.

Q. I show you Exhibit 135D, which is the check in question, United Studios, in amount $79.60. There is nothing on the check itself to indicate the purpose of the expenditures?

A. No. Do you have the check stub?

Mr. Avakian: The check stub shows electrical work 52 Mason Street. You refer to page 1235. Is that the testimony of Mr. Maundrell?

A. I believe so.

Q. The question and answer on that page is:

"Q. I show you plaintiff's Exhibit 135D, check dated March 31, 1946, No. 1981, in the amount of $79.60, to United Studios, and ask you for what purpose that check was issued?

"A. That was for electric work that was done on the new offices at 50 Mason Street."

Was it on the basis of that testimony that you concluded that expenditure should be capitalized rather than being treated as a current business ex-

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(Testimony of Ray Weaver.)

pendituret? A. That was part of it, yes. [2300]

Q. You note, do you not, that the date of that check is March 31, 1946, whereas the checks to Shell, the contractor at the new office, were in August, October, and November, of 1945?

A. Yes.

Q. Doesn't that indicate to you that the new office had been completed prior to March 31, 1946?

A. No, very often after construction of an office is completed, you will find you need new electric outlets, something of that nature, not a repair but actual additional cost of the new office.

Q. And in that type of expenditure you have to exercise judgment as to whether it is a major repair? A. Yes.

Q. And if it was a $5.00 expense of that kind, you wouldn't capitalize it?

A. I wouldn't call that a matter of judgment. That is a matter of whether or not it is worth bothering with.

Q. Whether it is worth bothering with is a matter of opinion and judgment, isn't it?

A. I presume it is.

Q. And did you exercise your judgment in deciding that that particular item should be capitalized?

A. Yes. I did it mainly to keep from being questioned concerning as to why I hadn't capitalized it.

Q. By capitalizing it you have, in effect, increased the [2301] amount of income computed to Mr. Remmer on the net worth?

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(Testimony of Ray Weaver.)

A. Yes. I have also increased depreciation.

Q. The depreciation on that would be how much, on that $79.46?

A. Somewhere in the neighborhood of $4.00.

Q. So you added 79 dollars and gave us a break to the extent of four dollars, is that right?

A. Well, no matter how you look at it, it would seem immaterial to me.

Q. And is it your opinion and judgment as an accountant, Mr. Weaver, that on items of this kind, which amount to approximately 79 dollars, it is proper accounting to go to all the accounting work that is necessary to set that up in a depreciation account, rather than simply treat it as a current business expenditure?

Mr. Campbell: Objected to as incompetent and misleading. The estimony is this is one of a number of items.

The Court: Objection sustained.

Q. Is it true, Mr. Weaver, that in setting up a particular expenditure as a capital rather than a current expenditure, considerable more bookkeeping work is required in connection with that item than there would be if treated as current expenditure?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Q. Is the amount of work which would be required to capitalize [2302] an expenditure a factor which you, as an expert accountant, would consider in deciding whether a particular item was of sufficient major importance to capitalize?

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(Testimony of Ray Weaver.)

Mr. Campbell: Objected to as incompetent.

The Court: You may answer that question.

A. It is one factor that would be considered, yes.

Q. Now, it is true, is it not, Mr. Weaver, that while this particular item and the two Hagen checks are small matters in amount, that in all of these various enterprises, concerning which there has been testimony in this case, the accumulated total of those items might be a very substantial amount?

Mr. Campbell: Objected to as argumentative and incompetent.

The Court: Objection sustained.

Q. You have listened to the entire testimony in this case, have you not?

A. With the exception of one or two days that I missed.

Q. Do you recall whose testimony, while you were away?

Mr. Campbell: Objected to——

The Court: Objection sustained.

Q. With the exception of one or two days you have listened to all the testimony? A. Yes.

Q. From your knowledge of the testimony in this case, is it not true, Mr. Weaver, that the total amount of these various [2303] miscellaneous items which you felt should be capitalized rather than being treated as current expenditures, amounts to a very substantial sum? A. You mean——

Mr. Campbell: I am inclined to let him answer, but I make the objection that it is not competent.

The Court: Objection sustained.

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(Testimony of Ray Weaver.)

Mr. Avakian: If the objection was based on the use of the word "substantial," we can have him give the exact amount. I did not want him to go to that trouble, your Honor.

The Court: The ruling will stand.

Q. Now, Mr. Weaver, you have set forth in Exhibit 165 as an asset 100 thousand dollars as the cost of 10-year lease, and then under liabilities you have set up a reserve for depreciation, which I believe you testified represents a pro rata allocation of that 100 thousand dollars over a ten-year period, am I correct in that respect?

A. No, the allocation is under reserve amortization of lease.

Q. I modify that—you set up for reserve for amortization on the 10-year basis, is that right?

A. That is right.

Q. Then in addition you have set up as assets in amount $48,801.50, the item "Other Assets, Equipment, Licenses, Good Will, etc.," and then you have set up a reserve for depreciation with respect to that item, have you not? [2304] A. Yes.

Q. And can you tell us the life period as used in computing your reserve for depreciation on that item? A. Yes, a period of ten years.

Q. Now, you have included in that figure $43,801.50, all of the physical assets of the Menlo Club, at the time of acquisition, I take it?

A. And all of the tangible assets and good will.

Q. In other words, that includes good will and also all physical assets?

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(Testimony of Ray Weaver.)

Mr. Campbell: Objected to—it doesn't include inventory.

Mr. Avakian: I think I should clear that up.

Q. The inventory is set forth as 31 thousand odd dollars? A. Yes, that is right.

Q. Aside from inventory, you have included in the $43,800, all of the physical assets, whatever they might have been, of the Menlo Club, Bar and Tiny's Restaurant? A. And all the tangible assets.

Q. Yes, I say you have also included all physical assets, none of the physical assets are left out?

A. Except the inventory.

Q. Now, do you know specifically what those assets were?

A. Well, I know that the physical assets were certainly much less than 31 thousand dollars worth.

Q. I am not talking about the amount. Do you know what they [2305] were—tables, chairs, refrigerators?

A. Represented tables and chairs of the Menlo Club; represented the ordinary restaurant equipment which you find in a restaurant and ordinary bar equipment you find in a bar.

Q. Do you know whether that equipment was new equipment or used equipment on May 1, 1945?

Mr. Campbell: Objected to—whether it was new or used is immaterial.

The Court: Objection sustained.

Mr. Avakian: The question of the life to be used has to depend——

The Court: You may answer the question.

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(Testimony of Ray Weaver.)

A. Well, the life use is based on the life on the return.

(Question read.)

Q. Can you answer that question?

A. No, I do not.

Q. Is it not true, Mr. Weaver, that deduction for depreciation should be based on a reasonable estimate of the life of the asset at the time of its acquisition?

Mr. Campbell: Objected to as immaterial in this case, he having stated that the life use here was that used on the return of the taxpayer.

Mr. Avakian: This is an expert witness. He is expected to do what is correct. Now, he has made numerous adjustments where he thought it was incorrect, all against us, I might say. [2306]

The Court: You may answer the question.

Q. Do you recall the question?

A. Not very much.

(Question read.)

A. Yes. Since ten years is used in the return, that certainly was at least a reasonable estimate of its life.

Q. You made no independent analysis of that?

A. No, I presumed if the taxpayer stated it would last ten years, it would last at least that long.

Q. Do you know the particular return you refer to?

A. The returns of the Menlo Club, both original and amended.

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(Testimony of Ray Weaver.)

Q. I show you prosecution's Exhibit 91, amended return of the Menlo Club for the year 1946, and I call your attention to schedule D, "Depreciation," and ask you if that is the portion of the return to which you refer?

Mr. Campbell: I object to that. He called for the original return as well as the amended return.

Mr. Avakian: They are all the same, but I will be glad to show him all of them.

Q. I show you prosecution's Exhibit 90, which is original return for 1946, and Schedule D, "Depreciation," is the same on both of those returns, is it not?

A. Yes, and on the original return as well as the amended, under column "Estimated Life Use, Depreciation," is stated ten years. [2307]

Q. And the only amount of depreciation in dollars as on that return is designated as "Furniture and fixtures $2,000," is that not correct?

A. That is right; so to the taxpayer's advantage I allowed depreciation on the entire amount, $43,801.50, even though they only claim $2,000 in the return.

Q. Let us see if you really did that to the taxpayer's advantage. Isn't it a fact that the taxpayer's return amortized that same 43 thousand dollar figure on a five-year amortization basis, and I will hand you prosecution's exhibit 91, which is amended return for 1946, and I call your particular attention to statement included on the part of that return designated "Depreciation 21." Will you read that over——

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(Testimony of Ray Weaver.)

Mr. Campbell: Just a minute—I am going to object to the question. He asked for the original return and then he hands him an amended return.

Q. Isn't it true, Mr. Weaver, that Mr. Remmer's individual 1946 return was filed after the Menlo Club filed its amended 1946 return and that Mr. Remmer's individual return showed as his share of Menlo Club income the amount allocated to him from the Menlo Club amended return that is in your hand?

A. You are talking about an entirely different item——

Q. Can you answer that question?

A. You are——

Mr. Avakian: May he answer the [2308] question?

The Court: You have one question propounded to the witness and I don't see how the witness, when a question is propounded and he is asked to look at an exhibit and then confronted with another question before he can answer the original question, I don't see how the witness can really go along.

Mr. Avakian: Mr. Campbell interposed an objection to the first question and I was trying to overcome the objection.

The Court: I don't care what caused it. Ask the witness a question and let him answer.

Mr. Avakian: Let me withdraw the question to which Mr. Campbell objected.

The Court: All right.

Q. Do you remember the question?

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(Testimony of Ray Weaver.)

A. No, but you are going into an entirely different subject.

Q. Do you remember the question?

A. No, I do not.

(Question read.)

Mr. Campbell: I object to that. The items speak for themselves.

The Court: He may answer.

(Question read.)

Q. Isn't that true, Mr. Weaver?

A. I don't recall when his individual 1946 return was filed.

Q. I hand you prosecution's Exhibit 5, which is Mr. Remmer's [2309] return for the year 1946. Would that assist you in answering my question?

Mr. Campbell: Is that a new question?

Mr. Avakian: Same question. He didn't recall certain things so I am trying to assist him in recalling them.

(Question read.)

A. Yes, that is right.

Q. Now, Mr. Weaver, getting back to the prior question which I withdrew at the time—it is true, is it not, that the Menlo Club 1946 amended return took an amortization deduction based on five years for an amount of $143,801.50?

A. Yes, in spite of the fact that the lease specifically states it is for ten years and cost 100 thousand dollars.

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(Testimony of Ray Weaver.)

Q. You heard Mr. Maundrell's testimony that when he prepared that statement he was under the impression the lease was for five years?

Mr. Campbell: I submit the record speaks for itself.

Q. That is the fact, that the amended return takes a five-year amortization for the 143 thousand dollar figure?

A. Yes, and it is entirely wrong.

Q. Whether it is right or wrong, what you did in Exhibit 165 was to break that same figure up into two amounts, one of 100 thousand dollars cost of ten-year lease, which you amortized on a 10-year basis, and the other $43,801.50, which you classed as other assets and depreciated on the ten-year basis, isn't that true? [2310]

A. That's the way the agreements read.

Q. Isn't that what you did? A. Yes.

Q. Very well. Now, the use of a ten-year life, as distinguished from a five-year life, means that you cut in half the amount of actual depreciation allowed the taxpayer, isn't that true?

A. That is true as far as it goes, but——

Mr. Avakian: Just a minute——

Mr. Campbell: He is entitled to explain.

The Court: Let him explain.

A. Included in this 43 thousand are his tangible assets, to which no depreciation credit should be allowed for any purpose. We have permitted it to remain in there to avoid any argument.

Q. But the fact is that the effect of your adjudgment, as compared with the Menlo Club 1946 re-

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(Testimony of Ray Weaver.)

turn, is that you have reduced the annual deduction by approximately 14 thousand dollars a year, isn't that right?

A. The depreciation of physical assets was allowed as claimed, except that we also permitted a deduction on intangible assets, to which actually they wouldn't be entitled under the law.

Mr. Avakian: May he answer my question?

Mr. Campbell: Let him finish.

Mr. Avakian: It can be answered yes or no.

(Question read.)

The Court: Can you answer yes or no? [2311]

A. Which return do you refer to?

Q. Comparing your exhibit 165 with the Menlo Club 1946 return? A. Yes, that is right.

Q. The answer is yes. That is what you had in mind when you said you did Mr. Remmer a favor?

Mr. Campbell: That is objected to.

The Court: Sustained.

Mr. Avakian: He said he did him a favor.

Mr. Campbell: I object—I ask that go out.

The Court: That may go out. This is not the time to argue.

Mr. Avakian: But your Honor permitted——

The Court: Just a minute—let us not have any difficulties now.

Q. Do you still have before you the 1946 Menlo Club amended return? A. Yes.

Q. And would you refer to the typewritten statement which is attached to it, which Mr. Maundrell

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(Testimony of Ray Weaver.)

testified he prepared, regarding the amortization of 143 thousand dollars? A. Yes.

Q. May I have that please? I am going to read to you that statement, Mr. Weaver: (Reads Exhibit 91). Had you read that statement prior to the commencement of this trial, Mr. Weaver?

A. Yes. [2312]

Q. Now, Mr. Weaver, it is a fact, is it not, that in 1948, approximately three years after this club was purchased by Mr. Remmer and his associates, the District Attorney's office in San Francisco, through a new interpretation of an old ordinance, took action——

Mr. Campbell: I object at this point.

Mr. Avakian: May I state the question?

Mr. Campbell: As being incompetent, if the Court please, as to any action taken in 1948 by the District Attorney's office. He has gotten to the point of interpretation of an old ordinance relating to the club.

The Court: I can't see what it has to do with the return filed in 1946.

Mr. Avakian: Because it has bearing on the estimate of the life——

The Court (Interceding): Objection sustained.

Mr. Avakian: Before the question is stated, your Honor?

The Court: Yes.

Mr. Avakian: In view of the fact that your Honor will not permit me to state the question, I

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(Testimony of Ray Weaver.)

will make an offer of proof. I will defer it to the recess. I would like that opportunity, since I can not ask the question. May I have that opportunity during the recess?

The Court: Yes, we will excuse the jury at any time.

Mr. Avakian: I suggest that we do it at the next recess. [2313]

The Court: No, we will not do it at any recess.

Mr. Avakian: I mean at the begining or end of the recess.

The Court: Very well.

Q. Now, Mr. Weaver, it is a fact, is it not, that proper accounting practice calls for amortization of an intangible asset acquired from capital outlay for a limited period of time, the length of which is based upon a reasonable estimate?

Mr. Campbell: Objected to as incompetent.

(Question read.)

The Court: Answer the question.

Mr. Campbell: I suggest further that the question does not contain sufficient elements.

The Court: Well, he may answer the question.

A. I do not understand exactly what you mean.

Q. Well, are you familiar with the provisions of the Internal Revenue Code and Treasury regulations providing for such deduction of intangible assets?

Mr. Campbell: Objected to as incompetent and immaterial.

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(Testimony of Ray Weaver.)

Mr. Avakian: An expert witness, your Honor.

Mr. Campbell: And has no bearing on any questions here.

The Court: You may answer the question.

A. You mean deduction of intangible? [2314]

(Question read.)

Mr. Campbell: I submit the question is incompetent.

The Court: What do you mean when you say "such"?

Mr. Avakian: Stated in the prior question.

Mr. Campbell: The prior question the witness said he didn't understand.

Mr. Avakian: I didn't hear the witness say he couldn't understand.

The Court: I heard him.

Mr. Avakian: This last question?

The Court: The one before.

Mr. Avakian: I will reframe it.

Q. Are you familiar with the provisions of the internal Revenue Code and the Treasury regulations, providing for depreciation of intangible assets acquired through capital outlay, where the value of the business in the production of income is for a limited period of time?

Mr. Campbell: Objected to as incompetent and immaterial. Assuming facts not in evidence.

The Court: Answer the question.

A. Generally speaking there is no deduction provided for intangible assets such as, for example,

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(Testimony of Ray Weaver.)

good will. Now there are certain intangible assets, such as a leasehold, for which a deduction is provided over the life of the lease. However, in this case the life of the lease was falsely stated [2315] in the return to be five years.

Mr. Avakian: I ask that the characterization here, "falsely stated" be stricken.

The Court: It may go out.

Q. Do you understand my question? Can you give me a direct answer to it?

Mr. Campbell: I submit he has given a direct answer.

The Court: Do you want to frame another question if you are not satisfied with that answer?

Mr. Avakian: I will frame another question.

Q. Mr. Weaver, if you do not understand my question, I would appreciate your saying so and I will be glad to reframe it. If you do, please give me a direct answer and then you will be permitted to offer any explanation.

Mr. Campbell: I do not believe that characterization is called for.

The Court: Let us go along.

Q. Now, Mr. Weaver, are you familiar with the provisions of the Internal Revenue Code and the Treasury regulations, which provide for a deduction for intangible assets acquired through capital outlay, where the value of the intangible asset in the business or in the production of income is for only a limited period of time?

Mr. Campbell: Again I object. Assumes a fact

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(Testimony of Ray Weaver.)

not in evidence, that there is such a general statement. [2316]

The Court: I think he stated there wasn't any provision.

Q. Is that your answer there is no such provision?

(Question read.)

The Court: Strike out the reference to falsely stated.

Q. Can you give me a direct answer to my question?

Mr. Campbell: I submit he has given it.

The Court: Objection sustained.

Q. Are you familiar with Section 29.23(L)-1 of Treasury regulations 111, entitled "Depreciation of intangible assets"?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

Mr. Avakian: Your Honor, we feel in cross-examining an expert we are entitled to test his knowledge of pertinent provisions of regulations that are applicable to what he did. The purpose of the question was first to find out——

The Court: Show it to him.

Mr. Avakian: Very good.

Mr. Campbell: I submit if that is for the purpose of testing general qualifications as an expert, there is some limitation which we finally reach, after voir dire of the witness, after extensive cross-examination as to background and qualifications, we must reach a point some place where general questions can not be asked for that purpose.

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(Testimony of Ray Weaver.)

The Court: I hope we will, but you may show him the provision. [2317]

Q. That is the section I described which I now hand you.

(Question read.)

Mr. Campbell: The question is, is he familiar with it?

Mr. Avakian: Yes. You can answer yes or no.

A. I am sure I have seen the section before, yes.

Q. You are sure you have. Do you wish then to correct your prior answer, generally speaking there is no provision for depreciation of intangible property? A. That was not my testimony.

Mr. Avakian: May we have it read?

The Court: That was not his testimony.

Mr. Avakian: He said generally speaking there was no provision for intangible——

The Court: That is just a portion of it. Read the answer.

(Answer read.)

Q. Do you wish to change that after looking at this regulation?

A. That section does not apply. This is a particular provision for leaseholds.

Q. I am not asking about leaseholds.

A. Well, this is a leasehold.

Q. I am asking whether you wish to change anything in respect to your answer?

Mr. Campbell: I submit that has been answered. [2318]

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(Testimony of Ray Weaver.)

The Court: You may answer this yes or no.

Q. I am asking if he wishes to change it?

A. No.

Q. In preparing Exhibit 165 and in exercising your judgment on the various adjustments that you made in preparing that exhibit, did you rely to any extent on Section 29.23(L)-3, Treasury Regulations 111?

A. Is that the one I was just looking at?

Q. Yes.

A. I don't believe so, because that does not apply here.

Q. You did not consider it applicable?

A. It is not applicable. It applies to return.

Q. And you did not use that section?

A. I can't say I used any particular section. I know from past experience that leasehold is amortized over the life of the lease. If you want me to go to all the facts, the particular section, I will be glad to do so, but I don't know it off-hand.

Q. All I am asking you, after you have read this section, did this particular section enter into the use of your judgment in preparing Exhibit 165? That is all I am asking.

Mr. Campbell: Objected to as asked and answered. He stated what he took into consideration.

The Court: Objection sustained.

Mr. Avakian: I will stipulate it has been asked, your [2319] Honor. I submit it has not been answered.

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(Testimony of Ray Weaver.)

The Court: Well, I feel differently; it has been answered.

Q. Mr. Weaver, I show you Exhibit 125C, which is last sheet in the asset section of the Menlo Club ledger for 1947, and is entitled, "Tiny's Restaurant, Menlo Bar, Menlo Club, Furniture, Fixtures, Equipment and Lease," and I also hand you prosecution's Exhibit 140, which is a photostat of a page entitled "Furniture, Fixtures, Equipment and Buildings." You are familiar with those two sheets, are you not? A. Yes.

Q. You recall, do you not, that Exhibit 140 was photostat produced here by the prosecution?

A. Yes.

Q. And do you know whether you, or any members of your staff, arranged for the preparation of this photostat? A. I believe I did.

Q. Do you recall when you did that?

A. No. It was after the Menlo Club records were originally delivered to us.

Q. Where did you have that photostat done?

A. I believe it was in our own office.

Q. Do you have a photostat machine in your office in San Francisco? A. Yes. [2320]

Q. Did you personally make the photostat?

A. No.

Q. Do you know who made it? Do you have a recollection?

A. I suppose whoever was employed as photostat operator at the time.

Q. Do you know where the original sheet from which this photostat was made now is?

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(Testimony of Ray Weaver.)

A. No, I do not.

Q. Did you personally handle that sheet in connection with the preparation of this photostat?

A. Yes.

Q. You specifically recall that, do you?

A. Yes.

Q. And did you take it out of some book at that time?

A. Yes, for the purpose of photostating.

Q. And you personally took it out of the book, is that right? You didn't have some other person, but you did it yourself?

A. I believe I did it myself.

Q. Do you know which book that was?

A. I believe it was in the Menlo Club book for 1945.

Q. Is that in evidence here?

A. I would have to look over the list of exhibits.

Mr. Avakian: Well, we will look for it ourselves. I thought you might know.

The Court: We will take a recess now. [2321]

Mr. Golden: Would your Honor take up this matter now?

The Court: No, not before recess.

Mr. Golden: After the recess, before the jury is called in?

The Court: Very well.

(Jury and alternate jurors admonished and recess taken at 2:45 p.m.)

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3:00 P.M.

(Defendant present with counsel.)

(In the absence of the jury.)
(NB 337—PP 53-56.)

3:10 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate juror stipulated.)

MR. WEAVER

resumed the witness stand on further

Cross-Examination

By Mr. Avakian:

Q. I show you prosecution's Exhibit 128, which is entitled, "Tiny's Restaurant and Menlo Bar, 1945," and I will ask you, Mr. Weaver, if this is the book from which you believe you extracted the original of Exhibit 140?

A. Yes, I believe it is. It may have been in a regular binder at the time rather than paper cover.

Q. Do you have any recollection now on that?

A. I believe it was.

Q. You say you believe the sheets that comprise this exhibit [2322] were bound in a stiff binder cover rather than the manila covers that are now on? A. Yes.

Q. Can you tell us where your photostat machine is with respect to your own personal office in San Francisco?

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(Testimony of Ray Weaver.)

A. It is on the floor just below.

Q. On the floor below you?

A. That is right.

Q. Was Exhibit 128 in your own office at the time you extracted the sheet which you had photostated? A. What is the date?

Q. That is 1945, Tiny's Restaurant and Menlo Bar book I just showed you. A. Yes.

Q. And then you personally took that sheet down to the photostat room?

A. I may have taken it down personally.

Q. Do you have a messenger service available there?

A. It is available. I do not always use it.

Q. You have incoming and outgoing boxes?

A. Yes.

Q. Did you at times use messenger service for sending anything to be photostated? A. Yes.

Q. Did things come back to you from the photostat room by [2323] messenger service also?

A. Yes.

Q. Do you recall in this particular instance whether Exhibit 140 was sent back up by messenger service? A. I don't know how it came up.

Q. You do not recall whether you personally picked it up or not? A. No, that is right.

Q. Do you know whether the original of Exhibit 140 was returned to you after after the photostat was made? A. Yes.

Q. You know that definitely?

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(Testimony of Ray Weaver.)

A. I always check every photostat with the original.

Q. Do you make any record of documents that are photostated?

A. I do not know whether we did at that time. We do now.

Q. You say that you always checked. Do you have a specific recollection of checking Exhibit 140 against the original, or are you just simply stating general practice?

A. It is my recollection because I was very much interested in that particular document.

Q. And then do you recall what you did with the original of Exhibit 140 after it came back?

A. Yes, I returned it to the book from which I had taken it.

Q. And you personally inserted it in the book?

A. Yes. [2324]

Q. Is there any way in which you can determine the approximate time of that, Mr. Weaver?

A. I do not know.

Q. Can you tell us who keeps whatever records are kept of photostats that are taken?

A. Usually the group leader keeps them for a certain length of time, just how long I do not know. It is more an administrative procedure.

Q. By group leader you mean your own section chief? A. Yes.

Q. The photostat department themselves do not maintain a record?

A. They may also maintain a record.

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(Testimony of Ray Weaver.)

Q. Have you searched in both of those places to determine whether there was any record that would indicate to you approximately when the original Exhibit 140 was returned to you?

A. No, I had no particular interest in knowing the date.

Q. Are you able to tell us the year it was returned to you? A. Either 1947 or 1948.

Q. When did you last see the original Exhibit 140, so far as you can recall now?

A. As far as I can recall now, I last saw it when I reinserted in the ledger from which I took it.

Q. And that would have been in 1947 or 1948?

A. That is right. [2325]

Q. You do not recall seeing it after that time?

A. No, sir.

Q. Was Exhibit 128 in any one's possession besides yourself personally during the years 1947 and 1948?

A. No one that would have removed any papers.

Q. That was not my question. Can you answer my question?

A. All of these records, for the purpose of keeping them from becoming mixed with others, were placed in a separate room on the floor below my own office and generally when I would work on the records I went down to the room and worked there, or if I was only going to work on one particular book, I might take the book up to my own office.

Q. When you removed the original of Exhibit

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(Testimony of Ray Weaver.)

140 to have the photostat, was Exhibit 128 at that time in your own office or in this room on the floor below?

Mr. Campbell: I submit that is immaterial.

The Court: You may answer the question.

A. I believe I took it to my own office, but my office has been moved several times since then and I can not remember just what floor it was on.

Q. In any event, you took it from this special room and to your own office, wherever it may have been? A. Yes.

Q. That is your best recollection?

A. Yes. [2326]

Q. At the time you got the original of Exhibit 140 from the photostat room and inserted it, as you said, in Exhibit 128, was that in your own office or in the special room where these records were being kept?

A. I believe it was still in my own office and then returned to the other room.

Q. Will you answer now then my question as to whether, during 1947 and 1948, any one other than yourself had custody or possession of Exhibit 128?

A. Whenever any records were requested by either Mr. Maundrell or Mr. Kyne, we would give them whatever they desired. Whether this record was ever returned to them under those circumstances, I do not recall, but that would be the only occasion when it would be out of my custody.

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(Testimony of Ray Weaver.)

Q. Did any other agent work with this Exhibit No. 128 during 1947 and 1948?

A. Yes. However——

Q. Would you give me the names of the agents?

A. Messrs. Morgan and Harkness.

Q. Did they ever take the book out of that special room, so far as you know, when working?

A. So far as I know, they never removed any of the records out of there unless they wanted to bring something up to my office just for a moment for the purpose of discussion.

Q. Was it in this same special room that you kept the B. & R. [2327] Smoke Shoppe 1944 dairy, which early testimony states was lost in the Bureau? A. Yes, I believe it was.

Q. And it was in that special room being kept there at the time it became lost, is that right?

A. What books?

Q. 1944 B. & R. Smoke Shoppe diary that was lost. A. I don't say it was lost there.

Q. Where was it being kept at the time, according to the testimony of agents who testified here, it became lost in the Bureau?

A. No, that was not the testimony. It might also have been returned at a request and then not subsequently returned to the Bureau.

Q. You recall the testimony of Mr. Morgan and Mr. Harkness and yourself that the last seen of that book was in the Bureau of Internal Revenue?

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(Testimony of Ray Weaver.)

A. That is true. That doesn't mean that it was lost there.

Q. Was it in that particular room, though, that it was being kept? A. Yes.

Q. Was that special room also the room in which you kept the memorandum of the conference with Mr. Thatcher which you stated you have lost?

Mr. Campbell: Objected to as assuming a fact not in evidence. [2328] He did not say the conference memorandum was lost.

Mr. Avakian: Can not be found is lost? He said he searched and couldn't find it. Isn't that lost?

The Court: Let us have the question.

(Question read.)

A. No, I did not keep that in the same place.

Q. That was kept in a different room?

A. I kept that in my own office.

Q. Which is the place which you said you received at the time the original of 140 from the photostat room? A. That is right.

Q. Now, your last recollection of seeing the original of Exhibit 140 is when you inserted it in No. 128, am I correct in that?

A. I believe that is right, yes.

Q. Now, I believe you testified that on or about July 11, 1949, you turned certain records of the Menlo Club over to Mr. Semenza, do you recall that? A. Yes.

Q. Was Exhibit 128 one of the documents which you turned over to him at that time?

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(Testimony of Ray Weaver.)

A. I think it was. If it appears on the list which is in evidence.

Q. I will hand you Exhibit 70, which is the receipt prepared by Mr. Semenza of records given to him on July 11, 1949. Does that refresh your recollection? [2329]

A. Is that marked 1945?

Q. Tiny's Restaurant and Menlo Bar, 1945.

A. Yes, that was included in these records.

Q. Do you know whether or not the original of Exhibit 140 was contained in Exhibit 128 at the time you turned it over to Mr. Semenza on July 11, 1949? A. I believe it was.

Q. Do you have any recollection of it?

A. No, because as I stated previously, whenever any of these records would be requested, we would return them and if they were again returned to us later, I would not go through to check every sheet to see if some sheets were not there.

Q. Let me find out just exactly what your testimony on that is. Do you have any specific recollection of seeing the original of Exhibit 140 contained in Exhibit 128 at the time you turned it over to Mr. Semenza?

A. No, I didn't go through the pages at that time.

Q. When you say you believe it was, do you mean simply that the last time you saw the original of Exhibit 140 it was contained in Exhibit 128 and you have no knowledge of ever having been taken out?

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(Testimony of Ray Weaver.)

A. I mean I replaced it in the book from which I took it and that thereafter no one had any occasion to remove any pages from any of the books, unless it was done when the books were out of our possession. That I can't testify to, [2330] of course.

Q. You don't know whether it was ever out for the reasons you stated, is that a fair statement?

A. I believe it was.

Q. Do you know whether you or anybody else in the Bureau of Internal Revenue could have lost the original of Exhibit 140?

A. I think it was not impossible, but very improbable.

Q. It would not be impossible but very improbable?

A. Yes; in fact, I would say here it was not lost; it was in the book at some time when it was turned over to some one else.

Q. Are you as sure of that statement as you were of your statement yesterday that your memorandum of your conference with Mr. Thatcher was upstairs on the third floor of this building?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. In any event, the last specific recollection you have of the original of that sheet is the occasion on which, after having it photostated, you inserted it back in Exhibit 128, your last specific recollection?

A. Actually looking at the sheet, yes.

Q. Now, you also testified on direct examination

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(Testimony of Ray Weaver.)

with regard to prosecution's Exhibit 125C. Do you recall testifying in regard to that exhibit?

A. Yes. [2331]

Q. When is your first recollection of having seen that sheet?

A. The first recollection of seeing this is at the time I looked through these records after they were deposited in the clerk's office here.

Q. Exhibit 125C, to clarify the record, is contained in bound volume which is designated Exhibit 125, is it not? A. Yes.

Q. And that is a ledger of the Menlo Club for the year 1947? That is the title, is that right?

A. That is right.

Q. And that likewise is a book which you turned over to Mr. Semenza on July 11, 1949, is it not?

A. Yes, that is right.

Q. Do you know approximately when representatives of the Bureau of Internal Revenue first obtained possession of the book that is in evidence, Exhibit 125? A. No, I do not.

Q. Do you know which particular agent obtained it?

A. No, I am not sure of that, either.

Q. Do you know which agent was working on the affairs of the Menlo Club during the course of your investigation?

Mr. Campbell: Course of his investigation?

Mr. Avakian: Course of investigation in which he was Menlo captain. [2332]

Mr. Campbell: I suggest the question, if the

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(Testimony of Ray Weaver.)

Court please, is misleading, in that he first asks as to the book which came into possession, he has testified, prior to his coming into the case. Now he asks what agents were working on the case while he was in it.

Mr. Avakian: There is nothing misleading about it.

The Court: What is your question, Mr. Avakian?

(Question read.)

Mr. Campbell: We submit it has been asked and answered.

The Court: Well, he may answer the question.

A. Mr. Morgan, Mr. Harkness and myself.

Q. Do you know whether Mr. Morgan or Mr. Harkness had custody or possession of that book at any time?

A. Well, if they worked on it, they had possession of it during that time, but all the records were in my general custody.

Q. Did they work on it?

A. Yes, they worked in this separate room.

Q. Were these records kept in that separate room continuously from the time you came into the case until you returned them over to Mr. Semenza?

A. Yes, except for occasions when they might be taken out for purposes of discussion.

Q. Did you at any time personally go through Exhibit 125 page by page?

A. Yes, at some time or other I did. [2333]

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(Testimony of Ray Weaver.)

Q. Do you know when? A. No, I do not.

Q. Did you do it all at one time or in piecemeal?

A. It would have been done all at one time.

Q. Did you make any notation or summary of pages that were contained in the book at any time?

A. No.

Q. Can you, without looking at that book, now tell me every page that is in it?

Mr. Campbell: Oh, that is objected to as argumentative.

The Court: Objection sustained.

Mr. Avakian: Well, your Honor, the question has been raised here as to whether——

The Court (Interceding): This ruling is going to stand.

Mr. Avakian: Well, I want to test the accuracy of his knowledge, your Honor.

The Court: It is ruled.

Q. When you say that you never saw the page that is designated Exhibit 125C until after it was deposited with the clerk during the course of this trial, do you mean that you have a specific recollection of every page that was in that book when you saw it? A. Well, I mean——

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained. [2334]

Q. Do you have a recollection that that page was not in that book, or do you simply not have a

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(Testimony of Ray Weaver.)

recollection as to whether you did see it there or not?

Mr. Campbell: Objected to as argumentative.

The Court: You may answer the question.

A. What I mean is this—when this Menlo Club record first came into our possession, I was very much interested in any account of that character which reflected the liability to Mr. Schriber for the purchase of the Menlo Club, and that is the reason I had photostats made of the exhibits you have before you. Now, I went all through every sheet of every book of the Menlo Club partnership at that time and the one you have before you now was not there because if it had been, I would have had it photostated. Now, when that came there, I do not know, but as I said before, upon occasion these records would be requested by either Mr. Kyne or Mr. Maundrell and would be returned and when they would again return to us I would not on each occasion go through every book and look at every page to see if any changes had been made.

Q. Do you recall when it was that you were particularly interested in the matter of the amount of liability to Mr. Schriber? Can you give us the approximate date of that?

A. Well, I was interested in it all during the investigation.

Q. Well, you said you had some particular concern and went through the book page by page. I am trying to fix the [2335] approximate time of that. A. I can't place the time.

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(Testimony of Ray Weaver.)

Q. You feel sure that the page designated 125C was not in Exhibit 125 at whatever time it was that you went through the book page by page, is that correct? Are you quite sure of that?

A 125C—I am not sure of the number.

Mr. Campbell: May he see the exhibit. It is hard to recall simply the exhibit number.

A. I am sure that at the time I went through the Menlo records, page by page, 125C was not there and 140 was there.

Q. Was where?

A. In the Menlo Club records.

Q. That wouldn't be 125, would it? That would be 128? A. No, I went through all the records.

Q. Now, do you know approximately how long prior to your turnover of the records to Mr. Semenza on July 11, 1949, it was that you made the page by page examination of the books that you just mentioned? What is your best recollection on that?

A. Well, I would say probably would be some time within the year, more or less.

Q. At the time that you turned the volume, designated in evidence here as 125C, to Mr. Semenza on July 11, 1949, can you state definitely that the page which is designated 125C was not in that book? [2336]

Mr. Campbell: Objected to as asked and answered, two or three times, if the Court please. He stated that he did not go through the records, that he had never seen that page, the other page was in

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(Testimony of Ray Weaver.)

there, that he inserted it, he had not looked again at the records.

The Court: Objection sustained.

Mr. Avakian: Will Mr. Campbell stipulate that is his testimony?

Mr. Campbell: I will let the record speak for itself.

The Court: All right, answer the question.

Q. Do you recall the question?

A. Not exactly.

(Question read.)

A. No, because the records may have been returned to the Menlo Club after having been originally received from them and I did not check each page every time they were returned and redeposited with us.

Q. It is quite possible then that at some time after you made your page by page examination, the book may have been returned temporarily to Mr. Maundrell and at that time he may have rewritten that page, as he testified he did, and inserted the new page in the book when he returned it to you?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. There was a time interval in there in which something like that [2337] might happen?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Do you know whether the Menlo Club books were returned to Mr. Maundrell or Mr. Kyne at any

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(Testimony of Ray Weaver.)

time during the period from the occasion on which you made your page by page analysis to the date July 11, 1949, when it was turned over to Mr. Semenza?

A. I have no definite recollection that they were, but if they were requested at any time, I certainly would have returned them.

Q. Do you have any recollection they were not returned?

A. No, I have no recollection of these particular records.

Q. Were you present during Mr. Maundrell's testimony that the entries on Exhibit 140 did not represent the true facts and that he had his secretary prepare Exhibit 125C for the purpose of setting forth the correct facts as he knew them?

Mr. Campbell: Objected to as argumentative. The record will speak for itself, as to what his testimony was. It is immaterial whether this man was present or not when Mr. Maundrell testified.

The Court: It may be some preliminary question. Answer the question.

A. I was present most of the time when Mr. Maundrell testified. I don't recall precisely what his testimony was. His testimony was very lengthy. I have not reviewed it. [2338]

Q. Have you reviewed that testimony?

A. No.

Q. You do not recall what he said?

A. I said I was present most of the time. As

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(Testimony of Ray Weaver.)

stated before, I missed two or three times. As to the time he was testifying, I do not recall.

Q. You say you were particularly interested during the course of your investigation as to the amount of liability of Mr. Schriber. Do you note on Exhibit 140, the photostat, the last entry made of payment to Mr. Schriber is dated February 28, 1946? A. Yes.

Q. Were you present in this court room when Mr. Maundrell and Mr. Schriber each testified that during 1946 there was a payment of 25 thousand dollars made on May 1st?

Mr. Campbell: Objected to on the same grounds.

The Court: Objection sustained.

Q. You have seen the check which represents that payment in evidence here, have you not?

Mr. Campbell: Objected to—he refers to the question on which objection was sustained.

The Court: Objection sustained.

Mr. Avakian: I will get the check—rather than take the time of going through these now, I will get at this another way. [2339]

Q. I show you Exhibit 125C. That contains an entry, does it not, of a payment to Gene Schriber on May 1, 1946, in the sum of 25 thousand dollars?

A. It contains a credit to the account. The account itself does not state whether it is a payment or not or how it was paid.

Q. The account shows, does it not, that 25 thousand dollars represents a reduction in that amount of the balance due? A. Yes, that is right.

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(Testimony of Ray Weaver.)

Q. And does that indicate to you, as an accountant, that there was a payment to Mr. Schriber in that amount, according to that entry?

A. Probably so, but only because I know some of the facts, not just from that.

Q. On Exhibit 125C there is also payment shown to Mr. Schriber in amount of 25 thousand dollars on May 1, 1947, is there not?

A. There is a credit to the account on that date, yes.

Q. Which reduces the balance due to Mr. Schriber? A. Yes.

Q. And that indicates payment to Mr. Schriber, does it not?

A. Well, normally it would. There are other reasons why credits could be made to the account.

Q. This is account of the payments to Mr. Schriber on account of 175 thousand dollars purchase price of the Menlo Club? [2340]

A. Yes. I have not seen checks for all of these credits.

Q. Now, calling your attention, Mr. Weaver, to the fact that payments or credits, as you call them, on May 1, 1946, and May 1, 1947, are noted in Exhibit 125C but are not entered in Exhibit 140, does that not indicate to you, as an accountant, that the change from the use of Exhibit 140 to the use of Exhibit 125C was made by Mr. Maundrell at some time after February 28, 1946, and prior to May 1, 1946? A. Not necessarily, no.

Q. If Mr. Maundrell had still been using the

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(Testimony of Ray Weaver.)

original of Exhibit 140 at the time of the 25 thousand dollar credit to Mr. Schriber's account on May 1, 1946, would it not have been normal and proper accounting procedure to have entered the amount of that 25 thousand dollar credit on the original Exhibit 140?

Mr. Campbell: Objected to as argumentative and calling for conclusion as to what Mr. Maundrell would do.

The Court: Objection sustained.

Q. Now, Mr. Weaver, from your examination of Exhibit 140, the photostat, and Exhibit 125C, although you state some of the particular entries are different, both sheets relate to the same transaction?

A. Yes, they relate to the purchase of the Menlo Club from Mr. Schriber.

Q. Now, on Exhibit 140, the photostat, the cost of equipment [2341] and inventory is listed at 75 thousand dollars, is it not?

A. Yes, that is right.

Q. And the cost of lease on that same exhibit is entered as 100 thousand dollars, is it not?

A. Yes, the lease cost was originally entered correctly.

Mr. Avakian: May we have that stricken as volunteer remark, whether it is correct or not?

The Court: Read the question and answer.

(Question and answer read.)

The Court: It may go out except the first part.

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(Testimony of Ray Weaver.)

Q. And the total of those two is 175 thousand dollars, is it not? A. Yes.

Q. On Exhibit 125C the same total of $175,000 is shown, is it not? A. Yes.

Q. But the allocation of the cost of lease and cost of equipment and inventory is made in different amounts from Exhibit 140, is that correct?

A. Yes, quite different.

Q. I will show you prosecution's Exhibit 91, which is the Menlo Club partnership return of income, designated amended return, and the filing date, that is, the Collector of Internal Revenue's receiving stamp is May 15, 1947, is that correct?

A. Yes, that's right. [2342]

Q. And that return contains in it a statement which allocates the 175 thousand dollar cost on the basis of $31,985.50 to merchandise and certain fixtures, is that correct?

A. Did you say $31,985.50?

Q. Yes. A. Yes.

Q. Now, except for the transposition of two numbers, that is exactly the same, is it not, as the amount set forth in Exhibit 125C, cost of equipment and inventory, $31,895.50?

A. Yes, on the record is $31,895.50.

Q. And on the return $31,985.50? A. Yes.

Q. In this amended return, which was filed May 15, 1947, the balance of 175 thousand dollars is designated as capital investment in amount of $143,801.50, isn't that correct?

A. Yes, that is what it shows here.

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(Testimony of Ray Weaver.)

Q. So the figure on that return filed in May, 1947, is exactly the same as the figure, cost of lease, on Exhibit 125C, namely, $143,801.50, is that correct?

A. That is correct, both the same amount.

Q. So that the allocation of 175 thousand dollars in Exhibit 25C is made in the same way as the allocation made in the amended return filed May 15, 1947, except for the transposition of those two figures, isn't that correct?

A. That's right. [2343]

Q. During the course of your examination did you at any time discuss with Mr. Maundrell the matter of the original of Exhibit 140 being different as to the allocation of 175 thousand dollars from the allocation made in the amended return filed on May 15, 1947?

Mr. Campbell: Objected to as immaterial as to any conversation.

The Court: He may answer the question.

A. I don't believe I would have because that would be considered of a possible fraudulent nature.

Mr. Avakian: May we have that statement after the answer to the question stricken as volunteer statement? I asked him if he did discuss it with Mr. Maundrell and he said he did not believe he would have and then a volunteer statement. May we have that stricken?

The Court: I think it is an explanation.

Mr. Avakian: Well, very well, if you want to give an explanation, let us go into it then.

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(Testimony of Ray Weaver.)

Q. If you think a particular matter might be a fraudulent matter, then you don't discuss it with taxpayer's representatives?

Mr. Campbell: Objected to as incompetent and immaterial.

Mr. Avakian: That is his explanation.

The Court: Objection sustained.

Mr. Avakian: Your Honor, may I not inquire as to explanation [2344] that he volunteered? You have permitted him to volunteer an explanation. May I not inquire into that?

The Court: The ruling will stand.

Mr. Avakian: I move again to strike that portion of his answer.

The Court: The Court has already ruled.

Mr. Avakian: I renew the motion.

Q. Your answer then is that you did not discuss it with Mr. Maundrell?

A. No, I am quite sure that I did not.

Q. Do you recall Mr. Maundrell's testimony that his allocation of $31,895.50 out of the 175 thousand as cost of equipment and inventory was based on appraisal of the Menlo Club made by the California State Sales Tax representatives?

Mr. Campbell: Objected to—the record is the best evidence of what his testimony was.

The Court: He may answer the question.

A. I recall him saying that he had some discussion with appraisers for the State Sales Tax people.

Q. Did you ever make any inquiry of the Cali-

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(Testimony of Ray Weaver.)

fornia State Sales Tax representatives to determine what appraisal they had made of the assets of the inventory of that business?

A. No, what they——

Mr. Avakian: That is the answer. He said he did not, that is the answer. [2345]

A. What they may——

Mr. Avakian: If he did not, there is nothing to explain.

The Court: All right. It is sufficiently answered.

Q. Is it your contention, Mr. Weaver, that the statement made when the return was filed with the Bureau of Internal Revenue, as to the manner in which this 175 thousand dollars was allocated and manner in which amortization deduction was computed, was a fraudulent statement?

Mr. Campbell: I am going to object on the ground this witness is not——

The Court: Objection sustained.

Mr. Avakian: Your Honor, he is——

The Court (Interceding): Mr. Avakian, I do not want to hear argument after I rule.

Mr. Avakian: May I ask permission to state my position before the ruling because you rule so fast we do not have opportunity to state our position.

The Court: When I rule that is final.

Q. Mr. Weaver, will you state, from your experience as an accountant, whether it is proper and correct accounting procedure to make entries in books of transactions promptly after they occur?

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(Testimony of Ray Weaver.)

A. Yes, they should be made as promptly as possible.

Q. And in view of that answer, would you state that the fact [2346] that payment of 25 thousand dollars to Mr. Schriber for May 1, 1946, is not entered on Exhibit 140, but is entered on Exhibit 125C would indicate to you, as an accountant, that Exhibit 125C was in existence at approximately the time of that transaction?

Mr. Campbell: Objected to as argumentative and asking for his conclusion and opinion as to matters which are within the province of the jury.

Mr. Avakian: Your Honor, the witness has been permitted to testify liberally as to what proper accounting procedure is and conclusions. He has looked at every entry made by Mr. Maundrell in the books of the Menlo Club and has testified because of his experience as an accountant he concludes the fact the entry was made means certain things to him that are not in the book. Now it is in line with that, your Honor, to show where it helps us rather than hurts us, that may have some interpretation as an accountant would indicate certain things. He has been permitted to draw conclusions, his judgment as an accountant in numerous instances, where his conclusion was to our disadvantage. We would like to show instances in which his conclusions as an accountant would be favorable to us.

The Court: May I have the question?

(Question read.)

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(Testimony of Ray Weaver.)

The Court: You may answer the question.

A. None of these records were actually adequately kept, so [2347] that normal bookkeeping procedure——

Mr. Avakian: I move the answer be stricken. He can answer that yes or no.

Mr. Campbell: He is entitled to give his opinion, he was asked for his opinion.

The Court: It will stand. Proceed with your answer.

A. Therefore, I couldn't use normal bookkeeping procedures to decide whether or not these entries have been made as of or approximately the dates indicated. I have no idea when they were made.

Q. But you have called upon your understanding of normal bookkeeping procedure in analyzing certain other entries made by Mr. Maundrell in the preparation of Exhibit 125-C, have you not?

A. That is right, and supported by other evidence.

The Court: We will take a recess now.

(Jury and alternate jurors admonished and recess taken at 4:04 p.m.) [2348]

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January 31, 1952—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Campbell: May I inquire again if anything has been heard of the witness, Schriber, whom I understand the defense requested be recalled?

Mr. Golden: He will be here today.

Q. Mr. Weaver, as I recall, you testified earlier in your examination that it was your opinion and judgment that the books and records of the Menlo Club were in part on the cash receipts and disbursements basis and in part on the accrual method of account, is that correct?

A. I do not recall that as my testimony.

Q. Well, could you give us your testimony in that regard?

A. You mean could I restate what I said before or——

Q. Yes.

Mr. Campbell: I object to that in that form.

The Court: Objection sustained.

Q. Is your opinion different than what it was? Give us your opinion now. I just want to get your testimony.

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(Testimony of Ray Weaver.)

Mr. Campbell: Objected to in that form.

The Court: Objection sustained. [2349]

Q. Well, Mr. Weaver, from your analysis of the books and records of the Menlo Club, can you, as an expert accountant, state whether the books were kept in part on cash receipts and disbursements method of accounting and in part on accrual method of accounting?

A. The records kept by the Menlo Club were entirely incomplete and actually followed no particular method. It consisted only of a record of cash receipts and disbursements, plus a few ledger accounts. For example, the purchase from Mr. Schriber and some partners' accounts.

Q. Now you say the records were entirely incomplete. It is true, is it not, that all of the receipts of the business were entered in those books?

Mr. Campbell: Objected to as calling for conclusion if all of them were entered.

The Court: You may answer the question.

A. I don't believe they were. I don't believe any of the receipts of the Menlo Club itself were entered in there for certain periods. I would have to check the records.

Q. You are referring now to the year 1945, in which Mr. Maundrell testified the poker sheets were inadvertently carried out by the doorman. Let us take 1946. You have all the poker sheets for the year 1946 in your possession, have you not?

A. Yes.

Q. You still have them upstairs in this building,

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(Testimony of Ray Weaver.)

except for [2350] the few offered in evidence here?

A. That is right.

Q. And is it not true, Mr. Weaver, that the receipts of the Menlo Club for 1946, as shown by the poker sheets prepared by the cashier's cage, were entered in the Menlo Club cash receipts book for 1946? A. Yes.

Q. And it is true, is it not, that the Menlo Club kept a book showing the receipts of the restaurant and bar business also for the year 1946?

A. Yes.

Q. Do you know of any testimony in this record of one penny or more of income of the Menlo Club for the year 1946, that was not entered in the cash receipts books of the Menlo Club?

Mr. Campbell: Objected to as incompetent. The record speaks for itself.

The Court: Objection sustained.

Mr. Avakian: Your Honor, he says it is incomplete. That is a damaging statement; I would like——

The Court (Interceding): I have ruled. If you want to know the reason, I will state it.

Mr. Avakian: Perhaps it would guide me.

The Court: I do not believe this witness is here for the purpose of telling us what the evidence in this case is. [2351]

Mr. Avakian: My point is, he says the books are incomplete——

The Court (Interceding): Here is my point. Let us not argue any further about it.

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(Testimony of Ray Weaver.)

Mr. Avakian: Then in view of your Honor's ruling that it is not proper for this witness to answer that question, we would ask that his statement that the books were entirely incomplete be stricken.

The Court: Motion denied.

Mr. Avakian: Denied before I make the motion?

The Court: You made it; you are not going to add any more to it.

Mr. Avakian: You interrupted it before I finished. I did not complete it.

The Court: Well, very well.

A. Before——

Mr. Avakian: Just a minute. There is no question pending, Mr. Weaver.

Q. Let us get back then to the question which I asked you several questions back and let me see if you can give me an answer. If you can not, say so. If you can, will you answer this question, Mr. Weaver. You made examination of the books and records of the Menlo Club for the year 1946, as they are in evidence here, would you say, as an expert accountant, that those books were kept in part on the cash receipts and [2352] disbursements method of accounting and in part on the accrual method of account? If you can't answer, say so.

A. No, due to the very nature of the records——

Q. You mean you can not answer?

Mr. Campbell: Just a minute——

The Court: You propounded a question—let the witness answer. Read the question.

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(Testimony of Ray Weaver.)

Q. Let us read the question and have him answer.

(Question read.)

A. I would say that since the books are incomplete——

Mr. Avakian: May we have that stricken, your Honor?

The Court: No let him proceed with his answer.

Mr. Avakian: I would be glad to cross-examine him. Since I can not, will you stop him making statements which your Honor will not permit me to ask?

The Court: The question was propounded and I propose to let him answer.

Mr. Avakian: I would love to get an answer.

The Court: You will get one if you will be quiet. Go ahead with the answer.

A. Since the records were incomplete in certain respects, it could not be on the accrual basis. The records were entirely on cash receipts and disbursements basis.

Q. They were going on the cash method?

The Court: Let me have that answer. [2353]

(Last answer read.)

Q. Were you wrong then in your earlier testimony, when I showed you that the Menlo Club income tax returns had a check mark that they were prepared on the cash basis and you said that that was incorrect, that they were actually kept partly on cash and partly on accrual basis?

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(Testimony of Ray Weaver.)

A. We were talking then about the returns and not the books. Now some further explanation of that is necessary. Returns may be prepared on either the cash or the accrual basis of accounting. The regulations require that where inventories are income and a determining factor, no basis other than accrual is the correct basis of reporting income. Therefore, where inventories are a factor, the accrual basis should be used. Now it is true that in cases where inventories are used in small retail establishments, the Treasury Department has not required those small businesses to report on the accrual basis, because to do so in many cases would involve a hardship from a bookkeeping standpoint. Therefore, there has actually arisen a sort of hybrid basis of reporting income which means, from the standpoint of purchases and sales, where returns are actually on cash basis but from the standpoint of inventory they are on accrual basis, but the books themselves might be entirely on the cash basis.

Q. What is your opinion as to which method should have been used for the Menlo Club in the year 1946? [2354]

Mr. Campbell: Objected to as immaterial. The question is what was used.

The Court: Answer the question.

A. The correct method of reporting income, wherever inventories are income and determining factor, it should be accrual method. However, we made no adjustment from cash basis to accrual basis

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(Testimony of Ray Weaver.)

in this case because to do so would have penalized the taxpayer for adjustment which purely a technical nature.

Q. As a matter of fact, Mr. Weaver, if you had made an adjustment of the Menlo Club to the accrual basis, would you have added any assets as of December 31, 1946, other than those which are already on your Exhibit 165?

A. To determine exactly what the charges would be and the resulting reflecting income. I can not answer without detailed analysis of every item at the beginning and end of each year.

Q. So far as accounts receivable are concerned, namely, the markers, you have already listed those in the assets as of December 31, 1946, Exhibit 165?

A. Yes; now that is an entirely different matter.

Mr. Avakian: Just a moment.

Mr. Campbell: I think he is entitled to finish his answer.

Mr. Avakian: He answered the question. He said yes.

The Court: He may proceed with his explanation. [2355]

Mr. Avakian: If it is an explanation of the answer, yes, but I would like to proceed with my question.

The Court: Let me have the question.

(Question and answer read.)

The Court: Do you want to explain?

A. Yes, it requires some explanation because I believe you are under misapprehension.

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(Testimony of Ray Weaver.)

Mr. Avakian: Let's not worry about my misapprehension, Mr. Weaver.

The Court: No, Mr. Avakian, if there is any admonition going to any one in this court room, it will come from the bench.

Mr. Avakian: May I request the witness not to worry about my misapprehension?

A. To explain the difference between accounts receivable that arise as the result of exchange of one asset for another. For example, if you had ten thousand dollars cash on hand at the beginning of the year. During the year some one borrowed that money from you, you would no longer have ten thousand dollars cash in hand at the end of the year, but if we had to show any asset at the end of the year, our statement would reflect a loss of ten thousand dollars, which obviously would be incorrect, since your assets have not changed at all in amount, they have only changed in character. You have substituted ten thousand dollars cash and got ten thousand dollars [2356] accounts receivable. That is exactly the same situation with respect to these markers. They have been exchanged for cash. Now if the asset arises as the result of the receipt of income, or if the liability arises as the result of payment in incurrence of an expense, then you have items which are not properly taken into account on net worth basis, if the taxpayer is reporting——

Mr. Avakian: This is no explanation. This is a lecture on unrelated matters.

The Court: Your point is not well taken. You

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(Testimony of Ray Weaver.)

may proceed if you have any further explanation you want to make.

A. I merely wanted to say finally that this is the reason you must make a distinction between cash receivable accounts and cash payable as to the source from which they arise, and you can not take into account, in determining net income under the net worth method, where the cash basis of reporting is used, any assets or liabilities that arise as the result of the receipt of income or the incurrence of expense, because to do so would give you an incorrect result.

Mr. Avakian: Your Honor, I move to strike the portion of the answer after "yes," as not responsive.

The Court: Motion denied.

Q. Now, Mr. Weaver, the fact is, is it not, in your Exhibit 165 you have already included as an asset of the Menlo Club [2357] on December 31, 1946, all of the markers that were in existence at that time, so far as the evidence here shows?

A. It will be necessary to do so——

Q. Just answer me.

The Court: Answer yes or no, Mr. Weaver.

A. Yes.

Q. Now from your examination over the last five years of the records and affairs of the Menlo Club, can you refer me to any single account receivable that is mentioned in the evidence in this case, as of December 31, 1946, of the Menlo Club,

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(Testimony of Ray Weaver.)

which you have not already included in Exhibit 165?

A. You mean, are there some accounts receivable that are not on the exhibit?

Q. Is there any item of accounts receivable mentioned in this evidence in this case of the Menlo Club for December 31, 1946, which you have not already included in Exhibit 165?

Mr. Campbell: Objected to as asking him to characterize the evidence. The record speaks for itself.

The Court: Well, he may answer the question.

Mr. Campbell: I make the further objection in this regard, I think the question should be if he knows of any which are not, but to ask him to search the record——

The Court: You may answer the question.

A. Well, I have no recollection of any; no, sir.

Q. Now when you say to compute on an accrual basis in [2358] preparing Exhibit 165 would have been prejudicial to the taxpayer, you did not have in mind any particular assets that you were going to add to Exhibit 165 as of December 31, 1946? You did not make that adjustment, did you?

A. I had in mind this, that whatever that adjustment would be, it would be purely technical in nature and would have no place in any issue of fraud.

Q. You had no particular adjustment in mind in making that statement?

A. No, no specific one, no.

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(Testimony of Ray Weaver.)

Q. Now isn't it a fact, Mr. Weaver, that if you put the Menlo Club on an accrual basis in your Exhibit 165, that as of December 31, 1946, you would have shown certain accounts payable as liabilities, which are not listed on Exhibit 165?

A. There was, to my recollection, no accounts payable on the records.

Q. Is it not true, Mr. Weaver, that if you were preparing a statement of the liabilities of the Menlo Club as of December 31, 1946, on accrual basis, you would have shown an amount for pay roll and withholding taxes due by the Menlo Club to the United States government and to the State of California as of December 31, 1946?

A. Those items would always be offset by assets of equal amount.

Q. Would you not have shown those as liabilities? [2359] A. Certainly, offset by assets.

Q. And to the extent, Mr. Weaver, that the Menlo Club actually paid those liabilities after December 31, 1946, the adjustment to the accrual basis would have reduced the net worth of the Menlo Club as shown on Exhibit 165 for December 31, 1946, would it not?

A. I don't follow that question.

Q. Well, on the accrual method of accounting, you enter the liability at the time the liability arises, even though it is paid at a later date, isn't that correct? A. Yes, also enter the asset.

Q. Yes, that is right. If, on December 31, 1946, the Menlo Club had certain liabilities which it had

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(Testimony of Ray Weaver.)

not yet paid, on the cash method you would ignore those liabilities, but on the accrual method you would show them as liabilities on net worth statement, would you not?

A. If they were reported on the books. The mere setting up of a liability would give rise to an asset of equal amount.

Q. Are you speaking now of cash or accrual method? A. Accrual method.

Q. But on the cash method, you do not show that liability, do you? A. If it is not in the books.

Q. In your Exhibit 165 did you set up any liability on account of accounts payable by the Menlo Club at December 31, 1946? [2360] Would you like to refer to the exhibit? A. Yes.

Q. I will show you my photostat copy for convenience. A. None.

Q. You have not. And if you had set up Exhibit 165 on the accrual method of accounting, would you not have listed as liabilities on December 31, 1946, the amount of any obligations of the Menlo Club due on December 31, 1946, but not yet paid? A. That would only be half——

Q. Let us get that half first and then we will go to the other half. Would you have set up?

A. The two can not be taken independently.

Q. Would you have set up that liability?

A. Yes.

Q. What is the other half?

A. The other half is that there would have been another asset.

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(Testimony of Ray Weaver.)

Q. And what would that other asset have been?

A. That would have been in connection with withholding the cash withheld from employees' checks, which is not reported in the books.

Q. Now you have actually shown in the assets on Exhibit 165 all of the cash in bank roll, the accounts receivable, any bank roll cash, any petit cash funds, and cash in bank accounts, have you [2361] not?

A. There may have been other cash, however. I have not looked at all the books.

Q. Isn't it a fact, Mr. Weaver, that on Exhibit 165 you have already included in assets every item of cash and every bank account balance as of December 31, 1946, that you know of that has been covered by the testimony in this case?

A. Every one that I know of, with the exception, I believe, there is testimony to the effect—if I am wrong, I am sure you will correct me——

Q. You can point to the testimony.

A. ——that taxes withheld from employees' wages were kept in a separate tax box and as the time arrived for the payment of those taxes, the amount of cash was taken and deposited in the bank account; therefore, did not appear as part of the bank roll or as part of the accounts receivable or as part of the bank account.

Q. You are confused, are you not, with the cash box kept at the 186 Club, Mr. Weaver?

A. My recollection was that the same procedure was followed at both clubs.

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(Testimony of Ray Weaver.)

Q. For my guidance, can you refer me to the witness who testified to that effect?

Mr. Campbell: Object to that, the record speaks for itself. He asks for his recollection——

The Court: Objection sustained. [2362]

Mr. Avakian: Your Honor, if he is going to justify from the basis of testimony, can't I just ask him if he can point to the testimony?

The Court: Objection sustained.

Mr. Avakian: I have read it all and I can't find it.

Q. Now, Mr. Weaver, you also stated that in your opinion—were you about to refer me to some testimony in that respect?

A. No, I was going——

Q. (Interrupting): Very well. Now, Mr. Weaver, you testified that in your opinion the Menlo Club was not a partnership but rather was an enterprise belonging solely to Mr. Remmer. You know, do you not, from your examination of the records in this case, that various parties described in evidence here as partners in the Menlo Club, received credits on the books of the Menlo Club for a percentage share of the profits for each respective year? You have seen that in the books that are in evidence here? A. Yes.

Q. And let us take Mr. Maundrell as an example. I call your attention to prosecution's Exhibit 125, which is a ledger of the Menlo Club—perhaps the prosecution might look at this sheet before I show it to the witness—and particularly

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(Testimony of Ray Weaver.)

to the page entitled: "Partners' Account Tiny's Restaurant, Bar and Menlo Club, Harold H. Maundrell, 10 per cent." I will ask you to look at that sheet and first of all will you tell me the [2363] balance of the account that was credited to Mr. Maundrell for the end of the year 1945?

A. Apparently carried over from another sheet it shows "Balance 1945," there is no designation as to whether or not it is credit or debit, but I presume from subsequent entries in the account that it was intended to be a credit balance, of $13,003.37.

Q. And I call your attention to prosecution's Exhibit 89, which is the Menlo Club partnership return of income for the year 1945, and I will ask you if on Schedule I, "Partners' Share of Income and Credits," there is allowed to Harold H. Maundrell in amount of 10 per cent, a credit of $13,003.37? A. That is what is entered.

Q. And that is the same amount in Exhibit 125?

A. That is right.

Q. Will you tell me the amount that is credited to Mr. Maundrell's capital account as his share of the profits for the year 1946, in Exhibit 125?

A. There is an entry here, 1946, apparently before a succeeding date of June 14, 1946, which states the profit for 1946, under credits, $8,349.65.

Q. And I call your attention to prosecution's Exhibit 90, the Menlo Club partnership return of income for the year 1946, and ask you if that does not show in Schedule I, Harold H. Maundrell, 10

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(Testimony of Ray Weaver.)

per cent, $8,349.65? [2364] A. Yes, it does.

Q. And that is the same figure you just read from Exhibit 125? A. That is right.

Q. And after the crediting of that 1946 share of profit, what was the credit balance in Mr. Maundrell's account as shown by Exhibit 125?

A. $21,353.02.

Q. Now is it not true, Mr. Weaver, that Exhibit 125, the account of Harold Maundrell before you, shows that during the year 1946, during the year 1947, and during the year 1948, Mr. Maundrell withdrew various amounts from the Menlo Club which were then deducted from his account to reduce the balance?

A. There are charges against his account. Some of them are for withdrawals and some for payments, apparently made from his account.

Q. Payments of his income tax?

A. I don't know what they represent, simply marked "Collector Internal Revenue," "Franchise Tax" and so on.

Q. What was the balance in Mr. Maundrell's account on December 31, 1946, according to the exhibit before you? A. $17,355.22.

Q. Now can you compute for me on this sheet of paper, which I will hand you, the amount of money withdrawn by Mr. Maundrell from the Menlo Club after December 31, 1946, according to [2365] Exhibit 125?

Mr. Campbell: Object to the question in that form—withdrawn. He can state the total of the

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(Testimony of Ray Weaver.)

charges shown in the books of that account. It would be his opinion and conclusion as to what Mr. Maundrell withdrew.

The Court: You may answer the question.

A. Do you want me to include the payments made?

Q. Well, in accounting, Mr. Weaver, a payment made on behalf of a partner and charged to his account is the same as withdrawal.

A. Well, you have to be careful in using accounting terminology here, I think. After December 31, 1946?

Q. Yes, that's right.

A. The total debits are $15,600.

Q. What was the balance at the end of 1946?

A. $17,353.22.

Q. So that, to use round figures, of the 17 thousand dollar cerdit balance that Mr. Maundrell had on the books at the end of 1946, approximately 15 thousand dollars was either withdrawn by him or paid for his account after December 31, 1946, is that right? A. Yes, that's right.

Q. Now, Mr. Weaver, you know, do you not, that Mr. Maundrell did work in connection with the affairs of the Menlo Club?

A. Yes. [2366]

Q. Now would it not be true, Mr. Weaver, that if you disallowed partnership status to Mr. Maundrell in the Menlo Club as a matter of proper accounting procedure, you should allow in some

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(Testimony of Ray Weaver.)

amount a salary to him as an expense of the business? A. I believe he was paid a salary.

Q. The same amount, isn't that true?

A. Yes.

Q. If we assume, as you have assumed, that the Menlo Club was not a partnership, but that it was a sole enterprise of Elmer Remmer, and if we assume further that Mr. Maundrell's employment was on the basis of a fixed salary, plus ten per cent of the profits of the business, and if we assume further that the Menlo Club was on the accrual basis of accounting, would the Menlo Club not be entitled to a deduction in the amount of the actual salary paid to Mr. Maundrell, plus the ten per cent share of the profits to which he was entitled under his agreement?

Mr. Campbell: Objected to as incompetent and assuming facts not in evidence, not within the scope of the direct examination.

The Court: Objection sustained.

Mr. Avakian: May we be heard on that?

The Court: Yes. We will excuse the jury.

(Jury and alternate jurors admonished and excused at 10:40 a.m.) [2367]

(In the absence of the jury.)

(NB 337—PP 92-100. NB 338—PP 1-4.)

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Campbell: I believe at the time of recess there was pending an objection to the form of question then asked.

The Court: Objection sustained.

Mr. Avakian: I understand it was sustained as to the particular form, your Honor.

Q. Now, Mr. Weaver, let us assume, as you have assumed, that the Menlo Club was not a partnership but rather was an enterprise owned solely by Mr. Remmer; let us assume further that during the year 1945, and the year 1946, Mr. Maundrell was an employee of the Menlo Club on arrangements, whereby he was to receive a fixed salary, plus 10 per cent of the profits each year; let us assume further that Mr. Maundrell, during the years 1945 and 1946, actually collected his fixed salary but that the amount of 10 per cent share of the profits was credited to him on the books; let us assume further that in the years 1947 and 1948, Mr. Maundrell actually collected, on account of the salary which had been credited to him on the books on

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(Testimony of Ray Weaver.)

December 31, 1946, the sum of approximately [2368] 15 thousand dollars; let us assume further that in the business of the Menlo Club inventories were a factor—would you then state, as an expert accountant, that under proper accounting procedure the Menlo Club business should set up, as an accrued liability at December 31, 1946, the amount of Mr. Maundrell's 10 per cent share of the profits, which have been credited to him on the books at that time and which had not been withdrawn?

Mr. Campbell: Objected to as incompetent, not within the scope of direct examination; immaterial here, in that it would seek to vary the testimony and the evidence before the Court in indulging in an assumption.

The Court: I can't hear you, Mr. Campbell.

Mr. Campbell: I object on the grounds that the question is incompetent, in that it assumes facts not in evidence; that it is immaterial, in that it seeks to go outside of the issues and evidence in this case, and finally that it is not within the scope of the direct examination.

The Court: The objection will be sustained.

Q. Mr. Weaver, you stated in one of your answers a few moments ago that under the Treasury Regulations, where inventories are a factor, the regulations require the use of the accrual method of accounting. Can you refer me to the particular section of the regulations which you had in mind?

A. That was only part of the answer. [2369]

Q. Well, it is the section of the regulations that

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(Testimony of Ray Weaver.)

you had in mind that I want to get from you now. Would you like to look at the regulations?

A. No——

Mr. Campbell: I am going to object. These matters, it seems to me, can be taken up outside the court.

The Court: Was your objection to the question he would like to look at something or another question before the Court?

(Previous question read.)

The Court: Answer that question.

Mr. Campbell: He started to answer.

The Court: Then there was another question.

Mr. Avakian: May we have the answer to that question?

A, This is asking for reference to some section of the regulations?

Q. Yes.

Mr. Campbell: Then I am going to object on the ground it states fact not in evidence. That was not his testimony.

The Court: Let us have this question read. Listen to the question.

(Question read.)

A. I can't remember the section numbers nor its contents without referring to the regulations themselves.

Mr. Avakian: I wonder if your counsel has a copy of the [2370] regulations which he can hand

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(Testimony of Ray Weaver.)

you for that purpose? I can furnish you with my own copy.

Mr. Campbell: We do not. I object to it as immaterial. It is a legal matter.

The Court: Objection overruled.

Q. I will hand you——

Mr. Campbell: Incidentally, my objection was not to his pointing to the regulation, but the cross-examining of his testimony, what his testimony was. The witness stated in his first answer that that was not his exact testimony.

The Court: Let me have the question.

(Question read.)

The Court: Is it your objection that he did not so state?

Mr. Campbell: That was only a portion of the statement which he made and in that respect would be misleading.

The Court: Objection overruled. He may answer the question.

Q. I will hand you my copy, Mr. Weaver, for your use. Section III regulation referring to income tax under the Internal Revenue Code issued by the Secretary of the Treasury, and I ask you if, from your examination of that, you can refer me to the particular section or sections you had in mind?

A. The methods of accounting prescribed are generally stated in Sections 29.41-1 through 29.41-3.

Q. Is that Sections 29.41-1-2-3, are those the sections to [2371] which you refer?

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(Testimony of Ray Weaver.)

A. Yes, that is right.

Q. Have you finished looking at that now?

A. Yes, unless you want me to state—pardon me.

Q. Would you like to read the language on that?

A. Not particularly.

Q. Now, Mr. Weaver, are you aware of the fact that the provisions of those sections to which you have just referred were, in 1951, held invalid by the United States Circuit Court of Appeals in the case of Glenn v. Kentucky Color & Chemical Co., Inc., 186 Fed. (2), 975?

Mr. Campbell: Objected to——

The Court: Sustained.

Q. Let me ask you if you are familiar with the case of Glenn vs. Kentucky Color & Chemical Co., Inc.?

Mr. Campbell: Objected to——

The Court: Mr. Avakian, please do not impose upon the Court.

Mr. Avakian: Your Honor——

The Court (Interceding): Do not impose on the Court. Now let us not have anything further said.

Mr. Avakian: Would it be possible to be heard in the absence of the jury?

The Court: No, nothing in the absence of the jury. Just go along. You know what I mean. [2372]

Mr. Avakian: I have to defer to your Honor's ruling.

The Court: You know when the Court rules, attorneys should not try to evade the ruling by saying the same thing in a different color.

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(Testimony of Ray Weaver.)

Mr. Avakian: It is not the same thing, your Honor.

The Court: That is all. Let us go along.

Mr. Avakian: Your Honor, I must respectfully feel I should cite as prejudicial error——

The Court: Very well, you may cite it. Let us go along.

Q. In making the statement, Mr. Weaver, that where inventories are a factor, the Treasury regulations require the use of the accrual method of accounting, did you take into account any sections of the regulations, any sections of the Internal Revenue Code, or any court decisions, aside from these three sections of the regulations which you mentioned?

Mr. Campbell: Objected to as immaterial and entirely incompetent.

The Court: Let me have the question.

(Question read.)

The Court: Objection sustained.

Q. Mr. Weaver, in testifying on Monday morning, I believe it was, in your direct examination with regard to your Exhibit 175, which is designated Elmer F. Remmer, Gallagher & Burton whiskey equity at December 31, 1943; 1944, 1945, and 1946, you were questioned as to whether the records of Cal-Neva, Inc., [2373] contained any entries in connection with this whiskey, and you stated that there was an entry showing payment for 100 cases on September 27, 1944, check No.

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(Testimony of Ray Weaver.)

6435, in amount of $6,896, and you stated that that was charged to liquor and whiskey purchases, and then on further questioning you gave these answers to these questions—I am reading from page 2148 of the transcript, beginning at line 19—you had before you then to refresh your recollection Cal-Neva ledger, which I believe is 146.

Mr. Campbell: At that time you say he testified it was for 100 cases? At the top of 2148 you will see he says, "I believe it was 100 cases, I am not sure of the amount."

Mr. Avakian: I will read the testimony beginning with line 15, page 2147:

"No, there were no entries in connection with this whiskey that appeared in the books of Cal-Neva whatsoever, except one entry, indicating the purchase by Cal-Neva from Mr. Remmer of a lot of 100 cases.

* * *

"Q. Now what was the amount of the whiskey which you refer to as having been reflected in the Cal-Neva books as having been delivered to Cal-Neva?

"A. Represented a lot of 100 cases. I believe it was 100 cases, I am not sure of the amount." [2374] Next question:

"Q. Mr. Weaver, can you refer to the Cal-Neva records and to where that entry appears?

"A. Yes.

"Q. Would you do so? What book is that in?

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(Testimony of Ray Weaver.)

"A. Under date of September 27, 1944, on page 113 of the check register.

"Q. That is exhibit——

"A. 146. There is an entry E. R. Remmer, 27th day of September, check No. 6435, and the amount is $6,896, and it is charged to liquor and whiskey purchases. That refers to the purchase of——

"Q. Are you reading from the book?

"A. No, but I know that refers to the purchase of Gallagher & Burton whiskey.

"Mr. Golden: That is not responsive. The question is what the books show.

"Q. Mr. Weaver, will you state in what manner you identify that as referring to the Gallagher and Burton whiskey?

"A. There might have been a notation on the check itself. If I could see the original check.

"Mr. Campbell: All right, we will pass that and if you will look for it during the afternoon recess we will come back to it." [2375]

Q. Since Monday, when that testimony was given, have you looked for that check, Mr. Weaver?

A. Yes.

Q. Have you found it?

A. No, I have not.

Q. Are you able, from further examination that you made, to complete or clarify your answer on that matter at this time? A. Yes.

Q. Do you need any further books before you for that purpose?

A. Well, I am not sure—Mr. Stewart gave some

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(Testimony of Ray Weaver.)

testimony as to the release of two 100-case lots of this whiskey to Cal-Neva a month or two prior to the issuance of this check. Now I do not recall whether those orders for the release of that whiskey are in evidence here or only Mr. Stewart's testimony is there in the record.

Q. Do I understand from that that you are not yet ready to give us the answer based on evidence in this case, that you wish to check further on that before you can give us the answer?

A. If there are any orders in evidence, I would like to see them.

Q. Have you already done that since last Monday, or would you still wish to make further investigation of the records to answer the question; so we will pass it on. In other words, are you prepared to give us an answer based upon whatever exhibits are here? [2376]

A. I believe so. As I recall now, there are no exhibits in evidence. I would like to check to be sure.

Mr. Avakian: I made no search myself on that point. I thought that you were going to do it.

Q. Are you able to give us the accurate answer to that now, or would you need to make further reference to the evidence?

A. I have some photostats of orders releasing them.

Q. Are they in evidence here?

A. They are not in evidence, no.

The Court: Did you finish your answer?

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(Testimony of Ray Weaver.)

A. I meant to add that I can use this to refresh my recollection on the subject matter.

Q. My question was, are they in evidence?

A. No.

The Court: Your question was an interruption of his answer. Now I want to see if he wants to answer?

(Question read.)

(Answer read.)

The Court: Does that complete your answer?

A. Yes.

Q. Now in your Exhibit 175—and I believe you have the original of that before you, do you not?

A. Yes.

Q. You have set up what purports to be the equity of Mr. Remmer in the Gallagher & Burton whiskey mentioned on that exhibit, at the end of each of the years 1944, 1945, and 1946, is [2377] that correct? A. Yes.

Q. In preparing that exhibit and in computing the amount of Mr. Remmer's equity, have you made your computations on the basis of the money actually expended by Mr. Remmer for the purchase of those assets and for any additions to the cost of them? A. Yes.

Q. And have your computations been based entirely and solely on the evidence that has been received in this case?

A. Yes. I believe in one or two cases that other items may have been used as corroboration.

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(Testimony of Ray Weaver.)

Q. You mean items that are not in evidence here? A. Yes.

Q. Without indicating what other material you used, can you point to the particular item on Exhibit 175 as to which you used material outside of the evidence in the case?

Mr. Campbell: Pardon me—I object to that——

The Court: Objection sustained. The reason I sustained the objection was that your question assumes an incorrect statement of the witness' answer.

Q. You said that as to certain items——

The Court (Interrupting): He used them for corroborating.

Mr. Avakian: But he did use material. [2378]

Q. Now as to any items on Exhibit 175, did you use any material for corroboration that is not in evidence here in this case? A. Yes.

Q. Can you tell me what particular items, without stating what the other material was?

A. The allocation of the amount owed to Sierra Wine & Liquor Company as between the year-ends had to be allocated.

Q. Which year-ends are you referring to now?

A. Well, Mr. Barengo's testimony——

Q. Which year-ends are you referring to?

A. 1943-44.

Q. Those two years? A. Yes.

Q. Was there any other item on Exhibit 175 as to which you made reference in corroboration to material which is not in evidence in this case?

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(Testimony of Ray Weaver.)

Mr. Campbell: I am going to object to the materiality.

The Court: He may answer the question.

A. I do not believe it would be done in any other case because all of the other deliveries are in the testimony and the deduction of amounts on hand were merely taken per case cost.

Mr. Avakian: May we have the question read again?

The Court: Yes, read the question. [2379]

(Question read.)

Q. Answer this yes or no.

A. I do not believe so.

Q. Now I call your attention to the item about half way down the first page of the exhibit, which is entitled, "1944 Floor Stock Tax" and the amount of it in the extreme right-hand column is shown as $7,479.22. Are you able at this time to refer me to the evidence in this case upon which you entered that amount for that item?

A. Are you referring to the second carload?

Q. Referring to the amount of 74 hundred some odd dollars.

Mr. Campbell: Pardon me, Mr. Avakian. There are two lots set forth in that amount. It refers to carloads, you will observe, on the exhibit.

Mr. Avakian: There is only one figure on my photostat of the exhibit in the amount of $7,479.22. It is as to that figure, your Honor, for Mr. Campbell's information, that I am asking the question.

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(Testimony of Ray Weaver.)

A. There is a floor stock tax return here in evidence with that inventory attached.

Q. I hand you prosecution's Exhibit 60, which is designated "Return of Floor Stock Tax on Distilled Spirits, Malt, Liquors and Wines Under Revenue Act of 1943. Name of Taxpayer, Cal-Neva, Inc., Lake Tahoe." Is that the exhibit to which you refer? [2380] A. Yes.

Q. And that shows the payment of a tax in amount of $7,479.22, is that correct?

A. Yes, that is right.

Q. Now, Mr. Weaver, in computing Mr. Remmer's equity in the Gallagher & Burton whiskey described on Exhibit 175, for the purpose of the use of that exhibit in computing Mr. Remmer's income on net worth basis, is it not true that proper accounting procedure calls for the inclusion in that equity of Mr. Remmer's only amounts which were paid out of Mr. Remmer's funds?

A. May I have the question again?

(Question read.)

Mr. Avakian: I will restate it. I will go into a couple of preliminary questions first.

Q. Mr. Weaver, Exhibit 175 was prepared by you and offered in evidence here for the purpose of showing your computation of Mr. Remmer's equity in this Gallagher & Burton whiskey on the respective date shown in this exhibit?

Mr. Campbell: Objected to as incompetent, his characterization.

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(Testimony of Ray Weaver.)

The Court: Objection overruled. Answer the question.

A. Yes.

Q. And this exhibit is one of the links in the chain of computing Mr. Remmer's total net worth according to the theories [2381] of the prosecution on the respective dates shown in Exhibit 175?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

Q. Well, Mr. Weaver, in preparing a statement of Mr. Remmer's equity in the Gallagher & Burton whiskey described in Exhibit 175, isn't it true that proper accounting procedure, where the purpose of computing the equity is to determine net income on net worth method, would be to include in that equity only the sums of money actually invested in that property by Mr. Remmer?

A. No, if you include in that definition of "actually invested in property" by Mr. Remmer amounts paid to his account, they may have been charged to him, otherwise.

Q. With that qualification you would say that the answer is yes? A. Yes.

The Court: We will take a recess at this time until 1:30.

(Jury and alternate jurors admonished and recess taken at 11:45.)

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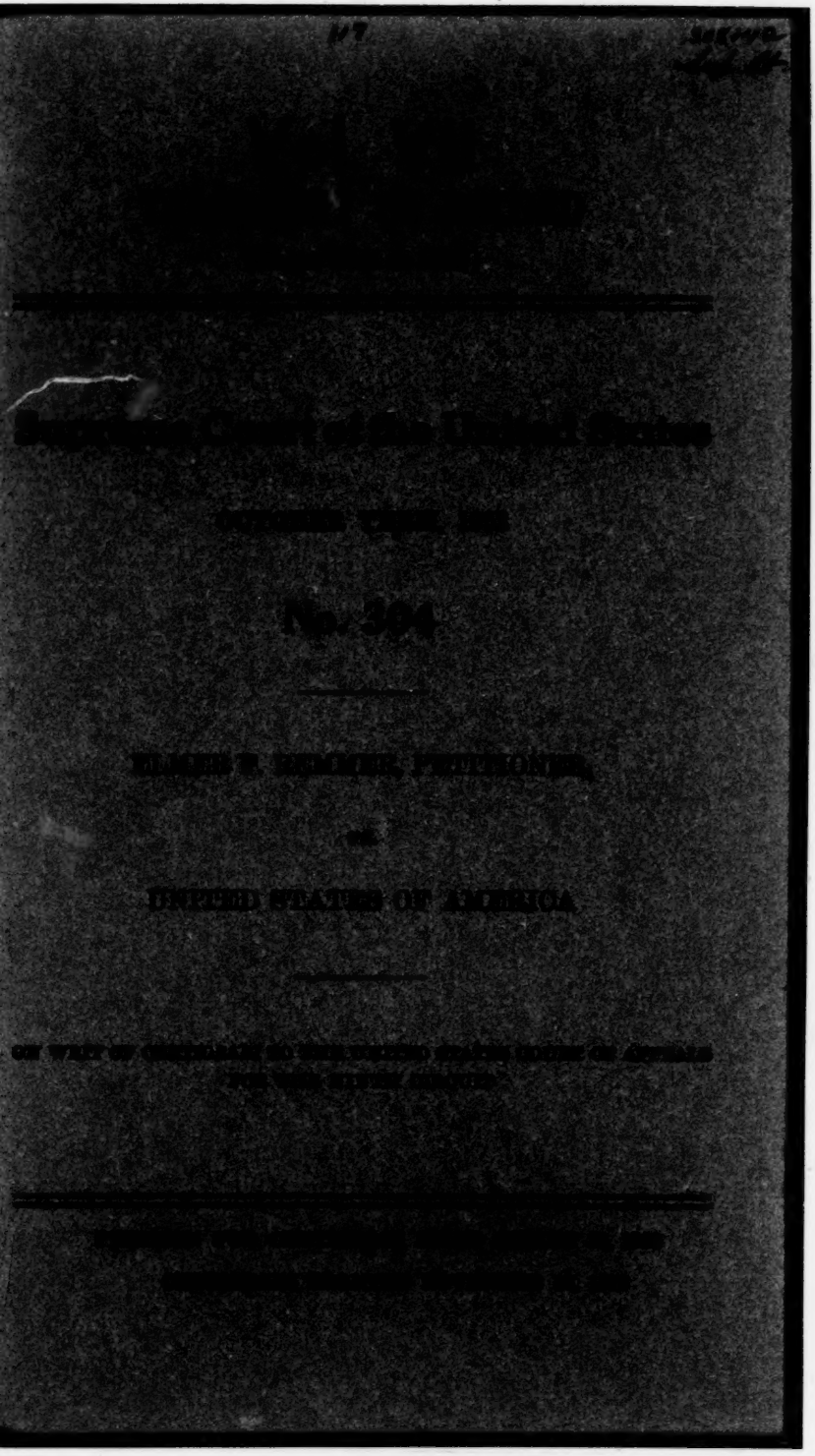

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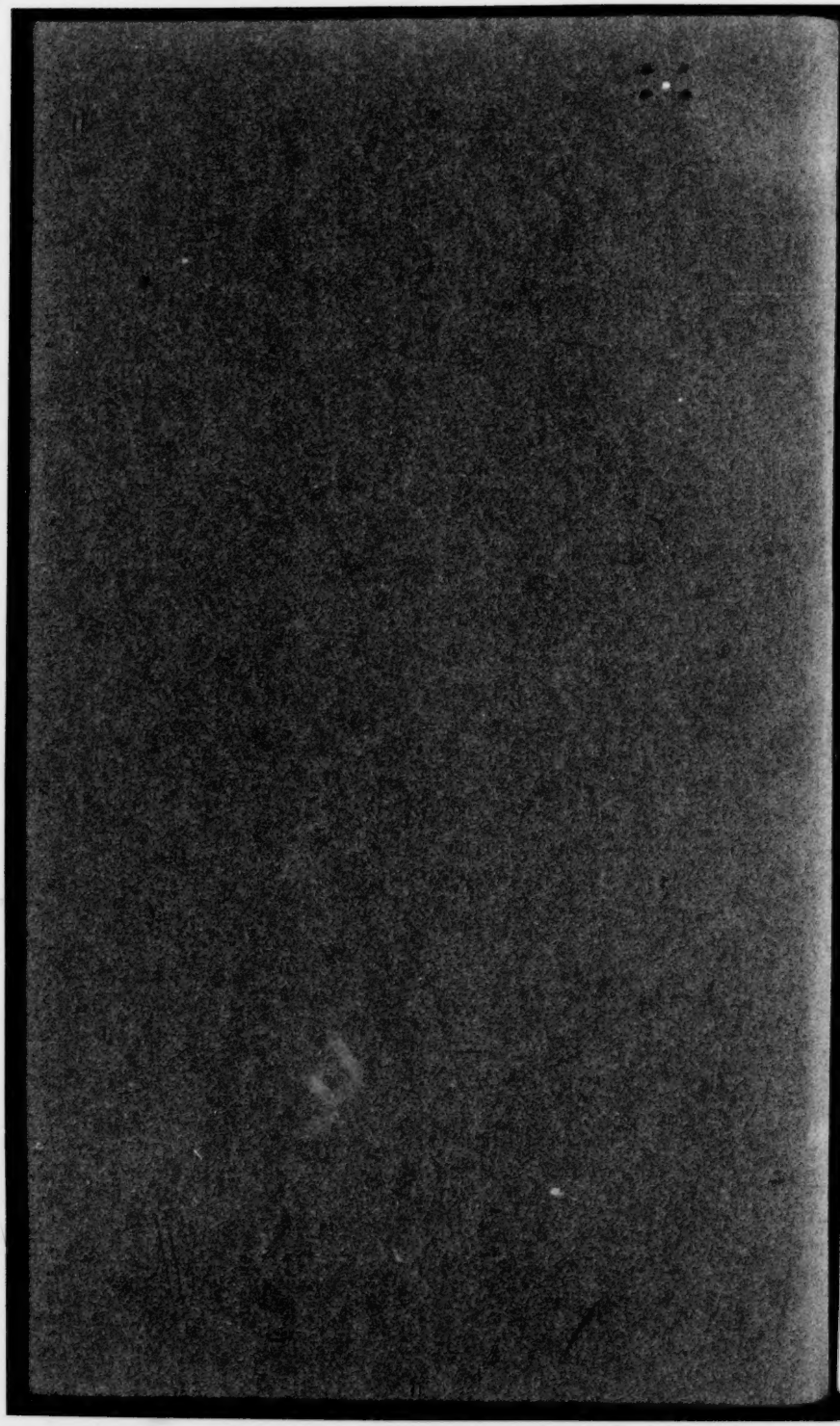

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes

Volume VII
(Pages 2749 to 3137)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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January 31, 1952—1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [2382]

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Campbell: Now I understand from Mr. Weaver, when he was attempting to volunteer something this morning, he desired to make a correction of some testimony given yesterday. I wish to advise the Court of that.

Mr. Avakian: We are very glad to have the correction. I wonder if Mr. Weaver could tell us the point to which he is referring?

A. Yes. Yesterday you asked me if I made any investigation of an appraisal by the Sales Tax people in the State of California with regard to the Menlo Club and I believe I said in answer to that that I had not, which is true, that I, myself, did not make an investigation, but I did cause an investigation to be made and you can find in the record——

Mr. Campbell: Pardon me—you did cause one to be made?

A. Yes, that is right.

(Last question and answer before recess read.)

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(Testimony of Ray Weaver.)

Q. Now, Mr. Weaver, in entering on Exhibit 175 the amount of $7,479.22 as part of Mr. Remmer's equity in that liquor, you assumed, did you not, that that amount of money had been paid as 1944 floor stock tax, either by Mr. Remmer or out of Mr. Remmer's funds or by Cal-Neva, Inc., in a manner which resulted in the amount being charged?

Mr. Campbell: Objected to as a compound question. [2383]

The Court: Objection sustained.

Q. Well, did you assume, in inserting that amount in Exhibit 175, that the payment of that 1944 floor stock tax, which is shown on the Cal-Neva, Inc., return, represented a payment by Mr. Remmer or a payment credited to his account, one or the other?

Mr. Campbell: Same objection. When he puts an alternative he——

The Court (Interceding): Well, he may answer.

A. When you say "payment credited to his account," you mean a payment made for his account?

Q. Well, I understood you to say in a prior instance that it would be proper to include that amount of Mr. Remmer's equity only if it came out of his funds, so if it was made in a manner charged against him, and I tried to follow that.

A. Yes, but in your last question you used the words "credit to his account" instead of charged.

Q. Well, charged to his account. You did make the assumption, with that change in my question?

A. That is what the facts indicated to me, yes.

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(Testimony of Ray Weaver.)

Q. And your answer is yes, you made the assumption?

A. Well, the facts indicated that to me.

Q. Because the facts indicated to you, you did make the assumption?

Mr. Campbell: I object—— [2384]

The Court: He has answered three times yes.

Mr. Avakian: As long as I understand his answer is yes.

The Court: It has been answered three times.

Q. Now, Mr. Weaver, if you are going on that assumption, then that amount should not be inserted in Exhibit 175?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Mr. Avakian: That is not argumentative. It is just a hypothetical statement.

The Court: Objection sustained.

Q. Mr. Weaver, can you point to any testimony in this case that shows that Mr. Remmer paid that amount of floor stock tax shown on the Cal-Neva, Inc., return?

Mr. Campbell: Objected to, the record speaks for itself.

The Court: Well, the objection will be overruled.

A. Are you confining me to testimony?

Q. In this question I am. There will be another one.

Mr. Campbell: There is documentary evidence as well as oral.

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(Testimony of Ray Weaver.)

The Court: This evidence includes both dodumentary and oral.

Mr. Avakian: I was trying to avoid compound questions by taking this piecemeal, and after I asked him regarding testimony I was going to ask in regard to exhibits.

Q. Can you show where in this case it shows Mr. Remmer paid [2385] that tax? Can you point to it in the testimony or the exhibit? A. Yes.

Q. Which ones?

A. There are a number of them.

Q. Testimony or exhibits? A. Both.

Q. Would you refer them to me, please?

A. First is the testimony of Mr. Forrester that this tax was paid cash as indicated by the notation "Cash" at the top of the return.

Q. The return shows that, does it not?

A. Yes, that's right.

Q. Very well.

A. Secondly, the records of Cal-Neva, itself, which show no payment of such an amount, either for Cal-Neva or for any one else. The whiskey on which the floor stock tax was paid is listed by case numbers on the sheets attached to Exhibit 60, which case numbers were checked in sufficient detail to satisfy us that they were the same cases of whiskey that were in storage at the Nevada Transit & Warehouse Company, according to an inventory which I believe was presented here by Mr. Stewart and is in evidence. Since the books indicate that this is the same whiskey as purchased by Mr. Remmer and no

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(Testimony of Ray Weaver.)

record of any payment of the floor stock tax on Cal-Neva books and [2386] the tax was paid in cash, it must have been paid by Mr. Remmer, unless we assume some outsider paid it for him.

Q. Was there any other evidence that you relied upon in reaching that conclusion, evidence in this case, I mean, of course?

A. Not that I recall now. If you have any points to raise I might think of some others.

Q. You state one of the reasons you drew that conclusion was there was no evidence in the Cal-Neva books that Cal-Neva had made the payment of that tax, which is $7479.22 in amount, either for Cal-Neva or for anybody else and for that reason, and the other reasons you mentioned, you assumed Mr. Remmer must have made it. Did I understand you correctly?

A. Yes, the facts indicate to me that he did make it.

Q. It is just as possible, is it not, Mr. Weaver, that Cal-Neva might have used some of its own cash to pay that tax, without the bookkeeper having made an entry of it on the Cal-Neva books?

Mr. Campbell: Objected to as speculative.

The Court: Objection sustained.

Mr. Avakian: It is no more speculation than the other conclusions, your Honor.

The Court: I am satisfied the ruling is correct.

Q. You have found in your accounting experience, have you not, Mr. Weaver, that bookkeepers

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(Testimony of Ray Weaver.)

sometimes do make mistakes [2387] and fail to record payments as made?

Mr. Campbell: Objected to as argumentative.

The Court: Objection sustained.

Q. Mr. Weaver, I believe you testified earlier that in computing net income on the basis of net worth increase, expenditures which are deductible for income tax purposes are of no consequence, immaterial, is that true? A. I did not say that.

Q. Is that true? A. No, it is not true.

Q. In computing net income?

A. Deductible expenses are not taken into account in making the computation. However, certain of those expenses which are deductible in nature may become incorrectly deducted in amount on the return filed.

Q. Perhaps I did not make my question clear. In constructing the net income of a taxpayer on net worth increase method, under proper accounting procedure, no addition is made on account of expenditures of the taxpayer during that period which are deductible for income tax purposes, isn't that true?

A. Well, there are two methods of computing. If you follow that method where you can add deductible expenditures in order to arrive at the sum total and then deduct again in order to make complete return, it would be the same——

Q. By the time you got to the net income, you would have ignored [2388] it, wouldn't you?

A. That is right.

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(Testimony of Ray Weaver.)

Q. In constructing Exhibit 175, in which you added to Mr. Remmer's equity in this liquor the floor stock tax payment of $7479.22, you assumed, did you not, that that tax payment was not a deductible expenditure for income tax purposes?

A. It is an additional cost of the liquor, yes.

Q. Now, in exercising your judgment that that should be treated as an additional cost of the liquor, rather than being treated as a deductible expenditure, did you rely to any extent at all upon any provision of the Internal Revenue Code or the Treasury Regulations?

Mr. Campbell: Object to the question as assuming a fact not in evidence, that there was a reliance on any independent judgment.

The Court: He may answer the question.

A. I can't think of any particular provision. I must have relied on the sum total of past training and experience.

Q. Does your past training and experience include a reading of the Internal Revenue Code and the Treasury Regulations?

A. Undoubtedly so, yes.

Q. You are not sure?

A. Well, I must have. I did not sit down and read it at any one time, but I surely must have read most of it at one time or another. [2389]

Q. Isn't it true, Mr. Weaver, that in the computation of net income on net worth method, proper accounting procedure calls for not adding to the net worth increase federal excise taxes paid as ordinary

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(Testimony of Ray Weaver.)

and necessary expenses connected with or pertaining to the taxpayer's trade or business, and likewise correct accounting procedure calls for not adding to the net worth increase any federal excise taxes paid as ordinary and necessary expenses in connection with the supervision, maintenance, or conservation of property held for profit or for production of income?

A. This does not come under that classification.

Q. Can you answer my question as to if correct accounting procedure calls for that?

Mr. Campbell: I object to that as immaterial.

The Court: Oh, I will permit the answer.

Q. Answer the question, please.

The Court: Didn't he answer?

(Question and answer read.)

Q. The question calls for correct accounting procedure.

The Court: I think that answers the question.

Mr. Avakian: I disagree with your Honor, but I will have to accept your ruling.

Q. Mr. Weaver, can you tell me why you conclude that the floor tax here is not covered by the accounting procedure in answering my [2390] question?

A. Because that provision relates specifically to ordinary and necessary expenses. This is not an ordinary and necessary expense. It is an additional cost of the liquor itself.

Q. Is it not true, Mr. Weaver, that in the case of

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(Testimony of Ray Weaver.)

federal excise taxes levied with respect to merchandise held for resale, a correct accounting procedure provides that the taxpayer may either add the tax to the cost of the goods or may deduct it as a current business expenditure?

A. I wouldn't attempt to make a general answer on federal excise taxes because I believe the rulings would depend upon the particular excise tax involved.

Q. In other words, you feel that the answer may be one way as to some excise tax and another way as to others?

A. Yes. Also this tax in accounting cost would be part of the purchase.

Q. Are you familiar, Mr. Weaver, with the ruling issued by the Commissioner of Internal Revenue on January 26, 1942, entitled——

Mr. Campbell: May I see that before the question is propounded? Counsel made reference, I think, to 10 pages of printed matter——

Mr. Avakian: Perhaps I can withdraw that question for now and permit counsel to examine that at the recess, your Honor, so I will withdraw the question at this time.

Q. Are you familiar, Mr. Weaver, with the provisions of Sec. [2391] 29.23(c)-2 of Treasury Regulations 111?

Mr. Campbell: Objected to as immaterial and incomprehensive.

Mr. Avakian: I would be glad to show it to him, your Honor.

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(Testimony of Ray Weaver.)

The Court: You may go ahead. You may show it to him.

Q. I will hand you my copy of the regulations, Mr. Weaver, for your convenience.

A. You are referring to the one you have underlined?

Q. I have underlined a portion of several sections—29.23(c)-2 is the one I am calling to your attention in particular.

A. I believe I have seen that or similar sections before.

Q. Did you rely to any extent at all upon that section of the regulations in exercising your judgment with respect to adding this floor stock tax, in the amount of $7479.22, to the cost of the goods, rather than treating it as a currently deductible expenditure?

Mr. Campbell: Objected to as incompetent.

The Court: What is your point on that, Mr. Campbell? My recollection of the testimony is that he relied upon the evidence in this case, documentary and oral and also on the regulations.

Mr. Campbell: Yes, he also stated that he relied upon the sum total of his experience. Now he is shown a regulation and asked if it is familiar and he has seen it before. He [2392] said yes. "Did you rely upon this specification regulation?"

The Court: To any extent.

Mr. Campbell: That is right. If he says yes, that is only part of the answer, because that is only part of what he relied upon under his own testimony.

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(Testimony of Ray Weaver.)

The Court: You may answer the question.

A. To tell you what I relied on, I would have to study this, as this refers to the other sections, and also study all of the rulings and court decisions made in connection with it.

Q. Can you tell me at this time whether you relied on that section to any extent at all in exercising your judgment with respect to this particular item, Exhibit 175?

Mr. Campbell: May I further point out, your Honor——

Mr. Avakian: I think your Honor ruled.

The Court: I think I can indulge one side occasionally. We have had so many instances throughout this trial where after ruling there is argument.

Mr. Campbell: This is a new question, and I wish to renew my objection. I wish to point out as an example a lawyer is asked for the reason that he does a particular thing. He is relying upon his sum total judgment. Now he is asked, "Have you read this particular decision of the court"? He may have read it, it may be one of many or may be one along with a number of other decisions.

The Court: I think if a lawyer is asked such a question [2393] he would be capable of answering and I think this witness likewise.

Mr. Campbell: I think he is, but I do not wish the question to be to the exclusion of other means.

The Court: I do not think the question excludes the other factors, so he may answer the question.

Q. Do you remember the question, Mr. Weaver?

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(Testimony of Ray Weaver.)

A. I would like to have it read.

(Question read.)

A. I have no independent recollection as to thinking of this section. Of course, I do not know. Sometime past reading decisions may have influenced me.

Q. It is true, is it not, Mr. Weaver, that that section deals specifically with the problem of either adding an excise tax to the cost of the goods or deducting it as an expenditure?

Mr. Campbell: If the Court please——

The Court: Objection sustained.

Q. Mr. Weaver, if you had omitted from Exhibit 175 the item of $7479.22 as the 1944 floor stock tax, the amount of Mr. Remmer's equity in that Gallagher & Burton whiskey would have been reduced by the amount of that tax, would it not?

A. Certainly.

Q. Mr. Weaver, it is my recollection—and you correct me if I am wrong—that you testified earlier that the return of the Menlo Club partnership return of income for the year 1946 was [2394] actually prepared in part on cash method and in part on accrual method. Is my recollection correct?

A. Yes, that is right.

Q. And in making that statement, were you referring to the fact that in the books of the Menlo Club for the year 1946, relating to the bar operation and the restaurant operation, the expenses accrued at the end of 1946, but not paid until 1947, were

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(Testimony of Ray Weaver.)

included as 1946 expense in making up the totals that were used on the tax return?

A. I believe I am referring—I would like to see the record of my testimony. I think that states precisely what I was referring to.

Q. Well, I don't know—this morning's testimony isn't written up and I don't know where it would be yesterday. Let me see if we can get at it faster this way. Let me show you Exhibit 127, which is Tiny's Restaurant for the year 1946. That is one of the books of the Menlo Club which you examined in the course of your investigation, is it not?

A. Yes.

Q. Now, let me call your attention, Mr. Weaver, to a page which at the top of it appears date December, 1946, and has heading, "Payments of Cash and Checks Paid Out," as well as to two pages which follow it, and in connection with that let me call your attention to a subsequent page entitled, "Summary Tiny's Restaurant," and particularly to the entries in that [2395] summary for the month of December. By comparing the amounts in the summary for the month of December as paid out by check, with the entries on the three preceding pages that I mentioned as check payments, can you tell us whether, in the summary sheet there was included, as expenses paid by check for the month of December, a number of checks which shown to have been dated January of 1947?

A. The summary to which you refer is summary of the pay roll and I see no entries of pay roll on

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(Testimony of Ray Weaver.)

these particular sheets on the pages here indicated.

Q. I showed you the wrong summary sheet. It is the reverse side of the sheet I showed you. I call particular attention to the summary sheet, "Tiny's Payments by Check," December, the amount of $21,-065.64, isn't that correct?

A. It is either $21,065.64 or $21,165.64.

Q. Now, I call your attention to the preceding pages that I mentioned to you earlier, showing disbursements by checks which are dated partly in December, 1946, and partly in January, 1947, and is the total of those checks shown as $21,065.64?

A. Yes, that is the figure entered as the total.

Q. And from comparison of the total of the checks issued in December, 1946, and January, 1947, with the total shown for December, 1946, in the summary sheet, are you able to state that the January checks shown in the preceding pages were listed as December expenses in the summary sheet? [2396]

A. Most of the items represent purchases rather than expenses. There are a few expenses included.

Q. But there are payments in 1947 for either purchases or expenses which are included in the summary sheet as December, 1946, payments, isn't that correct?

A. They appear to be 1947 payments, yes.

Q. And in that respect the book that is before you, Exhibit 127, was kept on the accrual method of accounting, was it not?

A. It is still only a record of cash receipts and disbursements. To a very small extent you might

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(Testimony of Ray Weaver.)

say an endeavor was made to throw expenses of the next year into the preceding year.

Q. The accrual method of accounting calls for deduction in December, 1946, on account of purchases or expenses incurred in that month which are not paid for until the next year, isn't that true?

A. No——

Q. In other words, if a taxpayer—take a restaurant operator—is on the accrual basis of accounting and he orders supplies and food and so on, which he received in the month of December, 1946, but he does not pay for those until January, 1947, under the accrual method of accounting he would deduct those expenditures as 1946 expenditures, would he not?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer the question.

A. When you say deduct, it is not quite correct because some [2397] of them may be included as purchases for inventory.

Q. He would set up as expenditure made in December, 1946, on the accrual method of accounting, even though they were not paid for until 1947?

A. If they were following a strict accrual method, yes. That is very rare except in cases where good records are kept.

Q. As to these entries in Exhibit 127, that is what was done, isn't it, they entered as expenditures in December, 1946, items that were actually paid for in January, 1947?

A. That appears to be the case with respect to

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(Testimony of Ray Weaver.)

these cases. Whether all the other is entered that way or not, I couldn't say.

Q. To the extent that that was done, Mr. Weaver, the books were kept on an accrual method, were they not?

A. To the extent that that was done.

Q. Now I will show you Exhibit 129, which is the exhibit relating to the Menlo Bar operation, and I will ask you if that is the book which you examined in the course of your investigation with respect to that bar operation? A. Yes.

Q. Now I call your attention specifically, Mr. Weaver, to the pages designated "Payments of Cash and Checks Paid Out," with respect to the month of December, 1946, and January, 1947, and I will ask you to examine that in relation to the summary sheet, which is also in this same exhibit, and particularly with respect [2398] to the summary for the month of December, 1946, and ask you whether in this book likewise payments which were made in January, 1947, were included in the summary sheet as of December, 1946, payments?

A. There are entries here paid in January which apparently refers to 1947, which are included in the year 1946.

Q. And the total of the checks listed for December, 1946, and January, 1947, is exactly the same as is shown for the month of December, 1946, in the summary sheet, isn't that right?

A. Those which appear in these sheets here. There are other 1947 checks appearing elsewhere.

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(Testimony of Ray Weaver.)

Q. To that extent, that book likewise was kept on the accrual method of accounting, was it not, Mr. Weaver? A. To that extent, yes.

Q. Now, Mr. Weaver, I am going to ask you to make a computation—and your Honor, after I make the request, if it is in order, we might take a recess to permit him to make it—whatever your Honor wishes. I am going to ask you, Mr. Weaver, to make a computation for me from those two exhibits of the amount of the payments made as shown in each book in January, 1947, which were included in the summary sheets as December, 1946 expenditures.

Mr. Campbell: I object to that as immaterial, incompetent and not within the scope of direct examination, if the Court please. [2399]

Mr. Avakian: I would like to be heard, if your Honor is in doubt.

The Court: I do not think it is within the scope of direct examination.

Mr. Avakian: It relates specifically, your Honor, to the construction of Exhibit 165, the Menlo Club summary sheet.

The Court: I do not doubt at some stage of the proceedings you might have such computation made.

Mr. Avakian: It relates to net worth.

The Court: I know what it is. Objection will be sustained.

Q. Mr. Weaver, in constructing the net worth of a business, which has maintained its books on the basis of accrual accounting, is it not proper account-

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(Testimony of Ray Weaver.)

ing procedure to prepare the net worth statement on an accrual basis?

Mr. Campbell: I am going to object, if the Court please, this has been asked and answered; various theories, it seems to me and half a dozen times in the last two days.

The Court: Let me have the question.

(Question read.)

The Court: Objection sustained.

Q. Mr. Weaver, in preparing Exhibit 165, did you set out as any accounts payable any obligations of the Menlo Bar or Tiny's Restaurant, obligations which were paid in January, 1947, but which were entered in the books as December, 1946, [2400] expenditures?

A. There were no liabilities on the Menlo Club net worth at all and they have none on the books.

Q. When you say there are none on the books, are you bearing in mind your testimony that examination of those two books shows that the summary sheets set up as December expenditures items which were not actually paid for until January, 1947?

A. Yes, but that does not mean that all items were included and records adequately to apply to it.

Q. I am asking you to the extent those items are there?

A. In the first place, if the records were adequate, we would not use net worth method in the computation to begin with. Certainly if the records

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(Testimony of Ray Weaver.)

were not adequate for cash basis computation of that income, certainly they are not adequate to apply accrual basis of computation, which would involve many factors not entered in any of these records.

Q. As a matter of fact, Mr. Weaver, isn't it true that in computing net income on the net worth method, proper accounting procedure calls for the determination of many matters which are immaterial in the computation of net income on the basis of receipts and disbursements?

Mr. Campbell: Objected to as incomprehensive.

The Court: Will you restate that question, please?

Mr. Avakian: May I have it read?

(Question read.) [2401]

Mr. Campbell: I object to the question on the ground it is incomprehensive.

The Court: Well, we will see if the witness can answer. Do you understand the question, Mr. Weaver? If you can, answer it, if you can't, say you can't.

A. I don't believe it can be answered properly off-hand.

Q. You have stated many times here, Mr. Weaver, the records of the Menlo Club were entirely inadequate. You have before you now two of the books of the Menlo Club for the year 1946, have you not? A. Yes.

Q. And Exhibit 127 refers to the restaurant portion of the Menlo Club business? A. Yes.

Q. And Exhibit 129 relates to the bar portion of

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(Testimony of Ray Weaver.)

the Menlo Club business? A. Yes.

Q. And I hand you Exhibit 126, and that relates to the card room portion of the Menlo Club business, does it not? A. Yes.

Q. Now, Mr. Weaver, I believe you testified already that so far as you can determine from your examination, all of the income of the card room shown on the daily poker sheets for the year 1946, were entered in the card room book that is before you as Exhibit 126, isn't that correct? [2402]

A. That all of the income shown in the poker sheets was transferred to these books?

Q. Yes, for the year in question. A. Yes.

Q. You have those poker sheets for several years, have you not?

Mr. Campbell: I submit that has all been asked and answered.

The Court: Yes.

Mr. Avakian: All right, it has been answered.

Q. Now with respect to the Menlo bar operation, which is for the year 1946, as reflected in the book before you, Exhibit 129, there is no evidence in this record that you know of, is there, of the failure to admit any income whatsoever in that bar in the year 1946, from the book before you?

Mr. Campbell: The witness is definitely being asked to search the record for something other than to testify as to facts.

The Court: Let me get the question.

(Question read.)

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(Testimony of Ray Weaver.)

The Court: Answer the question.

A. I believe we have some such evidence. Whether or not it is in court, I can't really recall, without reviewing the record.

Q. With respect to Tiny's restaurant portion of the business, [2403] Exhibit 127, for the year 1946, can you refer me to any evidence in the record in this case that shows that any of the income of that business was omitted from Exhibit 127 for the year 1946?

Mr. Campbell: I am going to object again.

The Court: Objection sustained.

Mr. Avakian: It is the same question, your Honor.

The Court: Yes, and I think I made a mistake in overruling the last objection.

Q. What other records of the Menlo Club for the year 1946 were turned over to you for your examination, aside from the three books that are before you, Mr, Weaver? First of all, can you identify records of that business which are in evidence here? A. Now what do you mean?

Q. I will withdraw that. There were also turned over to you, were there not, the check stub books of the Menlo Club, including the bar and restaurant, for the year 1946, were there not?

A. There were a lot of check stubs. Just what period they cover, I do not remember. Some were in 1946.

Q. They included 1946?

A. I don't know whether they included the entire year. I believe they did.

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(Testimony of Ray Weaver.)

Q. Everything you asked for in that respect was turned over to you, were they not?

A. As far as I know. [2404]

Q. And there were also turned over to you the cancelled checks of that business for the year 1946, were there not?

A. Yes, I believe it included the year 1946. I think there was one check missing.

Q. There were also turned over to you for the year 1946, the bank statements of the bank accounts relating to that business, were there not?

A. Yes.

Q. And I will show you prosecution's Exhibit 161 for identification, consisting of the carton which was produced here by the prosecution and that contains in it cancelled checks and bank statements obtained by you and your staff from the Menlo Club, does it not?

A. Yes. The account wasn't carried in the name of the Menlo Club, but it is primarily for that business.

Q. And all of the cancelled checks and financial statements relative to the accounts that were used in the Menlo Club business that you requested were turned over to you, weren't they?

A. As far as I know, yes.

Q. Now in addition all poker sheets of the Menlo Club for the year 1946 were turned over to you?

Mr. Campbell: Object—this is the third time counsel has asked that question.

The Court: Yes, not only today, but we heard this several [2405] days ago.

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(Testimony of Ray Weaver.)

Mr. Avakian: I don't recall asking.

Q. And with the exception of the few poker sheets which have been introduced in evidence here, you still have in your possession upstairs in this building the balance of the poker sheets for the year 1946, have you not? A. Yes, that is right.

Q. Now do you have in your possession at this time any other records of the Menlo Club relating to the year 1946?

A. We have some copies of Social Security tax returns.

Q. And those were made available to you upon your request? A. Yes.

Q. Now these three books which you have before you, which I believe are Exhibits 126, 127 and 129, contain in them not only a record of the receipts of the Menlo Club business, but they also set forth the disbursements of the business, do they not?

A. For 1946?

Q. Yes.

A. Are you speaking of all three sections of the club now?

Q. Yes.

A. The bar, the restaurant and the card room?

Q. That is right. A. Yes, that's right.

Q. So that these books and these various materials that were turned over to you contain a record of the receipts and they [2406] contain a record of the disbursements, isn't that right? A. Yes.

Q. And in addition the disbursements are sup-

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(Testimony of Ray Weaver.)

ported by cancelled checks and the bank statements, are they not?

A. Well, supported to the extent that it was possible, yes. In some cases that isn't full support.

Q. I believe you stated with the exception of one check, so far as you know, all cancelled checks and all bank statements were turned over to you, is that right?

A. Yes. What I mean, the checks were not necessarily explanatory of what was done with the money and I do not believe that all of the checks of all the Menlo Club bank accounts were entered in the books.

Q. But the checks were there, were they not?

A. Yes, with one exception.

The Court: We will take a recess for 15 minutes.

(Jury and alternate jurors admonished and recess taken at 2:45 p.m.)

3:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

Q. Mr. Weaver, I will hand you Exhibit 169 for your use in your testimony. Mr. Weaver, Exhibit 169 is a statement prepared [2407] by you of the

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(Testimony of Ray Weaver.)

assets and liabilities of the B. & R. Smoke Shoppe for December 31, 1943, 1944, 1945 and 1946, is it not? A. Yes, that's right.

Q. And on the bottom line you have set forth certain amounts designated as net worth for those respective dates? A. Yes.

Q. Now the first item, cash on hand, bank roll, Exhibit 111A, you have stated the amount on December 31, 1943, was 15 thousand dollars, and it is true, is it not, Mr. Weaver, that the only bank roll figure shown in Exhibit 111A is as of January 1, 1943, and that you assumed, in preparing this exhibit, that there had been no change at the end of 1943, in that amount?

A. That's right, because if you didn't use any bank roll at all, it would be to the taxpayer's disadvantage.

Q. If there wasn't any figure at all, there wasn't entry of bank roll item after January, 1943?

A. That is right.

Q. The book didn't purport to show one way or another what it was on January, 1944?

A. No, the book had just one figure, it had "win" or "lose." Was the only record we had of any amount.

Q. Then you assumed further, did you not, that the bank roll remained exactly the same on December 31, 1944, as it had been on January 1, [2408] 1943?

Mr. Campbell: That was all gone into on voir dire.

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(Testimony of Ray Weaver.)

The Court: Well, he may go into it on cross-examination.

A. That is right, because to make that assumption would result in no additional income in that period.

Q. As a matter of fact, if you had not made that assumption for 1944, and had treated the bank roll figure in 1944 as zero, it would have been favorable to the taxpayer?

A. If I thought the business could operate without a bank roll, yes.

Q. Now for the year 1945, "Cash on Hand Bank Roll," Pritchett testimony, 20 thousand dollars at December 31, 1945. I am going to call your attention to the attention of Mr. Pritchett, pages 1524 and 1525 of the transcript, where he stated, under direct examination by Mr. Campbell, as follows:

"Q. Now at the time you left the business at the end of 1945, do you recall the amount of cash on hand? A. No. I do not.

"Q. What is your best recollection?

"A. I think it was around five thousand dollars cash.

"Q. Do you recall whether or not there were also on hand at that time any accounts receivable?

"A. Yes, sir. [2409]

"Q. What was the amount?

"A. I don't recall what it was.

"Q. What is your best recollection?

"A. I believe around 15 thousand outstanding."

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(Testimony of Ray Weaver.)

Is that the testimony of Mr. Pritchett to which you refer on Exhibit 169?

A. Yes, I believe it is. There may be more to it than that. I can't tell without reviewing the record.

Q. So that although you state on your exhibit that there was 20 thousand dollars, Mr. Pritchett's testimony, upon which you rely, is that there was only five thousand cash and 15 thousand accounts receivable?

A. There was prior testimony that markers were treated as cash, as part of the bank roll.

Q. Can you refer me to that portion of the testimony? A. Not right now, no.

Q. Have you made any notes anywhere in preparing this exhibit?

Mr. Campbell: Objected to as argumentative. The record speaks for itself.

The Court: Sustained.

Mr. Avakian: If this was supposed to be a summary, can't he point to the place in the evidence where it is? We haven't been able to find it. We have read it carefully with this thought in mind. May I make that request?

The Court: I am not going to ask this witness to search [2410] through two or three thousand pages in this transcript.

Mr. Avakian: He must have done it already.

The Court: I know.

Q. Right now you are not able to refer me to any of the testimony to that effect, is that correct?

A. Outside of what you have stated to be Mr.

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(Testimony of Ray Weaver.)

Pritchett's testimony. It wouldn't make any difference whether you had accounts receivable 15 thousand and 5 thousand on hand, it would still be the same figure.

Q. I call your attention to Mr. Kyne's testimony on page 878, under examination by Mr. Campbell, as follows:

"Q. Will you explain what you mean by marker?

"A. One who bets and does not pay in this respect."

Now, Mr. Weaver, you said that 15 thousand dollars accounts receivable, which you have treated as cash, has been treated as cash because there has been some testimony, which you can not now point to, that the markers were treated as cash in the bank roll, is that correct? A. Yes, that's right.

Q. Now, Mr. Weaver, in a horse betting business, in which a person who bets and loses, fails to pay up, but instead puts in a marker, that marker would be treated as income on the accrual method of account, but not on the cash method of accounting, isn't that true? [2411]

A. No, I would say the existence of the marker would be the equivalent of the advance of that much cash to that particular individual. Whether by furnishing cash before the bet to him or whether furnishing it after he makes the bet, it would be cash in either case. If you want to classify part of this item as accounts receivable and the rest as cash, it makes no difference in the sum total of the figures, if it pleases you.

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(Testimony of Ray Weaver.)

Q. Well, in the preparation of asset and liability and net worth statements by certified public accounts, is it not proper accounting procedure, Mr. Weaver, to show cash as an item separate from the accounts receivable?

A. I would say it depends on the business. My recollection of the testimony is that these markers were treated as the equivalent of cash. They were maintained in the bank roll, of which no record was kept anywhere and the partners involved, one of them I couldn't talk to, the others had no recollection of the size of the bank roll, so the only thing that we could depend on was the custom of conducting a business of this character.

Q. You do have specific testimony five thousand is cash and 15 thousand accounts receivable, do you not? A. Yes.

Q. Is it not proper accounting procedure when a certified public account prepares statements of assets and liabilities and net worth for them to show cash separately from accounts [2412] receivable when they do have information as to the amount of the item?

Mr. Campbell: Objected to as asked and answered.

The Court: Objection sustained.

Mr. Avakian: I do not recall the answer.

The Court: The last question.

Mr. Avakian: It wasn't answered. He didn't state whether that was or was not proper accounting procedure. May we have the question read?

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(Testimony of Ray Weaver.)

(Previous question and answer read.)

The Court: Objection sustained.

Q. Mr. Weaver, bearing in mind Mr. Kyne's testimony that the meaning of marker is "one who bets and does not pay in this respect," is it not true that under proper accounting procedure the amount of that bet which is not paid would not be considered as income at that time under the cash receipts and disbursements method of accounting?

Mr. Campbell: Objected to as asked and answered.

The Court: He may answer the question.

Mr. Campbell: The further objection it is assuming a fact not in evidence. In the first place, I don't believe the witness would be bound by Mr. Kyne's definition. Secondly, I don't believe that was Mr. Kyne's entire definition. He stated among other things the so-called partners took out money and put in markers, as well as patrons to whom money was [2413] advanced.

The Court: The objection this witness would not be bound by Mr. Kyne's definition is a good objection. Objection is sustained.

Mr. Avakian: I am not saying he is bound.

The Court: It would have the same effect.

Mr. Avakian: I am asking him to make an accounting appraisal of the testimony.

The Court: Based on Mr. Kyne's definition.

Mr. Avakian: But it is in the testimony, in evi-

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(Testimony of Ray Weaver.)

dence, and the only evidence on that point by Mr. Kyne.

The Court: The ruling will stand.

Q. Mr. Weaver, isn't it true that, showing the cash separately from accounts receivable on account of markers, would have a material bearing on the construction of the net worth of the B. & R. Smoke Shoppe if you constructed that net worth on cash receipts and disbursements method?

A. Everything has a material bearing. I don't get the point of your question.

Q. You don't understand the question.

Mr. Campbell: I object to that.

The Court: He said he didn't get the point.

Mr. Avakian: It means he doesn't understand, your Honor. I don't know what he means if he doesn't mean that. Let me see if I can rephrase it so you can understand it. [2414]

Q. In the preparation of net worth statements for a business which has accounts receivable consisting of money owed to the business on account of transactions with that business, for which they have not yet been paid, does it make a difference in the computation of the net worth whether you use the cash receipts and disbursements method rather than the accrual method?

A. As I explained before, we only use the net worth method when records are inadequate. If the records were adequate enough to use the accrual method, certainly you would not resort to the net worth method. Furthermore, whether or not ac-

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(Testimony of Ray Weaver.)

counts receivable should be taken into consideration depends entirely upon the manner in which those accounts receivable arose. Now if they arose from advances of cash to another individual, whether that advance is made either before or after the occurrence of another transaction, I can see no distinction. It just replaces one asset, cash with another asset, accounts receivable.

Q. Have you finished? A. Yes.

Q. Now to the extent that accounts receivable consists of money owed to the business by a customer on account of a business transaction, for which the customer has not yet paid the business, would you not say, as a certified public accountant, that as to that kind of transaction, the [2415] account receivable would not be income on the cash receipts and disbursements method?

A. It depends entirely upon the nature of the transaction. There is not anything in the records of the B. & R. Smoke Shoppe to indicate the nature of any of these transactions except markers and advances to partners and advances to others. There is nothing to indicate any amount which would reflect any income that had been reported.

Mr. Avakian: May we have my question read?

(Question read.)

Q. Give me a direct answer.

Mr. Campbell: I submit the question has been answered.

The Court: The question has been answered.

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(Testimony of Ray Weaver.)

Q. Mr. Weaver, by using the cash figure of 20 thousand dollars in your Exhibit 169, instead of the amount of cash of five thousand dollars testified to by Mr. Pritchett, you have increased the net worth of that business by 15 thousand dollars, have you not?

A. Yes. If I hadn't put it that way, we would put it under accounts receivable.

Q. Now with respect to the same figure of 20 thousand dollars for the year 1946 in Exhibit 169, you again state that the authority for that is Mr. Pritchett's testimony. I call your attention to the following testimony of Mr. Pritchett, first on page 1512 under direct examination by Mr. [2416] Campbell:

"Q. Do you recall approximately when it was that you left in 1946?

"A. I left about the end of '45 and I was back there for a few days the end of March or middle of March.

"Q. How long did you remain at that time?

"A. Oh, about a week.

"Q. When you left in March, was the business still operating? A. No, sir.

"Q. And that was March of '46?

"A. That's correct."

And then again to Mr. Pritchett's testimony on cross-examination, beginning at page 1538:

"Q. Then as I understand, during the year 1946, you just went back to work there for about a week?

"A. Correct.

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(Testimony of Ray Weaver.)

"Q. Do you recall what time of year that was?

"A. About the middle of March.

"Q. About a week and then you left the place again? A. That's right."

Q. Now can you refer me to any testimony of Mr. Pritchett's other than what I have read to you, with respect to the amount of the bank roll that might have been on hand with the B. & R. Smoke Shoppe on March 31, 1946? [2417]

A. There is no record of the bank roll for that date in any record; no record of the cash in the safe on Mason Street or any of the safe deposit boxes; we couldn't talk to Mr. Remmer to determine the amount of the bank roll, the other partners had no recollection of the amount of the bank roll, and we knew in a period of five months there was a gross business of some five million dollars immediately succeeding 1946, so that would appear that the bank roll continued at 20 thousand wouldn't be unreasonable.

Q. Does that complete your answer?

A. Yes.

Q. (By Mr. Avakian): Your Honor, my question was referring to the nature of the testimony. I ask that the answer be stricken as not responsive, and the question be read to the witness.

The Court: The answer may go out.

(Question read.)

Q. Will you answer the question?

A. The bank roll——

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(Testimony of Ray Weaver.)

The Court: Referring to testimony, he means oral testimony.

Q. You say Mr. Pritchett's testimony in your exhibit. Can you refer to it?

A. The bank roll at the end of 1946 was carried over at the same figure used at the end of 1945 for the reasons I stated. [2418]

The Court: It can be answered yes or no.

A. No.

Q. Now, Mr. Weaver, during your examination yesterday regarding Exhibit 125C and 140, you made the statement that the records of the Menlo Club, although kept in a special room in the Bureau of Internal Revenue offices in San Francisco, might at times have been returned to the representatives of the Menlo Club for short periods. Do you recall that subject?

A. Yes, whenever they requested records, we returned them. Whether or not these were included, I can't recall.

Q. It is true, is it not, when you and the other members of your staff obtained those records, you agreed to return them upon request?

A. Yes, and we always did.

Q. Isn't it true, Mr. Weaver, that you, and the other members of your staff, refused to return those records to the defense when the defense requested the opportunity to examine them in October of 1951, for the purpose of preparing for this trial?

Mr. Campbell: I am going to object to that question, if the Court please, as being incompetent, im-

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(Testimony of Ray Weaver.)

material and it is a matter upon which the Court has heretofore ruled.

The Court: What ruling of the Court do you allude to?

Mr. Campbell: I judge counsel is apparently referring [2419] to some records other than those produced here, because the evidence here shows that these records were returned to the defendants and the receipt of Mr. Semenza secured some time early in 1949. Now he is referring apparently by this question to some other records.

Mr. Avakian: Your Honor, here is a box of records produced by the prosecution during the trial, relates to material business which we were trying to have an opportunity to examine and the prosecution refused to let us examine; although Mr. Weaver says they promised to make available and always did make available, the fact is they did not and Mr. Weaver knows that is so because he is the party who refused.

Mr. Campbell: This matter should be in the absence of the jury, but this is a matter which has been before the Court and upon which the Court has made rulings.

The Court: We will excuse the jury.

(Jury and alternate jurors admonished and excused at 3:30 for five minutes.)

(In the absence of the jury.)

(NB 338 pp. 54-56.)

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3:35 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further [2420]

Cross-Examination

By Mr. Avakian:

(Last question read.)

Mr. Campbell: I think the Court had not made its ruling prior to the jury going out.

The Court: Objection is sustained to the last question.

Q. Mr. Weaver, you testified at length on cross-examination to the exhaustive investigation which you and the members of your staff made in attempting to determine the assets and liabilities of Mr. Remmer during the period covered by your investigation. Let me ask you this, Mr. Weaver—and it is a preliminary question, will you please answer yes or no—during the five years covered by your investigation, did you follow up every lead which you found that might lead to the discovery of assets or liabilities of Mr. Remmer?

A. To the best of my ability, yes.

Q. Now in the course of your investigation, you made an examination, did you not, of prosecution's Exhibit 146, which is the ledger of Cal-Neva, Inc.,

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(Testimony of Ray Weaver.)

and particularly of the account of Elmer Remmer, designated as Account 10?

A. Yes, that is right.

Q. And let me call your attention, Mr. Weaver, to an entry in that account of E. Remmer, dated November 30, 1939, entitled "Placer County Taxes." Did you make any investigation to determine whether Mr. Remmer owned any property in Placer County, with respect to which Cal-Neva corporation paid taxes [2421] and charges to his account?

A. I can't recall whether I did or not.

Q. Did you search the records of the county recorder of Placer County?

A. No, I did not personally but it might have been done by some one else, I can't recall.

Q. As I recall, in your statement of the various official records you searched, you made no reference to Placer County. Can you tell us whether you did find that Mr. Remmer owned any property in Placer County? A. No, I did not.

Q. I call your attention also to another entry in that account dated November 30, 1942, entitled "Placer County Taxes." Did you make any investigation with respect to that through the cancelled check that was used for that purpose or any other way, to determine whether Mr. Remmer at that time owned any property in Placer County?

A. Is that the $4.45?

Q. That is right. Check was $4.45.

A. I don't recall doing it myself. It may have been done by somebody else, or it may have ap-

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(Testimony of Ray Weaver.)

peared the amount of taxes involved indicated real property of no great value.

Q. In other words, you might have assumed that the value of the property was too small for you to bother with in your investigation, is that [2422] right?

A. That is possible. Also that in 1940, we had a statement, under oath, that Mr. Remmer gave in Stockton, relative——

Mr. Avakian: Just a moment—was that statement given by Mr. Remmer?

A. Mrs. Remmer, relative to community——

Mr. Avakian: I will ask the witness not go into the contents of any statement.

(Question read.)

Mr. Campbell: He has inquired why, if he did not, he did not make the investigation.

The Court: I think the question goes to the reason why none was made. Let us have the answer.

(Answer read.)

Mr. Avakian: I followed up by asking if he might have thought the value of the property was too small to bother.

Mr. Campbell: And he answered what he had to go on.

(Question and answer read.)

Mr. Campbell: I submit he might explain that.

The Court: That part may remain in.

Q. Mr. Weaver, can you determine with consul-

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(Testimony of Ray Weaver.)

tation with other members of your crew or examination of your papers and files in this matter, that the official records of the county recorder of Placer County show that Mr. Remmer purchased some real property in that county on June 8, 1937, and sold it on September 16, 1946? [2423]

Mr. Campbell: I am going to object to this. That is counsel's testimony. He said he personally did not make any examination, he didn't know if others did. Counsel now asks if he will ascertain what he says the county records show.

(Question read.)

The Court: Answer yes or no.

Mr. Campbell: He asked him if he could determine from examination of his crew.

Mr. Avakian: The members of his staff or from his records.

The Court: You can answer the question yes or no.

A. No.

Q. You can not determine, that is your answer?

The Court: That is his answer, yes.

Q. Very well. Now I call your attention further to an entry in this same account, No. 10, of E. Remmer, Exhibit 146, dated April 30, 1946, and entitled "Mayris Chaney Loan" in amount of $2500, entered under charges. Did you notice that entry in your examination in this case?

A. May I refer to my working papers on this?

A. Yes, I did.

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(Testimony of Ray Weaver.)

Q. You did make an inquiry about that?

A. Not an inquiry?

The Court: Wait a minute—he answered the question once. [2424]

Mr. Avakian: May I strike the last question?

Q. You did notice that, Mr. Weaver. Did you make any investigation with respect to that matter?

A. I looked at the explanation contained in the Cal-Neva records which said to charge E. Remmer with cash received from Mayris Chaney $2500 in payment of his loan to the company and to write off uncollectable loans, which refer to a different part of the same entry, not pertinent here.

Q. So you found in your investigations that the entry represented repayment of loan by Mayris Chaney?

A. Yes and that the cash which, acording to the explanation of this entry, should have gone to Cal-Neva, went to Mr. Remmer personally instead; therefore, he was charged with that amount on the books of Cal-Neva.

Q. Did you make any investigation to determine when that loan had been made to Mayris Chaney?

Mr. Campbell: Objected to as immaterial. This is apparently advance of Cal-Neva, which mistakenly was repaid to Mr. Remmer and then charged to him.

The Court: He can answer the question. Do you understand the question?

A. Yes. I believe I discussed that with Mr.

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(Testimony of Ray Weaver.)

Semenza and I don't know that he could give a satisfactory explanation as to the exact date.

Q. Now, Mr. Weaver, in the computation of net income on the net [2425] worth basis, it is important, is it not, to take into account all real property owned by the taxpayer at the beginning of your net worth period and sold by him during the period?

A. Yes. I don't recall any sale being reported in any of his returns.

Q. And is it also important to determine, in order to make a proper computation—withdraw that.

Is it important, in making computation, to determine facts with respect to any money which the taxpayer either borrows from others or loaned to others during the period covered by the net worth computation? A. Yes.

Q. Did you, during the five years that you were investigating this case, make any investigation of the repayment to one J. B. Scarlett, also known as James Sullivan, by Mr. Remmer in 1949, of the sum of 25 thousand dollars borrowed from Mr. Scarlett by Mr. Remmer in a prior period?

Mr. Campbell: Objected to as assuming something not in evidence.

Mr. Avakian: The fact is in evidence.

The Court: I remember some testimony.

Mr. Campbell: I do recall Mr. Woodburn mentioned some money paid in 1949. But I do on the ground that it has not been shown that any such loan existed during the period which we have in

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(Testimony of Ray Weaver.)

consideration here. Mr. Woodburn stated, if I recall, [2426] when the money, if it was money, had been advanced from Mr. Scarlett. I believe when Mr. Adler made his payment in purchasing Cal-Neva from Mr. Remmer in 1948 or 1949, that Mr. Scarlett collected that sum back.

Mr. Avakian: I am only asking if he made any investigation of the matter.

The Court: Answer the question.

A. The only investigation I recall making in connection with the loan from Mr. Scarlett, or the loan made——

Mr. Avakian: I ask that be stricken because it is not responsive as to whether he investigated a repayment to Scarlett by Remmer.

The Court: He may answer the question.

(Answer read.)

Mr. Avakian: Just a moment——

The Court: He may proceed.

Mr. Avakian: May the witness be instructed to limit his answer to the Remmer-Scarlett transaction? May we have the question read?

The Court: Proceed.

A. The only investigation of a loan made to Scarlett was the sum of, I believe, $25,000 borrowed by Captain Devine of the San Francisco——

Mr. Avakian: That is not the Remmer-Scarlett transaction. The witness is trying to bring in something for a [2427] prejudicial purpose, has no relation to Mr.Sullivan's loan——

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(Testimony of Ray Weaver.)

The Court: Let me have the answer.

(Answer read.)

The Court: The answer may go out.

Mr. Avakian: I move the jury be admonished.

The Court: Of course, I have told the jury, I believe they understand, that they are to——

Mr. Avakian: I believe the witness——

The Court (Interceding): Do you want to take my place on the bench?

Mr. Avakian: I thought you were through. I am sorry.

The Court: I have instructed this jury many times, when it comes to decide this case they are to confine their decision and deliberations to and concerning only the evidence brought out by the mouths of witnesses on this stand and from documents in evidence and not the remarks of court, remarks of counsel or any other matter should be considered, but the jury, in deciding this case, shall accept the evidence, both oral and documentary.

Now you may proceed.

Mr. Avakian: Thank you, your Honor.

Q. Mr. Weaver, did you investigate the escrow records of the First National Bank in Reno, Nevada, relative to the sale of Cal-Neva Lodge by Mr. Remmer to Sanford Adler, with respect [2428] to an assignment shown in those escrow records, dated October 2, 1948, from Mr. Remmer to Mr. Scarlett of 25 thousand dollars of the funds coming to Mr. Remmer in that escrow transaction?

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(Testimony of Ray Weaver.)

A. That was connected with the answer I attempted to give.

Q. Did you examine those escrow records?

A. Yes.

Q. And did you find that in those escrow records there was an assignment dated October 2, 1948, signed by Mr. Remmer, assigning to Mr. Scarlett 25 thousand dollars of the funds which were to come to Mr. Remmer in connection with the sale to which that escrow related?

A. Yes; without looking at the records I wouldn't remember the amount. I do remember Mr. Remmer was supposed to have guaranteed the loan.

Q. Do you remember that there was an assignment in that escrow file from Mr. Remmer to Mr. Scarlett?

Mr. Campbell: I submit the records are the best evidence.

A. I do not recall, no.

Mr. Avakian: He does not recall, that is the answer.

Q. Now, Mr. Weaver, any loan which Mr. Remmer might have owed to Mr. Sullivan at the end of 1946 would have a material bearing in determining Mr. Remmer's net income for the year 1946 on net worth method, would it not?

Mr. Campbell: Objected to as assuming a fact not in [2429] evidence, any loan owing from Mr. Remmer to Mr. Sullivan.

The Court: Objection sustained.

Mr. Avakian: No further questions, with this

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(Testimony of Ray Weaver.)

reservation, may Mr. Weaver remain available for further possible examination after the other agents have identified certain documents.

The Court: We do not know yet whether there is any redirect examination. There may be. I will ask Mr. Weaver to remain until excused by both sides.

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.)

February 1, 1952, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumed the witness stand on

Redirect Examination

By Mr. Campbell:

Q. Mr. Weaver, during the course of your cross-examination and particularly yesterday, you were asked various questions concerning the records of the Menlo Club and of the three Menlo businesses, that is to say, the Menlo Club as referring to the card room, the Menlo Bar and Tiny's Waffle Shop. Now directing your attention to the bank account under the name of the Menlo Club, which is here in evidence, and which was the bank account under the name of Menlo Club in the Bank of America, Day and Night Branch, which, as I recall was opened in

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(Testimony of Ray Weaver.)

September or October, 1946—pardon me, is that correct? A. Yes, that is correct.

Q. I will ask you whether or not that bank account, or any reference thereto, appeared in the books of the Menlo Club?

A. No, the account did not appear in the books at all.

Q. And with particular to two checks which are here in evidence, being plaintiff's Exhibit 115, check drawn on the Menlo Club account as of November 7, 1946, in amount of 65 thousand dollars, and plaintiff's Exhibit 120, a check in amount of $16,005.50, also drawn on the Menlo Club account at the [2431] Bank of America, I will ask you whether or not, in the records which you examined of the Menlo Club and which are here in evidence, was any entry or notation made of those two checks?

A. May I see the Menlo Club book?

Q. Yes.

A. I think I will need both the 1946 book and the 1947 book as to partners' accounts.

Q. I hand you plaintiff's Exhibits 125 and 126, which are denominated "Menlo Club 1947" and "Menlo Club 1946" respectively.

Mr. Avakian: To save time, your Honor, we will stipulate that they are not entered in the books.

Mr. Campbell: Very well, we will accept the stipulation.

Q. Now, Mr. Weaver, during the course of your examination and investigation, were you shown at any time any books for the Menlo Club deferring to

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(Testimony of Ray Weaver.)

the card room for the year 1945? A. No, sir.

Q. Were you shown at any time, or did you see at any time, any of the so-called poker sheets for the Menlo Club for the year 1945? A. No, sir.

Q. Now with regard to the records which you saw for the Menlo Club for the years 1946 and 1947, which you have examined there, and the books and records of the other enterprises which are in evidence here, will you state whether or not any record was [2432] maintained relative to transfers of funds from one enterprise to another?

Mr. Avakian: May we have the question read?

(Question read.)

Mr. Avakian: I am not certain what Mr. Campbell means by reference to other enterprises. Do you mean all the other busineses, like 110 Eddy and so on?

Mr. Campbell: Yes.

Mr. Avakian: That is assuming something not in evidence. There is no evidence here that they were transferred.

The Court: Objection overruled.

A. No such record was kept.

Q. Now with regard to the Menlo Club records, that is to say, for the 1946 records here in evidence of the Menlo Club, were any accounts maintained of assets and liabilities other than the Schriber account and the capital accounts?

A. No, sir, those were the only ones.

Q. Now with regard to your examination of such

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(Testimony of Ray Weaver.)

records as you did examine of the Menlo Club—I believe you testified there were no records for 1945, is that correct? A. For the card room?

Q. Yes. A. No records for 1945.

Q. Now with regard to the records which you examined for 1946 of the club room, were all the receipts of the club room deposited [2433] in a bank account or bank accounts? A. No.

Q. Was it possible, or were you able to, Mr. Weaver, reconcile the bank account or bank accounts with the poker sheets?

A. No, I was not.

Q. Did you examine, or were you shown, or do you know of the existence of any record relative to the amount of cash maintained in safes or safety deposit boxes with regard to the Menlo Club or with relation to any of the businesses?

Mr. Gillen: Your Honor, it appears counsel is going into matters that were introduced in the prosecution's case in chief from other witnesses. This is repetitious. It is not harmful, but it is already in the record. Witnesses such as Mr. Kyne and Mr. Maundrell testified that money was placed in the safe deposit boxes and so on. I think this is just repetitious and a waste of time. I do not think it is proper redirect, it is already in the record, already established.

The Court: Objection overruled. Read the question.

(Question read.)

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(Testimony of Ray Weaver.)

A. I know of no such record.

Q. Now you were questioned yesterday relative to certain—or it may have been the day before—relative to certain payments made to Maundrell and charged to the account standing in his name in the Menlo Club books. Did your examination disclose whether any of the other persons, whose names appear therein [2434] with credits shown to their accounts and other than the defendant, Elmer Remmer, drew or received any monies other than for tax payments?

Mr. Avakian: Just a moment, your Honor, we object to that question on two grounds, your Honor. First of all, it is not proper redirect because the cross-examination related only to Maundrell, there was no questioning as to accounts of any other partner, and so it is not within the scope of cross-examination. Secondly, the question calls for information obtained by the witness in the course of his examination, which is beyond the scope of the evidence in this case and in that respect, even if the question was proper on redirect, it should be limited to the evidence that is in this case and not to other matters that may be speculation and hearsay.

Mr. Campbell: As to this latter objection, limit yor answer, Mr. Weaver, to the books and records which you examined.

Mr. Avakian: And then there is the first objection also.

The Court: It will be overruled. You may an-

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(Testimony of Ray Weaver.)

swer the question as modified. Now read the question.

(Question as modified read.)

A. Other than tax payments, there is no indication that any of the partners drew any money other than Mr. Remmer and Mr. Nelson.

Q. Mr. Nelson? [2435] A. Yes.

Q. Now your attention is directed——

The Witness (Interrupting): And Mr. Maundrell, of course.

Mr. Campbell: Yes, I eliminated him in the question.

Q. Your attention is directed to the fact that there has been some evidence in the record that parties by the name of Fricker and Ditto withdrew from the enterprise as of December 31, 1945. First, let me ask you, are there capital accounts set up in the records of the Menlo Club which are before you in the names of Fricker and Ditto?

Mr. Avakian: Object to that as not proper redirect, because it does not touch upon anything that was even remotely mentioned in cross-examination.

Mr. Campbell: I am going into this question of payments which were made to the persons indicated in these capital accounts of the partners, if the Court please, and Mr. Avakian went to some length as to payments made to Mr. Maundrell.

Mr. Avakian: Your Honor will recall Mr. Maundrell's was the only account. I was stopped in the course of questioning as to Mr. Maundrell's account by Mr. Campbell's objection and your Honor ruled

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(Testimony of Ray Weaver.)

in sustaining Mr. Campbell's objection that I couldn't go further into that line of questioning and questioning of Mr. Maundrell's account was stopped in the middle by Mr. Campbell's objection and your Honor's ruling, and there was no questioning whatever in respect to the other [2436] partner's accounts.

The Court: Objection overruled. You may answer the question.

A. The books show capital accounts for both Mr. Ditto and Mr. Fricker.

Q. As of December 31, 1945?

A. Yes; stated this way, "Balance 1945" and then there is an amount entered in the balance account which from the nature of the following entries, appears to be a credit balance of that date. There is no indication of anything preceding that date.

Q. Other than money debited against those accounts for taxes for the year 1945, were any further payments to them or debits to them entered in those records? A. No, sir, that's all.

Q. Now in your cross-examination yesterday, Mr. Avakian directed your attention on the books of Cal-Neva to some taxes paid in 1939, I believe, or 1941 or '42——

Mr. Avakian: '42.

Q. ——on some real property, apparently in Placer County, California, by Cal-Neva and charged to Mr. Remmer's acount, drawing account, and Mr. Avakian, by his questioning, asked you if you were

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(Testimony of Ray Weaver.)

aware that that property had been owned and was sold in the year 1946. Do you recall those questions?

A. Yes, I do. [2437]

Q. I am going to direct your attention to plaintiff's Exhibit 5, the return of Elmer Remmer for the year 1946, and ask you to examine it and state whether or not in the return for that year Mr. Remmer reported the sale of any real properties?

A. No, sir, there is no such sale on the return.

Q. And in connection with your examination and investigation, I will ask you if you found, Mr. Weaver, any evidence of capital gains on the sale of property, either real or personal, by Mr. Remmer during the years 1944 to 1946 inclusive?

Mr. Avakian: May we have the question?

(Question read.)

Mr. Avakian: We object on the ground again it calls for something that he apparently might have run into in his examination as distinguished from evidence, and it could then call for hearsay, speculation, opinion, or other matters.

Mr. Campbell: This can be answered yes or no.

The Court: What is your objection?

Mr. Avakian: It should be limited to the examination of evidence here, not anything he might have thought or run into or hearsay.

Mr. Campbell: If his answer is yes—we probably have to hear the answer first.

The Court: Have you finished your objection?

Mr. Avakian: Even though the answer is yes or

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(Testimony of Ray Weaver.)

no, it is still improper if it is based upon anything not in the [2438] record here.

The Court: Objection overruled. Answer the question.

Mr. Avakian: May he answer yes or no then?

Mr. Campbell: Answer yes or no.

A. May I have the question?

(Question read.)

A. No.

Q. Now, Mr. Weaver, you were examined yesterday at some length relative to an exhibit, to a schedule which you prepared, concerning the net worth of the B. & R. Smoke Shoppe, which is plaintiff's Exhibit No. 169. Now in connection with your examination into the affairs of the B. & R. Smoke Shoppe, did you have before you any records other than those in evidence here, with the exception of the diary book for 1944, of which there is a transcript in evidence?

Mr. Avakian: May that be answered yes or no, your Honor?

A. You mean confined to the years we are concerned with here?

Q. That is correct.

A. No, that is all I have.

Q. Relative to the years 1944 to 1946, did you have before you, or were you shown, any records of the gross business of the B. & R. Smoke Shoppe?

A. No, sir.

Q. Were you shown, or did you have before you,

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(Testimony of Ray Weaver.)

any records purporting to be the capital accounts of the partners in that [2439] business? A. No.

Q. Did you have before you, or were you shown, any record of the assets and liabilities of that business? A. No, sir.

Q. Were you shown, or did you have before you, any record of the expenses of that business?

A. No, sir.

Q. Were you shown, or did you have before you, any record of cash in safe or safety deposit boxes pertaining to that business?

Mr. Avakian: Objected to—that was asked and answered a few minutes ago, your Honor.

The Court: Objection will be overruled.

A. No.

Q. Now, Mr. Weaver, another matter was referred to yesterday. Your attention was directed to an entry in the books of Cal-Neva, Inc., in the drawing account of Elmer Remmer, relative to some entry in that account referring to an advance or loan to an individual by the name of Chaney, and I believe you stated what the entry made in the books stated concerning that transaction. Now it was not clear in my mind what that transaction was. Will you explain please?

Mr. Avakian: First of all, before he is permitted to answer, may he be instructed to answer whatever is in evidence [2440] and not speculation and hearsay?

Mr. Campbell: Yes.

Mr. Avakian: And secondly we object on the

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(Testimony of Ray Weaver.)

ground the record speaks for itself. Whether Mr. Campbell understands the records or not, is immaterial. He has been making objections to my questions on that same ground, which your Honor sustains. He can read the testimony to him.

The Court: In regard to your reference about objections made by Mr. Campbell, I overruled many objections of Mr. Campbell's on the ground the record was the best evidence. I want to just call your attention to that. The objection is overruled. You may answer the question.

A. According to Cal-Neva books, that represented an advance to that particular individual.

Q. By whom?

A. By Cal-Neva. The advance subsequently was repaid to Mr. Remmer personally, who retained the money and then it was then charged against his account.

Q. Just as any other drawing or advance by Cal-Neva to Mr. Remmer?

A. Yes, it actually represented an advance from Cal-Neva to Mr. Remmer.

Q. Now, Mr. Weaver, various questions were propounded to you regarding various theories of accounting by accrual basis and by [2441] cash basis, hybrid basis, and so on. Will you state, Mr. Weaver, in as simple terms as you can, what is meant by net worth method of ascertaining a person's income?

Mr. Avakian: Your Honor, we object to that question as calling for the witness' interpretation of

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(Testimony of Ray Weaver.)

law. I call your Honor's attention to the fact that upon rulings from the bench on Mr. Campbell's objection, the cross-examination was not permitted to go into that matter.

The Court: Objection is overruled.

A. Well, briefly, the net worth method tends to determine what the person owned at one particular date and then make a comparison what he owns at another date, the difference between the two representing an increase or decrease in his net worth and correspondingly an increase or decrease in his income, with this qualification—that we must take into account what is expended for nondeductible purposes, such as federal income tax and living expenses, which, if they would not have been expended, would still be on hand in the period and would reflect a further increase in his net worth.

Mr. Gillen: May it please the Court, in view of your Honor's ruling on this matter, I should like, at the earliest opportunity, to have an opportunity to present to your Honor some matters of law pertaining to cross-examination of expert witnesses, if your Honor will designate the time.

The Court: There is nothing before the [2442] Court.

Mr. Gillen: I request the opportunity to take it up at some other time in the absence of the jury.

The Court: The request is denied. Whenever a matter comes up before the Court on an objection and the Court deems that the question is of such a nature that the Court has a limited knowledge of

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(Testimony of Ray Weaver.)

the law and feels it is necessary to have argument, I will be glad to hear it, but when I do not feel that way about an objection, I am not going to take the time and send the jury out.

Mr. Gillen: I am not asking about the objection. I am asking the opportunity to take it up at some recess——

The Court: There is nothing before the Court. Every objection that has been made in the course of this trial has been ruled upon.

Mr. Gillen: I am not talking about the objection. I am asking an opportunity to present a matter your Honor does not know what it is.

The Court: Then I am not going to grant it.

Mr. Gillen: Without knowing what I wish to present?

The Court: Of course not. I am not going to sit and listen to some matter that I don't know if it refers to this case or not.

Mr. Gillen: Your Honor will never know until I present it. [2443]

The Court: I will try to get along without the information.

Q. Mr. Weaver, having complied to that practice and then arriving at the taxable income, do you also take into consideration and give effect to receipts of a nature which are not taxable? A. Yes.

Q. Those would be receipts of what nature?

A. For example, they might be gifts or inheritances, which would tend to increase the net worth at the end of one period but should not be taken

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(Testimony of Ray Weaver.)

into account because they are not taxable. They should be eliminated. Also under the tax law itself, certain capital gains are taxable only to a certain extent and the portion of those gains which are not taxable should be eliminated.

Q. And it is a part of the practice to eliminate those in arriving at what portion of the income is taxable net income, is that correct? A. Yes.

Mr. Campbell: You may recross-examine.

Recross-Examination

By Mr. Avakian:

Q. Mr. Weaver, do you still have before you the check for 65 thousand dollars and the check for $16,005.50, concerning which you were questioned by Mr. Campbell? A. Yes, I have. [2444]

Q. I call to your attention first, Mr. Weaver, the notation on Exhibit 115, which is the 65 thousand dollar check to Mr. Kyne, and you note, do you not, that except for the signature everything inserted on the check form is in typewriting?

A. Yes, that's right.

Q. And there is also typed on the face of that check the statement, "Loan to Elmer Remmer," is that correct? A. Yes, that is right.

Q. And this check with that notation on it was maintained in the office of the Menlo Club at the time you obtained the records of the Menlo Club, was it not?

A. Yes, but it was not reported on the books.

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(Testimony of Ray Weaver.)

Q. The check itself was there, is that right?

A. Yes.

Q. And the check was turned over to you when you requested the records? A. That is right.

Q. And at the time it was turned over this notation, "Loan to Elmer Remmer," was on the check?

A. Yes.

Q. And as an accountant, Mr. Weaver, is the notation on the check, "Loan to Elmer Remmer," of exactly the same significance that the identical notation in a book would have?

A. Not in view of the relationship of Mr. Remmer to the Menlo Club. [2445]

Q. If the Menlo Club had maintained a check register of this account and for this particular check had made an entry in the check register showing the date of the check, amount of 65 thousand dollars, and the notation, "Loan to Elmer Remmer," would that have had any further significance to you, as an accountant, than what is already on the check itself?

A. Making no assumptions, the two would have the same meaning.

Q. I call your attention to Exhibit 120, which is the check for $16,005.50, payable to William E. Kyne and endorsed Wm. E. Kyne, and there is a notation on that check, "Loan for Transit," is there not?

A. Yes, although it could not have been just for the purchase of the Transit Smoke Shoppe.

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(Testimony of Ray Weaver.)

The Court: Let me have the question and answer.

(Question and answer read.)

The Court: The answer should be yes or no. It should be stricken.

Mr. Avakian: The word "yes" was given.

The Court: All except the word "yes" will be stricken.

Q. Was that check likewise turned over to you by the representatives of the Menlo Club when you requested that they turn the records over to you or your representatives? A. Yes.

Q. And did you hear Mr. Kyne's testimony in this case that [2446] he cashed that check himself?

A. That's my recollection of his testimony, yes.

Q. In view of that, Mr. Weaver, do you now wish to change the answer that you gave a few minutes ago, to the effect that your examination of the records in this business did not show any withdrawals of money from the Menlo Club by any of the partners other than Mr. Remmer, Mr. Maundrell and Mr. Nelson, aside from income tax payments?

A. No, because Mr. Kyne stated that these monies were turned over to Mr. Remmer.

Q. Well, to correct your impression on that, do you not recall that Mr. Kyne testified that when he cashed this check he put the money in box No. 48, in which both he and Mr. Remmer had joint access? Do you recall that testimony?

A. I wouldn't recall his testimony without referring to the record.

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(Testimony of Ray Weaver.)

Q. Now in answer to Mr. Campbell's question as to whether you were shown any books for the Menlo Club for the year 1945, you stated that you were not. Were you referring then to the card room portion of the business only?

A. That is right.

Q. You were shown books of the Menlo Club for the year 1945 with respect to the bar business, were you not? A. Yes.

Q. And likewise with respect to the restaurant operation? [2447] A. Yes.

Q. Now in connection with the lack of a book for the card room operation of the Menlo Club for the year 1945, I call your attention to Exhibit 89, which is the partnership return of income of the Menlo Club for the year 1945, and I will ask you if you examined that return in the course of your investigation in this case? A. Yes.

Q. And at the time you examined it, did you notice the statement attached to it in the form of a letter dated May 10, 1946, to the Collector of Internal Revenue, which is a part of this exhibit and which I am now showing to you? A. Yes.

Mr. Avakian: Your Honor, I would like to read that letter at this time.

Mr. Campbell: I believe that has been read twice.

Mr. Avakian: Well, I don't know, it may have been read a long time ago, but it is pretty pertinent on this particular matter.

The Court: I think it has been read.

Mr. Avakian: It is not a long letter.

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(Testimony of Ray Weaver.)

The Court: Well, we will not read it again.

Q. Mr. Weaver, in connection with your examination of this matter and in connection with the letter attached to the return to which I have just called your attention, did you, [2448] or any of your staff on this case discuss with Mr. Maundrell the matter of the inadvertent destruction by mistake of the poker sheets of the Menlo Club for the year 1945?

Mr. Campbell: I object to the question in that form.

The Court: He can answer yes or no.

A. I can't answer it yes or no.

Mr. Campbell: The basis of my objection goes to this, it attempts to characterize what the conversation was, not whether there was a conversation.

Mr. Avakian: Let me reframe it, your Honor.

Q. Did you, or any of your representatives, discuss with Mr. Maundrell the letter to the Collector of Internal Revenue dated May 10, 1946, which is attached to the Menlo Club 1945 return?

A. I can't answer that yes or no either.

Q. You mean you do not remember?

A. We had a discusion. I do not remember whether it was with Mr. Maundrell or with some one else.

Q. Would it have been either Mr. Maundrell or Mr. Ayton?

A. Well, it may have been Mr. Kyne or someone connected with the club.

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(Testimony of Ray Weaver.)

Q. You did discuss it with some one connected with the Menlo Club? A. Yes.

Q. Did you personally discuss it with whoever that representative [2449] was?

A. No, I do not believe I did.

Q. One of the other members of your staff?

A. One of the other members.

Q. Did you hear Mr. Maundrell's testimony in this case to the effect that in remodeling of the offices at 50-52 Mason Street, a number of boxes of old and moldy papers were thrown out by the doorman and that inadvertently the box containing the poker sheets was thrown out with them?

A. I do not recall that testimony. That was the substance of discussions I recall.

Q. You do not recall Mr. Maundrell's testimony in this case about that matter?

A. No, and it does not comply with what I——

Mr. Avakian: Just a moment—you have answered the question.

Q. And it is a fact, Mr. Weaver, is it not, that as a part of the return of the Menlo Club for the year 1945 there was contained a statement that because of the inadvertent destruction of the Menlo Club poker sheets for the year 1945, the income of the card room had been calculated on the basis of the records which were still in existence for the same eight months of the year 1944?

Mr. Campbell: I think the record so states.

The Court: I think so. [2450]

Mr. Avakian: Well, as long as Mr. Campbell agrees it does so state.

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(Testimony of Ray Weaver.)

The Court: Well, it does, whether Mr. Campbell agrees or not.

Mr. Avakian: Well, I just wanted not to leave the jury confused on this point, your Honor.

The Court: Proceed.

Q. Now you stated that the books of the Menlo Club did not contain any records of assets and liabilities other than records relating to the Schriber account and the capital accounts. Do you recall that statement this morning?

A. Yes, I believe that was what I said.

Q. Now, Mr. Weaver, isn't it true that the customary method of single-entry accounting does not call for the maintenance of such records?

A. It calls for the maintenance of records of persons other than owners, none of which are contained here.

Q. I am not sure that I understand your answer. You mean that single-entry accounting calls for the maintenance of records as to asset and liability transactions with persons other than the owners?

A. Yes, that's right.

Q. Now do you know, from the evidence in this case, whether there were any asset or liability transactions of the Menlo Club with persons other than the owners, aside from Gene [2451] Schriber?

A. No, I don't except you said there were yesterday.

Q. The books of the Menlo Club which are in evidence here for the year 1946 and the books relating to the bar and restaurant operation for the

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(Testimony of Ray Weaver.)

year 1945, are kept on an accounting method that is commonly referred to as single entry, aside from the fact that in addition certain liability accounts are kept; isn't that true?

A. Well, if you want to say they are incomplete single-entry books, yes. A more accurate description would be simply a record of cash receipts and disbursements.

Q. Let me ask you first, the form of the books is the single-entry form; isn't that correct?

A. I don't see how it can be single-entry form if it is not single-entry system.

Q. Well, let me show you—do you have one of them before you? I will show you Exhibit 127, which is the book relating to the restaurant operation for the year 1946. First of all I call your attention to the fact that the book contains in it printed instructions, apparently prepared by the publisher of the book; is that correct? A. Yes.

Q. And the pages themselves are already blocked out in various amounts with printed designations of various categories for each column; isn't that correct? [2452]

A. Yes. In some places the column headings have been changed or others added.

Q. But the printed form itself contains printed column headings? A. Yes.

Q. And you note at the top of each page printed, "The Ideal System," U. S. Patent Office, is on there? A. Yes.

Q. And in the course of your experience as an

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(Testimony of Ray Weaver.)

accountant, you have found other taxpayers who have used this same form of book, have you not?

A. In small businesses, yes.

Q. Now insofar as the form of this book, as set up by the manufacturer or publisher is concerned, and disregarding for the moment the entries made in it, but insofar as the form as brought out by the publisher is concerned, is that a single-entry system?

A. I would still characterize——

Mr. Campbell: Just a moment—I will stipulate, Mr. Avakian, that the Ideal Printing Company prints a set of forms, designed for single-entry bookkeeping system.

Mr. Avakian: And will you also stipulate the books here are in that category?

Mr. Campbell: Yes, are at least a part of the forms that they print for that type of particular system. [2453]

Mr. Avakian: Will you also stipulate that that would be Mr. Weaver's testimony as an accountant?

Mr. Campbell: I don't know what his testimony would be. I can't stipulate to that; I only stipulate to the fact.

Mr. Avakian: I will accept it. I can understand your uncertainty.

Q. Now, Mr. Weaver, when you state that the books maintained by the Menlo Club were incomplete single-entry system, will you explain to me, by referring to Exhibit 127, what substantially you have in mind as to the incompleteness of the record?

A. Well, for example, we note that there is one bank which was not entered on the books at all.

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(Testimony of Ray Weaver.)

There is no record of cash in safe, cash in safety deposit boxes; there is no record of any assets or liabilities by way of amounts receivable or payable to other persons other than the alleged partners, and even the transactions with the alleged partners were not completely entered. For example, this 64 thousand dollars, which is marked "Loan to Elmer Remmer," I did not find in Mr. Remmer's account, either in capital account or in loan account, nor is there any record to show whether or not any of that amount has been repaid at any time.

Q. Now, Mr. Weaver, insofar as the preparation of an income tax return on the forms prescribed by the Treasury Department is concerned, does it matter, from an accounting point of view, whether you know that Mr. Remmer took 65 thousand dollars out [2454] of the bank as a loan or not?

Mr. Campbell: If the Court please, that is objected to as going right to the very matter which the jury is here to determine.

The Court: Objection sustained.

Mr. Avakian: Well, your Honor, I am trying to cross-examine——

The Court (Interceding): The objection has been sustained.

Mr. Avakian: Could I be heard on it, your Honor?

The Court: No.

Q. Is it not true, Mr. Weaver, that the income tax form prescribed by the United States Treasury Department and in effect for the years 1944, 1945

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(Testimony of Ray Weaver.)

and 1946, calls, from an accounting point of view, for computation of net income on the basis of receipts and disbursements rather than on net worth basis?

A. No. It calls for the computation of income on the basis of receipts and expenses. Not all disbursements are expenses.

Q. I will modify my question.

A. And, of course, not all receipts are taxable income, either.

Q. But it doesn't call for net worth method?

A. Not if the records are properly kept.

Q. There is no place on the form for net worth method? A. No.

The Court: We will take a recess for five [2455] minutes.

(Jury and alternate jurors admonished and recess taken at 11 o'clock.)

11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. WEAVER

resumes the witness stand on further

Recross-Examination

By Mr. Avakian:

Q. You stated, Mr. Weaver, that in your investigation you found no record of the amount of cash

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(Testimony of Ray Weaver.)

kept in the safes or safe deposit boxes at any time during the course of the investigation. Did I understand you correctly in that respect?

A. Yes, other than such portions as may have been designated bank roll.

Q. Now, Mr. Weaver, in your experience and training as an accountant, as a Revenue agent, from your understanding of accounting principles and Treasury regulations, can you refer me to any provision in law or in the regulations which requires that anybody keep a record of the amount of money that he may have in cash, either in safe or safe deposit boxes or in a vault or his wife's purse or anywhere else?

Mr. Campbell: I object to the question in that form as being incompetent.

The Court: Objection sustained.

Q. Mr. Campbell called to your attention this morning the fact that one of the partners in the Menlo Club, Mr. Ditto, had [2456] withdrawn at the end of 1945, and he asked you if you had found any evidence in the record that Mr. Ditto had withdrawn any money and your answer that you had not; is that correct? A. That is not correct.

Q. Will you give me the correct answer?

A. According to my recollection he said, "were there any amounts charged against Mr. Ditto's account other than the amounts paid on account of taxes."

Q. And your answer was that you had found

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(Testimony of Ray Weaver.)

nothing aside from amounts paid for taxes; is that right? A. Yes, that is right.

Q. Do you recall the following testimony given in this case by Mr. Maundrell on December 28th at page 1468 of the transcript:

"Q. Mr. Maundrell, did you ever see an agreement, wherein Mr. Ditto acknowledged—the agreement was signed by Mr. Ditto and Mr. Remmer—Mr. Ditto acknowledged that he received from his interest at the time he withdrew from the partnership of the Menlo Club 14 thousand odd dollars?"

Mr. Campbell objected.

"The Court: Objection overruled. Answer the question.

"A. Yes, sir."

Do you recall that testimony? [2457]

Mr. Campbell: I will stipulate that that was the testimony in the record.

Mr. Avakian: That is very generous.

Q. Do you recall that?

The Court: Pardon me, Mr. Avakian—let us avoid these remarks. Don't enter into argument over small matters.

Q. When you gave your answer to Mr. Campbell, did you have that testimony of Mr. Maundrell's in mind?

A. I had in mind Mr. Maundrell's testimony that there is no entry in the books of anything to Mr. Ditto and the thought also the books before me showed no such payment.

Mr. Avakian: May I have the question read so

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(Testimony of Ray Weaver.)

the witness may answer? I move to strike the answer as not responsive.

The Court: We will have the question and answer read.

(Question and answer read.)

The Court: The answer may stand.

Q. Can you tell me, Mr. Weaver, when you answered Mr. Campbell's question this morning, if you had in mind the testimony of Mr. Maundrell which I just read to you from page 1468?

A. Not the part that you have just read, no.

Q. Now in answering Mr. Campbell's questions this morning, as an explanation of the net worth method of determining income you stated the net worth method attempts to determine [2458] what the person owns at one date and to compare it with what he owns at another date and from the difference, being what he owes at those two dates, after making allowance for federal income tax and living expenses, to determine the amount of his net income or loss during the period, and on further questions from Mr. Campbell you stated you should also give effect to non-taxable receipts, which you enumerated as gifts, inheritances, and the nontaxable portion of capital gains. Is it not true, Mr. Weaver, that in determining net income on net worth method, you should also eliminate any money which the taxpayer has borrowed during the period that is covered by your net worth computation, which he has not repaid at the end?

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(Testimony of Ray Weaver.)

A. I believe that is covered in my statement. I didn't intend that statement to be a technical explanation of the net worth method. I tried to make it as simple as I possibly could. When I refer to the person's net, I mean his net worth at one period as compared with his net worth at another period, and in determining net worth I would include the cost of the assets which he owned, less the face value of the liabilities owed.

Q. In making a net income computation on the net worth method, you should take in account somewhere in your computation money borrowed by him during the period covered by the computation which he has not repaid at the end of the period?

A. Yes, assuming that corresponding liabilities and [2459] corresponding assets giving rise to the liability, are also computed in their net worth statement. Those statements should be consistent.

Q. Let us see if we can get this in simple terms. If you were making a net worth computation of me, for example, for the year 1941, and if during the year 1951 I had gone to the bank and borrowed a thousand dollars and at the end of 1951 I had not yet repaid that, you would show that as a liability at the end of 1951 in computing my net worth at that time, would you not?

A. Yes, if I also showed as an asset the thousand dollars that you borrowed or whatever asset into which you may have converted that one thousand dollars, because if I did not include the asset, then it would be incorrect to include the liability.

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(Testimony of Ray Weaver.)

Q. Let us suppose I used the thousand dollars to pay the salary of my legal secretary in my office, you would still show the thousand dollars as a liability at the end, would you not?

A. No, then it would depend on whether or not you were on a cash or accrual basis.

Q. Let us suppose I were on the cash basis.

A. Will you read the question?

(Question read.)

A. If one thousand had been borrowed from the bank, yes.

Q. And in that instance there would be no corresponding asset [2460] relative to that one thousand dollars, in view of the fact that I had spent the money for salary of my secretary?

A. That was an asset at the time the liability originated.

Q. But as at the end of 1951, when you were computing my net worth, there would be no asset in my net worth statement at that time relating to the loan at the bank of one thousand dollars?

A. Not if it was paid out, no.

Q. If you were computing my income for 1951 on the net worth method, and if at the beginning of 1951 Mr. "X" owed me a thousand dollars, you would show that thousand dollars in my assets at the beginning of the year, would you not?

A. Yes, unless the asset arose from a transaction relating to any income, in which case on cash basis it would be incorrect to include the asset.

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(Testimony of Ray Weaver.)

Q. Let us suppose Mr. "X" is just a friend, I have no business with him, and in 1950 I borrowed a thousand dollars, which I still owed at the beginning of 1951?

A. This is the reverse, I believe——

Q. Let me reframe the question. In 1950 I had loaned money to Mr. "X," with whom I had no business transaction, and he still owed that money to me at the begining of 1951, you would show that thousand dollars as an asset owing me at the beginning of 1951, would you not?

A. Yes. [2461]

Q. And then if Mr. "X" repaid me that money during 1951, you would then eliminate that from my assets at the end of 1951, would you not?

A. Yes.

Q. And is this a fair statement of the effect of those two loan transactions that I have mentioned to you, Mr. Weaver, that, if at the beginning of the period involved, in net worth computation, Mr. "X" owed me money which he paid to me during the year 1951, the amount of that payment would have the effect of decreasing my net income computed for the year on net worth method?

A. No, it depends on what happens to the repayment. If the amount repaid remained on hand at the end of the year in cash, it would have no effect, merely a substitution of cash asset. If during the year you took that cash and converted to some other asset, it still would have no effect, unless in the

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(Testimony of Ray Weaver.)

possible conversion you had suffered some loss or had some gain.

Q. I do not think I made my question clear. I will rephrase it. In computing my income for the year 1951 on net worth method, the amount of net income which you compute would be one thousand dollars less if you included Mr. "X's" obligations to me at the beginning of the year than it would be if you had not included Mr. "X's" obligation to me as an asset at the beginning of the [2462] year?

Mr. Campbell: Objected to as immaterial.

The Court: Let me have the question.

(Question read.)

The Court: You may answer the question.

A. You mean all things remaining equal?

Q. That is right. A. Yes.

Q. And similarly, as to the end of the year, the example where I had borrowed money during the year 1951, which I still owed at the end of the year, the inclusion of that thousand dollar liability of mine for that loan at the end of the year would reduce by one thousand dollars the amount of the net worth income computation, in comparison with what it would have been if you did not include that thousand dollar liability, isn't that true, again assuming that all things being equal?

A. I am simply trying to say that if the net worth in the period is understated and the net worth at the end of the period is overstated, you

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(Testimony of Ray Weaver.)

can't arrive at the correct net income computation.

Q. Are you able to give an answer?

A. The complex way in which you state it somewhat confuses me because I do not know whether you are taking things equal——

Mr. Avakian: Very well, let me restate it. [2463]

Q. What I am getting at is this, Mr. Weaver—it is true, is it not, that in order to make a correct, complete and accurate computation of net income on net worth method, it is necessary to take into account money which other people owe the taxpayer at the beginning of the period, and also money which the taxpayer owes to other people at the end of the period?

A. So far as it arises as the result of the receipt of income or the incurrence of expenses, which are not properly taken into account on cash basis.

Q. With that qualification, your answer would be yes? A. Yes, that's right.

Mr. Avakian: That's all.

Redirect Examination

By Mr. Campbell:

Q. Counsel has read from the record here, page 1486, question propounded to Mr. Maundrell and the answer, and I also wish to refer to the record at this time and read a few questions propounded to and answered by Mr. Maundrell, relative to the same subject matter to which counsel directed the attention of the witness.

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(Testimony of Ray Weaver.)

The Court: Do you mean you just propose to read it?

Mr. Campbell: I am going to ask the witness a question concerning it.

The Court: Oh.

Q. Mr. Avakian asked you, Mr. Weaver, if you had in mind at [2464] the time you gave your answer relative to payments made to Mr. Ditto the following question asked Mr. Maundrell and the following answer, page 1468 of the record. Question by Mr. Gillen:

"Q. Mr. Maundrell, did you ever see an agreement, wherein Mr. Ditto acknowledged—the agreement was signed by Mr. Ditto and Mr. Remmer—Mr. Ditto acknowledged that he received from his interest at the time he withdrew from the partnership of the Menlo Club 14 thousand odd dollars?

"A. Yes, sir."

I will ask you if, in giving your answer, you had in mind also the redirect examination of Mr. Maundrell——

Mr. Gillen: I do not think Mr. Weaver said he had that in mind. My recollection is he did not have that in mind, that testimony of Mr. Maundrell, when he gave his answer to Mr. Campbell's question.

Mr. Campbell: I am going to ask him if he had in mind this morning the following testimony, page 1472:

"Q. In response to counsel's questions, you said you had seen some kind of agreement between Mr. Remmer and Mr. Ditto? A. Yes, sir.

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(Testimony of Ray Weaver.)

"Q. When did you see that?

"A. Last night. [2465]

"Q. Where did you see that?

"A. Mr. Gillen's apartment.

"Q. Had you ever seen it prior to that time?

"A. No, sir.

"Q. Did you ever have any knowledge with reference to it prior to that time? A. No, sir.

"Q. Do you know, of your own knowledge, whether any 14 thousand dollars was paid to Mr. Ditto? A. No, sir.

"Q. Did you ever talk to Mr. Ditto about any such agreement? A. No, sir."

Did you have that testimony in mind at the time of your answer?

A. I had Mr. Maundrell's complete testimony in mind, rather than the part that Mr. Avakian read.

Mr. Campbell: That's all.

Recross-Examination

By Mr. Avakian:

Q. Mr. Weaver, do you have before you the book of the Menlo Club that shows Mr. Ditto's capital account? A. Yes.

Q. What is that exhibit number? A. 125.

Q. And does that show the amount of Mr. Ditto's capital [2466] account at the time he withdrew from the partnership at the end of 1945?

A. It shows net total during 1945. It shows balance 1945, which I assume is December 31st—it

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(Testimony of Ray Weaver.)

doesn't so state—and in the balance column there is an amount entered, which from the nature of the succeeding entries appears to be a credit balance on that date.

Q. What is the amount of it?

A. $14,583.90.

Q. And from your examination of the records and of the Menlo Club partnership tax returns for the years 1945 and 1946, you do know, do you not, that at the time of Mr. Ditto's withdrawal, that is, at the end of 1945, Mr. Remmer's percentage in that partnership increased from 40 per cent to 55 per cent?

A. I know it increased. There is nothing on the books to indicate any payment for any increase.

Q. I call your attention to prosecution's Exhibit 89, which is the Menlo Club return for the year 1945, and Exhibit 90, which is Menlo Club partnership return for the year 1946, and direct your attention to Schedule I of each return, and ask you whether those returns show that for the year 1945 Mr. Remmer's percentage interest was 40 per cent and for the year 1946 his percentage interest was 55 per cent?

A. That is what the returns state, yes.

Mr. Avakian: No further questions.

The Court: Any further questions? [2467]

Mr. Campbell: Just a moment. That's all.

The Court: You are excused, but please remain available until excused by both parties.

Mr. Campbell: Yes, he will be available.

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Mr. Thompson: We have a stipulation, your Honor, of the testimony of a witness. I would like to read into the record, your Honor, the stipulation relating to testimony of Dorothy A. Remmer.

The Court: Very well.

Mr. Thompson: It is stipulated that if Dorothy A. Remmer should appear, be sworn and testify as a witness in the above case (refers to the case now on trial), she would testify in substance as follows: That she resides at 634 Grand Avenue, Oakland, California——

The Court: Just a moment before you proceed with this stipulation. Is there any question of privilege?

Mr. Thompson: This is the defendant's sister, your Honor.

That she resides at 634 Grand Avenue, Oakland, California; that she is a sister of the defendant, Elmer F. Remmer; that her name appears, or appeared, on public records as the owner in joint tenancy with Mrs. Helen L. Remmer, the wife of Elmer F. Remmer, of certain real property located in Contra Costa County, California; that Dorothy A. Remmer never had any beneficial interest in any of said real property located in [2468] Contra Costa County, California; that Dorothy A. Remmer did not furnish any of the money used to purchase said real property or pay any part of any loans, the proceeds of which were used to purchase said property; that Dorothy A. Remmer did not make any loans to Helen L. Remmer or Elmer F. Remmer; that Dorothy A. Remmer never had, and does

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not now have, in her possession or in her name, individually or jointly, any other property that belongs to Mrs. Helen L. Remmer or Elmer F. Remmer; that when the real property in Contra Costa County, California, which was sold by Helen L. Remmer and Dorothy A. Remmer was sold, it was sold after December 31, 1946, and Dorothy A. Remmer did not receive any part of the proceeds of said sale or sales.

Mr. Golden: So stipulated.

Mr. Campbell: Now the defense has asked that Mr. Schriber be recalled for further cross-examination.

Mr. Golden: Is it the Court's pleasure that we call him now?

The Court: If counsel wants to call him; I have no preference.

Mr. Thompson: We have an exhibit we would like to have marked and counsel would have an opportunity to examine it over the noon recess.

The Court: Very well.

Mr. Thompson: I have two documents, the first of which [2469] I would like to have marked Exhibit 109A, inasmuch as that refers to that same exhibit and may be more easily handled if it is marked in that series. A similar photostatic document, which we would like to have marked Exhibit 109B. At this time, your Honor, we offer in evidence Exhibits 109A and 109B and would like to have counsel have the opportunity to examine them during the recess.

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Mr. Avakian: May we withdraw them from the clerk's possession during the recess?

The Court: Any objection to withdrawing them?

Mr. Thompson: No objection.

The Court: They may be withdrawn during the noon recess.

GENE SCHRIBER

having been previously sworn, was recalled and testified as follows on

Cross-Examination

By Mr. Gillen:

Mr. Gillen: So the record may be clear, may it please the Court, Mr. Schriber was called some weeks ago as a witness by the prosecution. He was examined and cross-examined. With the Court's permission, we were to have an opportunity to recall him for further cross-examination. He is already under oath. He is now here for further cross-examination by the defense.

The Court: Very well. You may proceed.

Q. Mr. Schriber, I will hand you here two-page typewritten [2470] document, defendant's "Z" for identification. I will ask you to look at it and examine it, look particularly at the second page, the purported signatures. Have you done so, sir?

A. Yes.

Q. Do you recognize the signatures on the second page of that document? A. Yes.

Q. Whose signatures are they?

A. Elmer Remmer and myself, Gene Schriber.

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(Testimony of Gene Schriber.)

Mr. Gillen: I will offer this exhibit as defendant's Exhibit "Z" in evidence.

Mr. Campbell: To which we object on the grounds that the document purports to be a summary of some kind made in 1949, purporting to be a recitation of certain facts which are signed with the name Gene Schriber and that of Elmer L. Remmer, agreeing as to facts. Now that is not the proper method of getting facts before the Court.

The Court: Let me see the exhibit.

Mr. Gillen: It is a statement against the interest of the defendant in this case.

(Laugh indicated.)

Mr. Gillen: I don't see what is so amusing about that.

The Court: We do not want any demonstrations at all. There should be no demonstrations here whatever.

Mr. Campbell: It is matter for testimony, if the Court [2471] please, not for memorial. Further, it is not the best evidence.

Mr. Gillen: I do not know what counsel means, not the best evidence, bearing the signature of the two parties involved.

The Court: The objection is sustained. We will take our recess at this time.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

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February 1, 1952—1:40 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SCHRIBER

resumes the witness stand on further

Cross-Examination

By Mr. Gillen:

Mr. Gillen: Perhaps it would be more practical, your Honor to discuss the matter of these exhibits after we finish with Mr. Schriber.

The Court: Very well.

Q. Mr. Schriber, you testified here some weeks ago as a witness for the government, and you were cross-examined. You remember the occasion, do you not? A. Yes.

Q. And without consuming the time to repeat your testimony, but just preliminarily a resume of your testimony to bring out our thoughts of the subject matter, you recall testifying, do [2472] you not, that Mr. Remmer in 1945 purchased from you the three units comprising the Menlo properties, called the Menlo Club card room, restaurant and bar? A. That is correct.

Q. And that the agreed price was 175 thousand dollars? A. That is right.

Q. And there were executed in your behalf by Mr. Remmer certain promissory notes, covering the agreed price, and a down payment of 25 thousand

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(Testimony of Gene Schriber.)

dollars upon execution of those notes and agreement; is that true? A. That is correct.

Q. And then there were other subsidiary things, such as lease on the premises, which was guaranteed by Mr. Remmer, and so forth; do you recall that?

A. That is right.

Q. And then you recall testifying, do you not, that the initial payment of 25 thousand dollars was in the form of cash, which subsequently, at the request of Mr. Remmer, was returned by you and in lieu thereof you took a check for 25 thousand dollars signed by Mr. Maundrell, who was then keeping books for the Menlo Club?

A. That's right.

Q. Now did you and Mr. Remmer, at any time subsequent to the return of the 25 thousand dollars in cash by you to Mr. Remmer and the taking by you in lieu thereof a check for 25 thousand [2473] dollars, representing first payment on that agreement for the purchase of the Menlo properties, at any time subsequent thereto was there entered into between you and Mr. Remmer an agreement and statement of the status of the transaction? Do you understand my question?

A. Yes, I understand. Yes, we talked about it, but the statement was not prepared and signed until later.

Q. Then your answer is that there was subsequently a written statement of the status of the transaction between you and Mr. Remmer; that is,

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(Testimony of Gene Schriber.)

history of the payments and the then status of the transaction, signed by both of you?

A. A period afterward, that is correct.

Q. Now, Mr. Schriber, I will ask you to look at defendant's Exhibit "Z" for identification again, the document I showed you this morning, the signatures on which you have already identified as those of yourself and Mr. Remmer. Now I ask you if that is the agreement and statement executed by and between you and Mr. Remmer, relating the history of the transaction and its then status?

A. That's right.

Mr. Gillen: Now again I offer this document as defendant's Exhibit "Z" in evidence.

Mr. Campbell: To which we make the same objection as heretofore; not the best evidence and purports merely to be a memorial of testimony which has been offered in evidence here. [2474]

The Court: Objection sustained.

Q. All right, let me ask you this: Did you at any time subsequent to the execution of the original agreement of sale to Mr. Remmer of the Menlo properties, and subsequent to the time that you returned the 25 thousand dollars cash to Mr. Remmer and took in lieu thereof a 25 thousand dollar check as first payment under the agreement, relate the circumstances of returning the 25 thousand dollars cash and taking a check to Mr. Weaver of the Internal Revenue Department?

Mr. Campbell: Objected to as immaterial and incompetent, if the Court please, hearsay.

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(Testimony of Gene Schriber.)

The Court: You may answer the question yes or no.

A. Yes.

Q. And did you relate that to him in connection with an inquiry by Mr. Weaver into your own personal income tax affairs? A. Yes.

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained. The answer will go out.

Q. Was there anybody else present when you related the circumstances of the return of the 25 thousand dollars cash to Mr. Weaver and the taking of 25 thousand dollar check signed by Mr. Maundrell in lieu thereof?

Mr. Campbell: That is objected to, if the Court please. It is incompetent, immaterial, and the question purports to state conversation which is incompetent and immaterial. [2475]

Mr. Gillen: May I correct my question. I am told I used the name of Weaver instead of Remmer. I should have said returned the 25 thousand dollars cash to Mr. Remmer and took a check for 25 thousand dollars in lieu thereof.

Mr. Campbell: We make the same objection.

The Court: Objection sustained.

Mr. Gillen: May I point out your Honor permitted him to answer he did have a conversation with Mr. Weaver, permitted him to answer that question? This is merely a question asking whether anybody else was present when he did have that conversation with Mr. Weaver.

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(Testimony of Gene Schriber.)

The Court: Well, you can answer the question.

Mr. Campbell: This is characterization of the conversation and proposes to put forth the subject matter.

The Court: The question is merely as to who was present.

Mr. Gillen: That is all, your Honor.

The Court: You may answer.

A. Mr. Morgan, Mr. Weaver, and some other gentleman; I don't remember the other man's name.

Q. Mr. Morgan is the gentleman who sits in the court room and is also connected with the Internal Revenue Department? A. That is right.

Q. Now can you fix the time that you had that conversation with Mr. Weaver and Mr. Morgan?

A. No, I can't fix the time exactly. It was sometime in the [2476] latter part of 1946.

Q. The latter part of the year 1946?

A. Yes.

Q. And can you fix the place where that conversation took place?

A. 714 New Montgomery Street, I think is the address.

Q. That is the office, or one of the offices, of the Internal Revenue Department?

A. That's right.

Q. Now, Mr. Schriber, in the year 1949, or at any later time, did you show Mr. Weaver and Mr. Morgan, or any one of the other members of the Internal Revenue Department of San Francisco, this document which you have examined and which

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(Testimony of Gene Schriber.)

has been identified here as defendant's Exhibit "Z" for identification? A. No.

Mr. Gillen: Now, may it please the Court, I feel we have now laid the foundation for the admission of this as the best evidence in support of oral testimony, and ask that it be admitted as defendant's Exhibit "Z" in evidence.

Mr. Campbell: To which we object upon all the grounds heretofore stated.

The Court: Same ruling.

Mr. Gillen: I then respectfully ask the Court's permission to be heard on the matter out of the presence of the jury. [2477]

The Court: Very well, we will excuse the jury.

(Jury and alternate jurors admonished and excused at 1:50 p.m.)

(In the absence of the jury.)

(NB 338, p. 100; NB pp. 1.9.)

2:15 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Gillen: May it please the Court, the defense has no further questions of the witness Schriber.

Mr. Campbell: No further redirect.

The Court: Then Mr. Schriber may be finally excused?

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A. Yes.

The Court: I understand there is an offer of Exhibits 109A and 109B.

Mr. Campbell: It has been stipulated that those exhibits, consisting of the present documents, may be admitted into evidence.

Mr. Gillen: So stipulated.

Mr. Campbell: First, your Honor, please, as I earlier informed the Court, the government has one witness, after whose testimony it intends to rest. Prior to putting that witness on the stand, it is necessary certain computations be made and I therefore request an early recess, in order that that may be done and his testimony taken Monday morning. [2478]

The Court: Ladies and gentlemen of the jury, I want you to know that counsel on either side and the Court are not at all desirous of wasting any of your time, but I really believe the end of the case would be expedited if we adjourned at this time until Monday morning. So we will be in recess until Monday morning. Monday is calendar day, so this case will be in recess until 11:00 o'clock.

(Jury and alternate jurors admonished and recess taken at 2:35 p.m.) [2479]

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Monday, February 4, 1952—11:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

A. V. BRADY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name, please?

A. Augustus V. Brady.

Q. Mr. Brady, what is your present official position?

A. I am technical advisor of the Penal Division, Bureau of Internal Revenue.

Q. How long has that been your position?

A. About 5 years, 5 years the first of May.

Q. Prior to that were you connected with the government in any capacity? A. Yes, I was.

Q. In what capacity?

A. I was Internal Revenue Agent for around 22 years prior to that time.

Q. As Internal Revenue Agent, to what office or offices were you attached?

A. Well, I was attached to the Internal Agent in charge of San Francisco, Honolulu, Denver, New York and Washington, D. C.

Q. At various times during your 22 years as an Internal [2480] Revenue Agent; is that correct?

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(Testimony of A. V. Brady.)

A. Yes, sir.

Q. And your position as technical advisor to the Penal Division of the Bureau of Internal Revenue, to what office or offices have you been attached?

A. Just to the San Francisco office.

Q. Now, Mr. Brady, in connection with your duties as an Internal Revenue agent, prior to your connection with the Penal Division as technical advisor, did you have an occasion to meet the defendant, Elmer Remmer? A. Yes, I did.

Q. In that connection, I am going to call your attention to plaintiff's Exhibits 11 and 12, being individual income tax returns of Elmer F. Remmer and his wife, Helen L. Remmer, respectively, for the year 1934, and I will call your specific attention to plaintiff's Exhibit 11 and the signature appearing thereon as the officer before whom this return was sworn to, A. V. Brady, and ask you if that is your signature? A. Yes, sir; it is.

Q. I will ask you whether or not you were present at the time the signature, Elmer F. Remmer, was atached thereto? A. Yes, I was.

Q. Who placed that signature hereon?

A. Mr. Remmer.

Q. That is the defendant here? [2481]

A. Yes, sir.

Q. And calling your attention to the body of the document and the pen and ink written words and figures, I will ask you whose writing that is?

A. That is my writing, Mr. Campbell.

Q. And I call your attention to plaintiff's Ex-

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(Testimony of A. V. Brady.)

hibit 12, first to the writing appearing in the body of the return of Helen L. Remmer, and ask whose writing appears thereon?

A. That is my writing, Mr. Campbell.

Q. Were you present at the time that that return was signed? A. No, sir; I was not.

Q. I call your attention to the fact that the acknowledgment of the signature is before one Mattie G. Sterling, a notary public in and for the City and County of San Francisco. Were you present at the time the acknowledgment of the notary public was placed thereon? A. No, I was not.

Q. Now, Mr. Brady, where was it that these returns were prepared?

A. Prepared in the Bank Club in Reno.

Q. And do you recall the date upon which they were prepared?

A. Mr. Campbell, I have a report at the time I secured those delinquent returns and if I could use that to refresh my recollection I think it would help me.

Q. So you have that with you? [2482]

A. Yes, I do.

Q. Will you produce it? You have handed me a document consisting of some five pages; is that the report to which you refer? A. Yes, sir.

Mr. Campbell: May this be marked for identification as government's Exhibit 182 for identification?

Q. Now, Mr. Brady, I hand you back 182 for identification and ask you if you will refresh your

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(Testimony of A. V. Brady.)

recollection, and having refreshed your recollection, state upon what date it was that these returns were filled out by you?

A. Mr. Campbell, the report here is dated——

Q. Never mind that—state the date, if you will.

A. Well, possibly a couple of days ahead of this report.

Q. Would an examination of the returns assist you? A. Yes. May 3rd.

Q. Of what year? A. 1937.

Q. You stated that these returns were prepared at the Bank Club in Reno? A. Yes, sir.

Q. What was the occasion of your being there at that time?

A. Well, I had just finished checking the books of the corporation in which Mr. Remmer owns some stock.

Q. What corporation was that? [2483]

A. Cal-Neva Lodge, Inc.

Q. Yes?

A. And during the course of the examination of that corporation I found there were a substantial amount of dividends paid to the stockholders and I was anxious to see whether the stockholders reported the dividends as reflected on the books of the corporation.

Q. And for what year had those dividends been paid? A. For the year 1934.

Q. On the occasion of May 3, 1937, when you were in the Bank Club and this return was filled out, did you have a conversation with Mr. Remmer?

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(Testimony of A. V. Brady.)

Answer that yes or no. A. Yes, sir; I did.

Q. Who, if anyone, beside yourself and Mr. Remmer were present on that occasion?

A. May I relate how I met Mr. Remmer?

Q. No, just if you will answer the question. Who, if anyone else, was present, if anyone else was present during any part of the time?

A. Mr. William Graham was present; I believe also Mr. James McKay.

Q. Did they remain throughout the conversation? A. No, sir; they did not.

Q. Had you met Mr. Remmer prior to that occasion? A. Not to my recollection. [2484]

Q. Who, if any one, introduced you to him on that occasion?

A. Mr. McKay and Mr. Graham both, I believe.

Q. Now will you state the conversation which you had with Mr. Remmer on May 3, 1937?

The Court: I think we had better hear that conversation in the absence of the jury first.

(Jury and alternate jurors admonished and excused at 11:15 a.m.)

(In the absence of the jury.)

The Court: The thought I have, it has been my practice whenever a conversation with a defendant or statement of a defendant has been related, I like to hear it in the absence of the jury. I have no idea what it is, but we will see what it is first.

Q. Mr. Brady, will you relate then the conversation which you had at that time?

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(Testimony of A. V. Brady.)

A. Mr. Campbell, this is some 15 years ago.

Q. You may refresh your recollection examining that document. Just relate, if you will, the conversation.

Mr. Golden: By that document, you refer to 182?

Mr. Campbell: For identification.

Q. Incidentally, in that connection, Mr. Brady, in the absence of the jury, is that a report which you made in your official capacity at the time concerning the facts which you are now about to relate? [2485] A. Yes, sir.

Q. And that was, of course, the type of report and report which was ordinarily and customarily made in situations of the kind where you obtained a return? A. Yes, sir.

Q. All right. Now will you proceed and relate the conversation?

A. Well, I came into the Bank Club and asked Mr. McKay and Mr. Graham if they could contact Mr. Remmer for me, in that I had some personal matter to take up with him and they, of course, knew I had just checked the Cal-Neva because I asked them to show me their returns to see whether they reported the dividends which the corporation paid in that year.

Q. If I may interrupt on that point—we are in the absence of the jury; if the Court permits you to relate the conversation, you are not permitted to relate your conversation with Mr. Graham and Mr. McKay outside the presence of the defendant,

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(Testimony of A. V. Brady.)

Mr. Remmer, so your answer will necessarily be confined in relating conversations during such times as the defendant, Mr. Remmer was present. You understand that? A. Oh, yes.

Q. All right.

A. I want to get this as correct as I can, Mr. Campbell.

Q. Yes, go ahead; proceed.

A. Well, I met Mr. Remmer through Mr. Graham and Mr. McKay [2486] and I told him that I had just checked the books of Cal-Neva Lodge and the books disclosed that he had received a dividend of some 17 thousand dollars. I wanted to know if he made a report——

Q. For what year?

A. For the year 1934. Now my recollection is Mr. Remmer said to me, he admitted that he received the dividend, however, and he said he lost the money gambling, therefore, he felt that he was not required to file a return, in that he had lost more than the amount he received. I explained to him that income from those sources, that is dividends, could not be used to offset gambling losses, even though the corporation was a gambling corporation, and I think Mr. Remmer understood it from that time on.

Q. Of course, that is your conclusion. It is what you told him?

A. Yes. And then I got the returns prepared and told him it would be necessary at that time to take a jurate himself and Mrs. Remmer, not being

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(Testimony of A. V. Brady.)

present, I asked him to have her return acknowledged before a notary public, which he did. They were delivered back to me a few days later. However, at that particular time, I did not pick up any taxes——

The Court (Interceding): Let me ask you, is that the sum and substance of your conversation with Mr. Remmer?

A. I would say so. [2487]

The Court: Are you planning to testify to any other conversations with him?

Mr. Campbell: There are one or two more particulars regarding this conversation which I wish to draw out, which he has not related yet.

The Court: I say planning—do you anticipate being called upon to relate any other conversations?

Mr. Campbell: No, there will not be any other conversation other than this particular one.

Q. You never had any other conversations other than that one relating to his tax matters?

A. Not relating to his tax matters.

Q. On that occasion was anything said regarding the delinquent penalty set forth on this return?

A. The fact I had the penalty on the return——

Q. Was anything said?

A. I am sure I explained to Mr. Remmer the reason for it, because in my report I mentioned I discussed the charges with him.

Mr. Avakian: It assumes in that respect he is drawing on his conclusion as to what he probably did.

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(Testimony of A. V. Brady.)

The Court: Well, I am not interested in those questions. I had other reasons for sending out the jury.

Q. Was anything said in the course of that conversation as to [2488] his financial situation as it existed at the time of your conversation?

A. He pleaded that for the past several years he had made nothing; as a matter of fact at that time he owed Messrs. Graham and McKay several thousand dollars. I have a notation here: "It was also noted on the books of Cal-Neva Lodge, Inc., that this taxpayer had received advances for several years."

Q. Did he tell you anything other than the fact he had not made any money, that he had no money available and that he was indebted to Mr. McKay and Mr. Graham? A. Yes.

Q. What else did he tell you?

A. He said he did not have money to pay the taxes when I picked up the delinquent returns.

Q. What was the amount of the delinquent returns?

A. $142.50, together with penalty, $35.60. Because otherwise I would have asked for——

Q. Don't reason what you would have done. What is it he said? Is that what he said?

A. To the best of my recollection.

Mr. Campbell: That covers the scope of the conversation.

The Court: We will call in the jury. We will go over the ground in the presence of the jury.

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11:20 A.M.

(Defendant present with counsel.) [2489]

(Presence of the jury and alternate jurors stipulated.)

MR. BRADY

on the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Now, Mr. Brady, will you relate the conversation which you had with Mr. Remmer on the 3rd of May, 1937, on the occasion of your preparing these delinquent 1934 returns of Mr. Remmer and his wife?

A. That refreshes my memory that referring to the report that I prepared at the time, dated May 17, 1937. I was introduced to Mr. Remmer by Mr. Graham and Mr. McKay and I told him that I had just made an examination of the books and records of the Cal-Neva Lodge, Inc., in which he was one of the stockholders, and found that——

Mr. Gillen: That would be hearsay.

Mr. Campbell: No, he is relating the conversation had with Mr. Remmer.

Mr. Gillen: I am sorry, I misunderstood.

A. Mr. Gillen, I said Mr. McKay and Mr. Graham introduced me to Mr. Remmer.

Mr. Gillen: I am sorry, I misunderstood.

Q. Just proceed.

A. I told him I checked the books of the corpo-

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(Testimony of A. V. Brady.)

ration and found there was a substantial dividend paid in 1934 and I wanted to know whether he made a record of it on his return and I believe he told me at the time, to the best of my recollection, that [2490] he did not file a return because he did not make sufficient income. He admitted receiving this dividend but said he lost that and more in gambling and that was the reason he did not think he was required to file a return. I explained to Mr. Remmer at the time that income from this source, that is, dividends from a corporation, even though the corporation was a gambling corporation, may not be offset by gambling losses, therefore, a return was required, which I secured; and there is one other thing, I picked up this 1934 return in 1937 and I asked Mr. Remmer, I said, "How about 1935 and 1936, they would also be delinquent now," and he told me he had made no money for those years, he had lost it gambling.

Q. Do you recall anything else that was said on that occasion?

A. Only that I explained the necessity in view of a 25 per cent delinquent penalty.

Q. I call your attention on the returns they set forth 25 per cent delinquent penalty, was that put on prior to the signing of these returns by Mr. Remmer and his wife? A. Yes.

Q. Now at the time Mr. Remmer signed this return, was any money paid on account of the taxes, do you know? A. No, sir.

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(Testimony of A. V. Brady.)

Q. Did you have any conversation with Mr. Remmer relative to that?

A. To the best of my recollection now I asked for the tax and [2491] penalty. As I told him, it was the procedure to collect the tax and penalty if possible. He said he didn't have the money and therefore I took the returns without the payment of tax.

Q. Now, Mr. Brady, was anything said in that conversation relative to Mr. Remmer's and his wife's source of livelihood during the years 1934, 1935 and 1936?

A. Well, the source of livelihood——

Q. What did he say?

A. Well, he said his income was from gambling.

Q. I believe you stated he told you he had lost money during those years?

Mr. Gillen: Objected to as leading and suggestive. He has his answer. That is objected to—argumentative.

The Court: It may be it is leading.

Q. What, if anything, did he say as to money he was living on during that time?

A. I asked him about his income. He said, well, he had been in debt to Mr. Graham and Mr. McKay and I believe he said also, "Look at the books and see where I have overdrawn my account at Cal-Neva."

Q. Was Mrs. Remmer present or not during this time? A. No, sir; she was not.

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(Testimony of A. V. Brady.)

Q. What, if anything, was done relative to securing her signature on her return?

A. Well, the fact I couldn't [2492] acknowledge——

Q. No, not the mental process—what did you do?

A. I asked Mr. Remmer to have her return acknowledged before a notary and returned to me.

Q. I believe you stated it was returned to you within a few days?

A. Within a few days it was returned, yes.

Q. And will you state the amount of taxes that you found to be due on these returns?

Mr. Gillen: Objected to—the return would be the best evidence of that.

Mr. Campbell: Very well, I will read from Exhibit 11, delinquent return of Elmer Remmer for 1934, shows tax liability of $142.50, plus 25 per cent delinquent penalty, $35.60, or a total of $178.10. On plaintiff's Exhibit 12, delinquent return of Helen L. Remmer's income for the year 1934, shows the same figures as to the amount of tax due and the 25 per cent delinquency.

Q. Now, Mr. Brady, have you, at my request, prepared a chart setting forth assets and liabilities of Elmer F. Remmer and Helen L. Remmer for each of the dates December 31, 1943, 1944, 1945 and 1946? A. Yes, I have, Mr. Campbell.

Q. I show you this accounting sheet headed "Elmer F. and Helen L. Remmer" and ask you if that is the chart to which you refer?

A. Yes, it is. [2493]

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(Testimony of A. V. Brady.)

Mr. Campbell: May this be marked for identification as government's Exhibit 183 for identification. I presume counsel will want to examine this before questions are asked.

Mr. Avakian: It will take about 10 minutes.

(Jury and alternate jurors admonished and noon recess taken at 11:30 a.m.)

February 4, 1952—1:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BRADY

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Q. Mr. Brady, I am going to return to you this plaintiff's Exhibit 183 for identification, which you have previously identified as a chart prepared by you at my request. Mr. Brady, I will ask you if, in preparing this chart, and under my instructions, you gave effect to Exhibits 150 and 150A, the certified copy of the statement from the Bureau of Public Debt and the photographic copy of the bonds, in your notes? A. Yes, sir; I did.

Q. And did you also give effect to Exhibit 169 in evidence? A. Yes, sir; I did.

Q. Did you also, at my request, give effect to Exhibit 164? A. Yes, sir; I did.

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(Testimony of A. V. Brady.)

Q. And to Exhibit 163? [2494]

Q. And to Exhibit 165?

A. Yes, sir; I did.

Q. Did you also give effect to Exhibit 98?

A. Yes, sir; I did.

Q. To Exhibit 115? A. Yes, sir; I did.

Q. To Exhibits 144 and 145?

A. Yes, sir; I did.

Q. Did you also give effect to Exhibit 175?

A. Yes, sir; I did.

Q. To Exhibit 133G? A. Yes, sir.

Q. Did you also give effect to Exhibit 28?

A. Yes, sir; I did.

Q. To Exhibits 36 and 37? A. Yes, sir.

Q. And in the preparation of this chart did you also give effect to Exhibits 45, 46, 47, and 48?

A. Yes, sir.

Q. Did you also give effect to Exhibit 42?

A. Yes, sir.

Q. And to Exhibit 41? A. Yes, sir.

Q. And to Exhibit 106?

A. Yes, sir; I did. [2495]

Q. And to defense Exhibits "T" and "V"?

A. Yes, sir; I did.

Q. Did you give effect to Exhibit 53?

A. You mean Exhibit 35?

Q. I am referring to an account in the Bank of America, Grand Lake Branch?

A. I have that as Exhibit 35.

Q. Did you give effect to Exhibit 35?

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(Testimony of A. V. Brady.)

A. Yes, sir.

Q. That is correct. Did you give effect to Exhibit 49? A. Yes, sir; I did.

Q. And to Exhibits 38 and 39?

A. Yes, sir; I did.

Q. Did you give effect to Exhibit 139?

A. What exhibit is that, please?

Q. That is an invoice relative to the purchase of—— A. Yes, sir; I did.

Q. And to Exhibit 174, which is an exhibit headed "50-52 Mason Street, San Francisco office Improvements, Fixtures and Equipment."

A. Yes, sir; I did.

Q. Did you give effect to Exhibit 147A?

A. Yes, sir; I did.

Q. Did you also, in preparing this exhibit, give effect to the account of Elmer Remmer in the ledger of Cal-Neva, which is [2496] here in evidence, and to the schedule prepared and introduced in evidence by Mr. Weaver in relation thereto?

A. Yes, sir; I did.

The Court: Do you have that exhibit number?

Mr. Avakian: Cal-Neva ledger is 146.

Mr. Campbell: And 172, the schedule.

Q. And Exhibit 176, which consists of two checks signed by Albert Villaudy?

A. Yes, sir; I did.

Q. I believe you stated you gave effect to Exhibit 172? A. Yes, sir.

Q. Did you also give effect to Exhibits 40 and 40A? A. Yes, sir; I did.

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(Testimony of A. V. Brady.)

Q. And to Exhibit 144?

A. Yes, sir; I did.

Q. To Exhibits 108 and 109?

A. Yes, sir; I did.

Q. Did you also, in preparing this chart, give effect to Exhibit 140? A. Yes, sir; I did.

Q. And to Exhibit 53? A. Yes, sir; I did.

Q. And to Exhibits 13 and 14?

A. Yes, sir; I did.

Q. Did you also give effect, in preparing this chart, to [2497] Exhibits 1 to 6, inclusive?

A. Yes, sir; I did.

Q. Have I now covered, Mr. Brady, the exhibits which you took into consideration in preparing this chart?

A. I believe that you have, Mr. Campbell.

Mr. Campbell: It will be offered in evidence as government's Exhibit 183.

Mr. Avakian: Your Honor, we have a number of specific grounds of objection to this exhibit, in addition to the general ground it is incompetent, irrelevant, and immaterial, based on the witness' conclusion of law, and after stating the more specific grounds, I would like the opportunity to call your Honor's attention to a case which we think is directly on it.

The Court: We will excuse the jury.

(Jury and alternate jurors admonished and excused at 1:15 p.m.)

(In the absence of the jury.)

(NB 339 pp 24-47.)

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2:45 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BRADY

resumes the witness stand on further

Direct Examination

By Mr. Campbell:

Mr. Campbell: At the time of the recess I had offered [2498] in evidence government's Exhibit 183 for identification and an objection is pending. I renew my offer.

The Court: Objection overruled and Exhibit 183 may be admitted in evidence.

Q. Now, Mr. Brady, with relation to government's Exhibit 183, did you also cause to be prepared an enlargement of that chart?

A. Yes, sir; I did.

Mr. Campbell: I will ask to have this marked, bearing the same number as Exhibit 183. I presume it may be 183A.

The Court: Is that to be offered in evidence also?

Mr. Campbell: Yes, sir.

Mr. Avakian: If it is a duplicate of something already in evidence, we do not see the propriety of putting in an identical exhibit simply as an enlargement. If counsel wants to use it for the ease and facility of examination of the witness, it may be used.

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(Testimony of A. V. Brady.)

Mr. Campbell: That is the purpose of the offer, that it may be clearer.

Mr. Avakian: We have no objection to that use, but do object to it being put in evidence as a duplication.

The Court: It will be admitted in evidence as 183A

Mr. Campbell: With the Court's permission, I would like to put this on the table facing during these questions. [2499]

The Court: Mr. Campbell, when you refer to any item on the duplicate, point it out so counsel can follow it on their copy of the original exhibit.

Q. Now, Mr. Brady, according to this chart which you have prepared, the original of which is marked 183, what is the amount of total assets as shown by that chart as of December 31, 1943?

A. Total assets, $170,789.89.

Q. And it is true, is it not, that the detail of each of those assets is set forth under the heading of 1943 of that chart? A. Yes, sir.

Q. You have 183 before you?

A. Yes, I do, Mr. Campbell.

Q. And will you state the amount of assets and liabilities of Mr. Remmer as shown by that chart as of December 31, 1944?

A. The assets $210,408.26; the liabilities, $23,-182.93.

Q. And as of December, 1945?

A. Total assets end of 1945, $437,311.05; the total liabilities at the end of 1945 is $189,160.32.

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(Testimony of A. V. Brady.)

Q. And as of December 31, 1946?

A. December 31, 1946, total assets, $1,004,985.36; total liabilities, $522,294.47.

Q. Now, Mr. Brady, as shown by that chart, what was the net worth of Elmer Remmer as of December 31, 1944?

A. 1944, net worth was $187,225.33. [2500]

Q. And what was the net worth as of the beginning of 1944, which is to say, December 31, 1943?

A. $141,837.12.

Q. What is shown by that exhibit as being the increase in net worth of the defendant, Elmer Remmer and his wife, Helen Remmer, for the year 1944?

A. The increase in net worth for 1944, is $45,388.21.

Q. And what is the increase in net worth as shown by that chart in the year 1945?

A. The increase in net worth for 1945 is $60,925.40.

Q. And what is the increase in net worth for the year 1946?

A. The increase in net worth for the year 1946 is $234,510.16.

Q. Now on that chart have you added to the increase in net worth the federal income taxes paid as shown by Exhibits 13 and 14?

A. Yes, sir; I have.

Q. And those are the figures set forth on the chart immediately following the items of increase in net worth? A. Yes, sir.

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(Testimony of A. V. Brady.)

Q. And with regard to living expenses, have you left that item blank as to each of the years?

A. Yes, sir; I have.

Q. Now in Exhibit 183, have you arrived at a figure of total income for each of the years, 1944 to 1946, based upon the increases in net worth plus the income taxes paid during [2501] the course of the three years? A. Yes, sir; I have.

Q. And will you give that figure for each of the years, 1944 to 1946, inclusive?

A. Total income 1944 is $50,747.91; total income for 1945 is $71,065.40; 1946 total income, $254,285.42.

Q. Now on the chart have you subtracted from those totals the total amount of income reported for each of the years by Elmer Remmer and his wife, Helen Remmer? A. Yes, sir; I have.

Q. And what, according to the chart and the figures making it up, have you found to be the difference between the total income and the income reported for each of the three years, 1944 to 1946, inclusive?

A. The difference for 1944 is $31,747.91; for 1945, the difference is $11,747.04; for 1946 the difference is $231,795.84.

Q. Now assuming, Mr. Brady, that the net taxable income of Elmer Remmer and Helen Remmer for the year 1944, on a community property basis, was the sum of $50,747.91, which was reported on separate returns of the husband and wife; assuming further that, as disclosed by the returns of that

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(Testimony of A. V. Brady.)

year, there were no dependents, and assuming that each was entitled to all of the deductions claimed on his or her returns for the year 1944, that is, as disclosed by Exhibits 1 and 2, respectively, what then would have been the income tax due to [2502] the United States from Elmer Remmer and from Helen Remmer for the year of 1944?

Mr. Avakian: Your Honor, to that question I want to make the objection based upon the grounds presented in connection with Exhibit 183, that it is incompetent, irrelevant, and immaterial, that it calls for conclusions of law, and more specifically that it is based upon assumptions of fact which are not covered by the evidence and upon assumptions of fact which are contrary to the evidence, which have been specifically enumerated to your Honor in the absence of the jury in connection with Exhibit 183, which we will be happy to go into again if your Honor desires.

The Court: Objection overruled. Answer the question.

A. The total tax liability for Elmer Remmer in 1944 would be $10,821.86; total tax liability for Helen L. Remmer for 1944 would be $10,821.86.

Q. And will you state the amount reported by them as income tax due for that year 1944 in their returns, Exhibits 1 and 2?

A. Tax disclosed on the returns were $2,570 on the return for Elmer Remmer and a similar amount on Helen L. Remmer's return.

Q. Mr. Brady, assuming that during the year

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(Testimony of A. V. Brady.)

1945 the net taxable income, on a community property basis, of the defendant, Elmer F. Remmer, and his wife, Helen L. Remmer, was the sum of $71,065.40, and assuming further that they had no dependents and reported their income on a community property basis, and [2503] assuming further that they were entitled to all of the deductions claimed by them on their returns for 1945, being evidenced here as Exhibits 3 and 4, respectively, what then would have been the tax owed by each of them for the year 1945?

Mr. Avakian: Just a moment, your Honor. We object to that question likewise on the ground it is incompetent, irrelevant and immaterial; calls for the witness' conclusions of law, and more specifically it assumes facts which are not in evidence and assumes facts which are contrary to the uncontradicted evidence, which we have more specifically enumerated to your Honor in connection with Exhibit 183 and which we will be glad to enumerate again if your Honor desires.

The Court: Objection overruled.

Mr. Campbell: Pardon me, I wish to make one addition to the question.

The Court: Have the question read.

(Question read.)

Q. Will you answer the question?

A. The total tax liability for 1945 of Elmer Remmer would be $16,951.49. For Helen L. Rem-

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(Testimony of A. V. Brady.)

mer for 1945 the total tax liability would be $18,006.18.

Q. And what is the amount reported by them for that year, as disclosed on their returns, Exhibits 3 and 4?

A. Tax disclosed on the return of Elmer Remmer is $13,072.02. Tax disclosed on the return filed for Helen L. Remmer for 1945 [2504] is $14,074.29.

Q. Mr. Brady, assuming that for the calendar year 1946 the defendant, Elmer F. Remmer, and his wife, Helen L. Remmer, had a net taxable income, on a community property basis, of $254,285.42, which was returned on a community property basis, that is to say, dividing the income, one-half to the husband and one-half to the spouse; assuming further that they had no dependents during the year 1946, and allowing to them all deductions as shown in evidence here, what then would have been the income tax liability of each, Elmer Remmer and Helen Remmer, for the year 1946?

Mr. Avakian: Your Honor, we object to that question on the ground it is incompetent, irrelevant and immaterial; it calls for conclusion of the witness on matters of law. It is based on assumptions which are contrary to the evidence and assumptions of fact not covered by the evidence, such as the assumption that the fact that there was $65,000 in cash, an assumption contrary to the evidence that there were no partnerships in existence, and all of the other specific items which have been enumerated to your Honor in connection with the offer of Ex-

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(Testimony of A. V. Brady.)

hibit 183, which we will be glad to go into in detail if your Honor desires.

The Court: Objection overruled. Answer the question.

A. Mr. Campbell, do you have in mind, too, that I show increase in contributions? [2505]

Q. Yes, I asked you considering all the deductions as disclosed by the deductions here.

A. The total tax liability for Elmer Remmer for 1946 would be $86,069.50. The total tax liability for Helen L. Remmer for 1946 would be $86,069.50.

Q. And what is the amount of income tax which was reported by Elmer Remmer and Helen Remmer on their 1946 returns, as disclosed by the Exhibits 5 and 6, respectively?

A. The total tax disclosed on the return for Elmer Remmer was $2,776.87 and a similar amount was shown on the return filed for Helen L. Remmer.

Q. Now, Mr. Brady, for the three-year period, 1944 to 1946, inclusive, and based upon figures which you gave as to the income tax which would have been due under the facts which I gave you to assume in the questions, what would then be the difference between the income tax reported on the three-year returns and the tax which you found to be due from the income as stated in government's Exhibit 183?

A. Mr. Campbell, do you want that——

Q. The total for the three years, yes.

Mr. Avakian: Your Honor, may we have a moment, before the witness answers, to confer?

The Court: Yes.

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(Testimony of A. V. Brady.)

Mr. Avakian: Thank you, your Honor.

The Court: Do you understand the [2506] question?

A. I do.

The Court: You may answer.

A. For Elmer Remmer the difference is $95,-423.96. For Helen L. Remmer the difference is $95,476.38, or a total of both of $190,900.34.

Q. That figure which you have given me for the two would represent the difference in tax reported and that which would have been due, assuming the facts which I gave you in my hypothetical question; is that correct? A. Yes, sir.

Mr. Campbell: You may cross-examine.

Cross-Examination

By Mr. Avakian:

Q. Mr. Brady, let me ask you preliminarily with regard to Exhibit 183, whether in the preparation of that exhibit you treated all of the net worth of each of the enterprises shown on the exhibit as belonging entirely to Mr. Remmer?

A. I took the net worth as shown on the various enterprises, based on statements admitted here in evidence, Mr. Avakian. For instance——

Q. (Interrupting): Pardon me—were you going to use an example?

A. For example, B. & R. Smoke Shoppe, I used——

Q. Let us take the Menlo Club as an example, and for the Menlo Club you have shown at 1946 a

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(Testimony of A. V. Brady.)

net worth of $192,836.47. That is the total net worth of the Menlo Club business as shown on [2507] the exhibit prepared by Mr. Weaver and in evidence here, is it not? A. That is correct.

Q. And you, in preparing Exhibit 183, took the entire net worth of the Menlo Club as Mr. Remmer's net worth, rather than using only his partnership equity in that business; isn't that true?

A. No, I took this amount because I believed from the evidence it shows it was his business.

Q. Well, I am trying to get what figure. On that same exhibit—let me get it for you—I will hand you for your use Exhibit 165, Mr. Brady, and that shows the net worth of the Menlo Club on December 31, 1946, as $192,836.47, does it not?

A. That's right.

Q. And then farther down on that same exhibit there is the heading, "Capital Accounts per Books," and then there is listed the names of Harold Maundrell, Thomas Turner, Wm. Fricker, Elmer Remmer, Wm. Kyne, Massie Ditto and Oscar Nelson, with an amount opposite each name?

A. That is true.

Q. And amount opposite Elmer Remmer's name for December 31, 1946, under the heading "Capital Accounts per Books," is $39,508.60, is it not?

A. That is correct.

Q. Instead of using that figure, you used, as Mr. Remmer's [2508] investment in the Menlo Club the total net worth of the club of 192 thousand, did you not?

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(Testimony of A. V. Brady.)

A. Well, the reason why that was taken into account——

Q. Tell me whether that is what you did?

A. Yes, we took 192 thousand.

Q. So what you did, in preparing 183, was to treat the Menlo Club as being Mr. Remmer's sole enterprise, rather than a partnership; isn't that true? A. As his net worth business, yes.

Q. Without going into detail at this time on the others, is that likewise true with respect to the other businesses mentioned, the B. & R. Smoke Shoppe, Day-Night Cigar Store, 110 Eddy Street, and Transit Smoke Shop?

A. Yes, we considered those Mr. Remmer's personal businesses.

Q. And in preparing Exhibit 183, you treated the entire assets of each of those businesses as Mr. Remmer's assets; is that true?

A. Mr. Avakian, the figure that we were able to secure here may not be all the income. We do not know what was in the safe deposit boxes, for example.

Q. Well, can you answer my question? Let us have the question.

A. If you——

Q. Let us have the question read.

(Question read.)

A. Well, we treated as Mr. Remmer's businesses the net worth [2509] as disclosed on these various exhibits.

Q. What I am getting at is this, Mr. Brady—in

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(Testimony of A. V. Brady.)

preparing Exhibit 183, you did not treat any of the businesses which I just named as partnership, but rather treated each of them as Mr. Remmer's sole enterprise; isn't that true?

A. No, I would say that *is true,* Mr. Avakian, because I did not make up these statements. I just wrote down on this schedule, Exhibit 183, the net worth as disclosed by the people that did make the examination. I made no examination of these books and records.

Q. I understand that, but in the exhibit relating to the 110 Eddy Street, for example, there is a figure which shows the net worth of the entire business and then also on that same exhibit there are amounts showing the capital account according to the books, of each of the partners. Now when you used that exhibit in preparing Exhibit 183, you entered as Mr. Remmer's net worth on Exhibit 183 the total amount of the 110 Eddy Street net worth rather than the amount shown on that same exhibit as his partnership capital account; isn't that true?

A. I don't have a copy of 163.

Q. I call your attention to the fact that on 110 Eddy Street, which is Exhibit 163, in addition to the net worth of the business, there are various capital accounts per books listed in the lower portion of page one; that is true, is it not? [2510]

A. That is true.

Q. Now in preparing Exhibit 183, did you not take the amount of Mr. Remmer's capital account shown on the lower portion of that exhibit, but

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(Testimony of A. V. Brady.)

rather took the figure shown as the total net worth of the entire business, did you not?

A. Yes, we took the net worth as shown on the business being Mr. Remmer's.

Q. And that is true of each of the businesses that are enumerated; isn't that so, Mr. Brady?

A. Well, I don't know. I would like to see the other exhibits because I believe some of these books did not show all the assets, so it would be pretty hard to get a correct net worth from the books.

Q. I intend to go into that detail later, Mr. Brady, so we will defer that for the moment. Now you stated, Mr. Brady, you were a Revenue Agent with the office of the Bureau of Internal Revenue for 22 years prior to this present position, and then I understood you to say for approximately the last five years you have been a technical advisor in the Penal Division of the Bureau of Internal Revenue in San Francisco; is that correct? A. Yes.

Q. And your immediate superior in that position during the last five years has been, and still is, Mr. Campbell, the chief prosecutor here? [2511]

A. Correct.

Q. And you were assigned as accountant to Mr. Campbell to assist his office in tax investigations?

A. I was asked to make such computations.

Q. Generally your employment is to assist Mr. Campbell's office? A. Yes.

Q. And you work directly under his supervision?

A. Yes.

Q. In the preparation of Exhibit 183, did you

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(Testimony of A. V. Brady.)

receive any instructions from Mr. Campbell in any respect whatsoever? A. Yes, I did.

Q. Were there any instances on Exhibit 183 where Mr. Campbell instructed you as to the particular figure that you should enter on the exhibit?

Mr. Campbell: Objected to as immaterial, if the Court please.

The Court: Objection overruled. Answer the question.

A. Yes.

Q. And did Mr. Campbell instruct you, Mr. Brady, that in preparing Exhibit 183 you should show the entire net worth of each of these businesses which I have named as Mr. Remmer's net worth? A. Yes.

Q. And I call your attention to the fact, Mr. Brady, that on [2512] Exhibit 183 the years are listed without any particular date of the year. It is true, is it not, that in preparing a computation of net income on the net worth basis, the computation should be made as of the last day of each year?

A. I believe Mr. Campbell, when he read this off, told me December 31st, Mr. Avakian.

Q. And it was your intent, was it not, to include the assets and liabilities as of December 31st of each year? A. Yes.

Q. And you did not intend to include any assets or liabilities that were in existence on some other day in any of these years unless that same asset or liability was in existence on the very last day of each year? A. That is correct.

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(Testimony of A. V. Brady.)

Q. In other words, an asset that was in existence in the middle of the year would have no bearing in the computation of net income on net worth basis if it were not also in existence at the end of the year; isn't that true?

A. If it was in existence at the end of the year it applied to the net worth statement.

Q. So if it were in existence at the middle of the year and not at the end of the year, it would be immaterial for this purpose?

A. Well, it might be transferred to another asset.

Q. If that asset is not in existence, then that wouldn't be [2513] an asset? A. Correct.

Q. Mr. Brady, I call your attention that on Exhibit 183 you have included as cash on hand at the end of 1946 the sum of $65,000. Can you refer me to the exhibit or testimony in this case which shows that that $65,000 sum was on hand in Mr. Remmer's possession on December 31, 1946?

Mr. Campbell: Objected to as not proper cross-examination, unless he states that the source he obtained it was from something in the evidence. Then he can be asked to refer to the testimony.

Mr. Avakian: Let me ask a preliminary question.

Q. Did Mr. Campbell instruct you to put that $65,000 figure there? A. Yes.

Q. And did you base the insertion of that $65,000 figure on Mr. Campbell's instructions?

A. Not entirely.

Q. Can you point to any evidence or testimony

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(Testimony of A. V. Brady.)

in this record which shows that Mr. Remmer had $65,000 cash on hand at the end of 1946, that is, on December 31st?

A. I know the check, Exhibit 115——

Mr. Campbell: Wait a minute; let him finish.

The Court: Have you finished?

(Question and answer read.) [2514]

A. I said 115 and I stopped. I didn't finish.

The Court: Finish the answer.

Q. Finish your answer, Mr. Brady.

The Court: Let us have the question and answer.

(Question and answer read.)

The Court: Proceed.

A. I believe Mr. Campbell took into account 115 and the testimony of Mr. Kyne that this $65,000 had not been retained.

Q. You say you believe Mr. Campbell took that into account?

A. Yes; you asked me why we took $65,000——

Q. So I may make myself clear—Mr. Campbell has stipulated here he is not an accountant and I am trying to find out from you, as an accountant, the basis for your computation, as an accountant, in the preparation of Exhibit 183 and in giving your testimony here.

Mr. Campbell: Objected to as argumentative.

The Court: Just propound the questions.

Q. Now with respect to Exhibit 115, I show you that, and that is a check drawn on the Menlo Club,

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(Testimony of A. V. Brady.)

dated November 7, 1946, in amount of $65,000, payable to W. E. Kyne, endorsed W. E. Kyne, and marked on the face of it "Loan to Elmer Remmer," is it not? A. That is correct.

Q. And you have in mind Mr. Kyne's testimony that this $65,000 was placed in Box 48 at the time that it was cashed and that the [2515] money in that box was used from time to time as needed in the various businesses?

Mr. Campbell: Objected to as argumentative and not within the scope of direct examination, not proper cross-examination. He has stated the source of the material which he placed in here, the exhibits as to each one, and the instructions which he was given. What the witness may or may not have had in mind, I suggest is immaterial.

Mr. Avakian: Your Honor, we are entitled to get the accounting analysis of the accountant of the evidence that pertains to this point which, on Mr. Campbell's instructions——

The Court: You may answer the question.

A. I have no recollection, Mr. Avakian, of Mr. Kyne saying that he put that money in Box 48. My recollection of the testimony was he cashed the check, gave the money to Mr. Remmer.

Q. And is that, so far as you understand, the basis for Mr. Campbell's conclusion that $65,000 was still on hand December 31, 1946?

Mr. Campbell: That is objected——

The Court: Objection sustained.

Mr. Avakian: Your Honor, he testified that the reason Mr. Campbell had——

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(Testimony of A. V. Brady.)

The Court (Interceding): I don't believe this witness can testify to the basis of anyone else's conclusion except his own. [2516]

Mr. Avakian: We are in this position, Mr. Campbell is in effect testifying without taking the stand and being cross-examined.

The Court: Objection sustained.

Q. Is it not true, Mr. Brady, that the inclusion of $65,000 item as an asset of Mr. Remmer's on December 31, 1946, would be improper and erroneous, from an accounting point of view, unless Mr. Remmer actually had that money on December 31, 1946?

A. You are making an assumption there he didn't have it.

Q. I am asking the question—read the question.

(Question read.)

Mr. Campbell: Objected to as incompetent.

The Court: You may answer the question.

A. Well, if we had some proof that he didn't have it, I would say it should not be there.

Q. Now can you answer my question?

A. May I have the question?

The Court: Yes, read the question.

(Question read.)

A. Well, if he didn't have the money, there was any contention that he didn't have it, I would say it would be wrong. For instance, if he repaid the $65,000.

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(Testimony of A. V. Brady.)

Q. It wouldn't matter what he did, the important thing would be, did he have $65,000 cash on hand December 31, 1946, wouldn't that be the important thing in determining whether the [2517] inclusion of that particular item is correct from an accounting point of view?

A. If he didn't have $65,000, it would be incorrect.

Q. Mr. Brady, in testifying as to tax you computed, would be due on the amount of income which you have computed on Exhibit 183, and in comparing that with the amount of tax shown on Mr. Remmer's return, and then computing the difference between the tax shown on Mr. Remmer's return and the tax which you computed due, did you make any allowance for the fact that the various persons designated as partners of these different enterprises paid income tax on their returns on the portion of the income of those enterprises?

Mr. Campbell: Objected to as not proper cross-examination. He was only asked as to specific matters.

The Court: Answer the question.

A. I did not.

Q. So you did not mean to imply, then, did you, by your testimony, Mr. Brady, that the United States of America was deprived of taxes from somebody in the total amounts that you have testified to as the difference between what Mr. Remmer paid and what you included——

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(Testimony of A. V. Brady.)

Mr. Campbell: That is objected to.

The Court: Objection sustained.

Q. It is true, is it not, Mr. Brady, that as a matter of proper tax accounting, and as a matter of procedure of the [2518] Bureau of Internal Revenue, that in the event it is determined that a particular amount of income should have been taxed to Mr. A rather than to Mr. B, and if it is determined that Mr. B actually did pay tax on that account, that in designating that income to Mr. A, a refund should be allowed in the amount of taxes paid by Mr. B?

Mr. Campbell: Objected to as immaterial to the issues.

The Court: Objection sustained.

Mr. Avakian: Your Honor, we would like to be heard because we think it is an important point on the question whether taxes were evaded.

The Court: The ruling will stand.

Q. In your Exhibit 183 I find no reference in the liabilities to any obligation of Mr. Remmer to one Robert L. Jeffers. Will you tell me, Mr. Brady, whether you are familiar with the testimony in this case, to the effect that on September 27, 1946, Mr. Remmer borrowed 50 thousand dollars from one Robert L. Jeffers?

Mr. Campbell: Objected to as incompetent and immaterial, not proper cross-examination, whether or not he is familiar with the testimony.

The Court: Objection sustained.

Q. Mr. Brady, if you omitted from Exhibit 183

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(Testimony of A. V. Brady.)

any liability owed by Mr. Remmer to Mr. Jeffers on December 31, 1946, your computation of net worth would be erroneous to the extent of [2519] that liability, would it not?

Mr. Campbell: Objected to as assuming a fact not in evidence, that there was a liability on December 31, 1946.

The Court: Objection sustained.

Mr. Avakian: Your Honor, may we be heard on that?

The Court: The ruling will stand.

Q. In the preparation of Exhibit 183, did you give any consideration whatsoever to defendant's Exhibit A-1, which is a note dated September 27, 1946, from Elmer Remmer to Robert L. Jeffers, in amount of 50 thousand dollars?

A. No, I did not.

Q. Did you have any discussions with Mr. Campbell whether or not you should show any liability in Exhibit 183 with respect to that amount?

A. No, I did not.

Q. Did Mr. Campbell instruct you as to the liabilities which you should include in preparing Exhibit 183? A. Yes.

Q. Did he give you a list of liabilities to include?

A. No, he told me what liabilities to put down here.

Q. And are the ones which you have set forth in Exhibit 183 the ones which he told you to put in there? A. Yes.

Q. And did he say anything to you about

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(Testimony of A. V. Brady.)

whether or not you should include any liability with respect to defendant's [2520] Exhibit A-1?

A. No, he did not. Do you want to know why?

Mr. Avakian: Why he did not? I assume you wouldn't know why he did not tell you. I am not asking that, Mr. Brady.

Q. Now, Mr. Brady, I note that in Exhibit 183 you have an item, "Cash in Safety Deposit Boxes," with a question mark entered after each of the years shown on the exhibit. Did you insert that question mark because you didn't know the amount of cash in the safe deposit box or boxes at the end of each year?

A. I was instructed to put it that way because there was no evidence as to the amount of cash in the box at any particular period.

Q. You say you were instructed—Mr. Campbell instructed you? A. Yes.

Q. And is it not true, Mr. Brady, that to the extent that there might have been cash in the safe deposit boxes at the end of any of these years, your net worth computations would to that extent be erroneous?

A. Well, it might be materially increased if we know the amount there. We left nothing, but if there was something there, it certainly would increase the assets of Mr. Remmer.

Q. For that particular year? A. Yes.

Q. And in the event the amount in safety deposit boxes changed from the end of one year to the end of the next year, the [2521] amount of your

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(Testimony of A. V. Brady.)

net worth computation as shown on Exhibit 183 would be incorrect, would it not?

Mr. Campbell: Objected to as argumentative. It is apparent from the face of the exhibit that if an asset is changed or added to it changes the face of the document. I suggest this is all argumentative.

The Court: You may answer the question.

Mr. Avakian: It is not argumentative.

A. Any asset that is changed is bound to change the increased net worth that way, yes, Mr. Avakian.

Q. Now it is true, is it not, Mr. Brady, that in an accounting analysis, the term "net worth" means the difference between the total assets and the total liabilities? A. At a given period.

Q. Yes, at a given point of time; isn't that true?

A. Yes.

Q. And isn't it true, Mr. Brady, that it is impossible to make an accurate determination of net worth if you are unable to determine the amount of any particular asset or liability that is in existence as of that particular time?

Mr. Campbell: Objected to as argumentative.

The Court: You may answer the question.

A. Mr. Avakian, if we know what total assets hadn't been discovered, probably carried in some other name, we might increase this picture [2522] considerably.

Mr. Avakian: I ask that be stricken.

The Court: It may go out.

Mr. Avakian: Would you like to have the question read, Mr. Brady? A. Yes.

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(Testimony of A. V. Brady.)

(Question read.)

A. To get an accurate net worth, yes, Mr. Avakian.

Q. It would be impossible to get an accurate net worth?

A. It would be impossible unless we knew the amount of the assets.

Q. Now, Mr. Brady, did you hear something in this case to the effect that there was money in some amount in safes and safety deposit boxes, during the entire period covered by your Exhibit 183?

Mr. Campbell: Objected to as immaterial, whether he heard it or not.

The Court: Let me see that Exhibit 183. Where is that item?

Mr. Avakian: Item 125.

The Court: There seems to be no amount set here as to cash in the safety deposit boxes.

Mr. Avakian: That is right.

The Court: I will sustain the objection.

Mr. Avakian: The purpose of the question, may I state the purpose of it? That is the point here which I am driving at, which may not be clear to your Honor. The purpose of the [2523] question, your Honor, is to show that there is evidence of an asset, but the evidence does not show the amount of the asset, and the significance of that, your Honor, then is that if there is an asset, the amount of which can't be determined, then to that effect

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(Testimony of A. V. Brady.)

there is an uncertainty in the net worth that is computed.

The Court: Yes, but they did not insert any amount in here.

Mr. Avakian: That is the point, your Honor. The asset is there, but the amount is not inserted.

The Court: Objection will be sustained.

Q. Now I note in preparing Exhibit 183 you have shown certain amounts as representing Gallagher & Burton whiskey at the end of 1943, 1944, and 1945, with no amount for 1946, and then I note that subsequently, as another asset, you have shown, "Due from Bank Club for 900 cases of whiskey," and an amount for the end of 1946. Those two items, I take it, are related in Exhibit 183, is that true, Mr. Brady.

A. That is my understanding, yes.

Q. Now, did Mr. Campbell instruct you to set up those two items in that way?

A. I believe you will find, Mr. Avakian, that Mr. Weaver testified as to the Gallagher & Burton whiskey and at the end of 1944——

Q. (Interrupting): Perhaps you didn't understand my question. [2524] My question was, did Mr. Campbell instruct you to set up Exhibit 183 the way you have in respect to those items?

A. Yes.

Q. I note the figures that Gallagher & Burton whiskey in 1945 amount due was $21,191.50 and then the amount that is due the end of 1946 shown as $29,979?

A. Yes.

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(Testimony of A. V. Brady.)

Q. And the difference between those two is approximately $2800, isn't it, Mr. Brady?

A. The difference is that, yes.

Q. Now you are aware, are you not, of the testimony in this case that Mr. Remmer was not paid by the Bank Club for that whiskey in the amount of $29,989 until July 30, 1947?

A. Yes, I heard that.

Q. And isn't it true that in the case of a taxpayer, who is on the cash basis, the amount that is receivable on the sale of merchandise that is not paid for until a later date, should not be taken into income until the later date on which he actually gets the money?

A. I would say any profit he realized on that, that profit would not be taken up until it was realized.

Q. From an accounting point of view, the effect of that Gallagher & Burton whiskey transaction has been to put the $2800 into Mr. Remmer's 1946 tax year?

A. No, it has not. I might tell you why. I believe Mr. [2525] Weaver testified that at the end of 1945 there were some 800 cases of whiskey and there were 900 cases that were transferred to the Bank Club. I have recollection there was no profit in that transaction at all, so if the item was left out at the end of 1946, it would be a great distortion. If there was a substantial profit, or any profit, probably that profit should not be reported

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(Testimony of A. V. Brady.)

on net worth statement until it was realized, but I do not think is the case here, Mr. Avakian?

A. Now, Mr. Brady, let me ask you this as a preliminary question and you can answer it yes or not. You stated that you are employed in Mr. Campbell's office as a technical advisor. Can you tell us when you first started work on the case of Elmer Remmer, approximately?

Mr. Campbell: Objected to as immaterial, not proper cross-examination.

The Court: I think he may answer.

A. My recollection is about March of 1950 I saw the case when it came up and I consulted with the attorney to whom it was assigned.

Q. And from that time until the present time you have, at various times during the period, worked on the case, is that correct?

A. Yes, I might be called, for instance, to make computations based on certain figures, etc., but I would not work on the case continuously. [2526]

Q. Now have you at any time, Mr. Brady, made any computations of increase in net worth of Mr. and Mrs. Remmer for these three years, which computations have been based on your own analysis as an accounting expert, independently of any instructions given to you by Mr. Campbell as to what to include in assets and liabilities?

Mr. Campbell: Objected to as not proper cross-examination.

Mr. Avakian: The witness is offered here as an expert, your Honor.

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(Testimony of A. V. Brady.)

The Court: Objection sustained.

Q. Isn't it true, Mr. Brady, at some time prior to and during the period that you were assigned to this case, you have made computations of net worth of Mr. and Mrs. Remmer for the years 1944, 1945, and 1946 which are different from the computations set forth in Exhibit 183?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained. That is the same question I just ruled on.

Mr. Avakian: No, it is not, your Honor, it is a different question and it is offered for the purpose of impeaching the witness by showing prior inconsistencies.

The Court: The ruling will stand.

Mr. Avakian: Will your Honor permit us to be heard on that? [2527]

The Court: No, let us proceed.

Q. Now I note one of the assets which you have shown as described on Exhibit 183, as loan to Brice and Silverman in amount of 12 thousand dollars at the end of 1945 and four thousand dollars at the end of 1946. Can you refer me, Mr. Weaver, to any testimony or exhibit in this case which shows that that transaction with Brice and Silverman was a loan, as distinguished from an investment in business?

Mr. Campbell: Objected to as incompetent and improper, unless his testimony shows he put that there as the result of some testimony.

The Court: You may answer the question.

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(Testimony of A. V. Brady.)

A. I did not review the evidence on that item there.

Q. You inserted it in this exhibit and in that fashion on instructions of Mr. Campbell?

A. Yes.

Q. And isn't it true, Mr. Brady, that if the Remmer transaction with Brice and Silverman was an investment made in a business in 1945, which business failed during the year 1945, and Mr. Remmer's loss in that investment was the amount of four thousand dollars, that it would be improper, from an accounting point of view, to show the transaction the way it is shown in Exhibit 183?

Mr. Campbell: Objected to as assuming facts not in evidence. [2528]

Mr. Avakian: That is the evidence and uncontradicted evidence. Mr. Maundrell's description of this transaction was this was an investment by Mr. Remmer made with Mr. Brice and Mr. Silverman in a night club in New York, which failed after eight days.

The Court: He may answer the question.

A. The way it is put on this statement——

Mr. Campbell: Object——

The Court: Answer the question.

A. If we had an investment at the end of 1945 of 12 thousand dollars and that investment was reduced to four thousand dollars, I would say our loss is reflected in our increase in net worth.

Mr. Avakian: May we have the question read. I think the witness missed the facts of the question.

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(Testimony of A. V. Brady.)

(Question read.)

The Court: Now you may answer.

A. The increase we have in net worth took into account decrease in——

Mr. Avakian: He inserted facts different than in the question.

The Court: Clear it up.

Q. Can you answer the question I asked you?

A. I understand from your question, Mr. Avakian, that if a person had 12 thousand dollars at the end of 1945 and that [2529] one asset was reduced to four thousand dollars through a loss, that loss is taken into account in our increase in net worth.

Mr. Avakian: Let me rephrase the question.

Q. If I invested 12 thousand dollars in a business and during the same year, after a period of eight days, that business went broke and in liquidation of it I got back only four thousand dollars at the termination of that transaction you would not, in computing my net worth at the next year end, show any asset whatsoever with respect to that business, would you?

Mr. Campbell: Objected to as incompetent, assuming facts not in evidence and misleading.

The Court: Objection sustained.

Q. Let me come back to the specific situation, Mr. Brady. You have before you Exhibit 183?

A. Yes.

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(Testimony of A. V. Brady.)

Q. I believe you refer to the Brice and Silverman item described in Exhibit 183 as a loan?

A. That is right.

Q. Now, Mr. Brady, will you assume these facts, for the purpose of asking the question: assuming that the 12 thousand dollars paid by Mr. Remmer to Brice and Silverman was not a loan, but rather was an investment with Brice and Silverman in a business; assume further that during the year 1945 that business failed, and assume further that as a result of the liquidation of that business, after it failed, Mr. Remmer at [2530] some time before the end of the year 1946 got back four thousand dollars. Now on those assumptions, Mr. Brady, isn't it true that it would not be proper to show the four thousand dollars as an asset that is listed on Exhibit 183 as of the end of 1946?

Mr. Campbell: Objected to as assuming facts not in evidence.

Mr. Avakian: Those are the facts, your Honor. Got back eight thousand dollars instead of four thousand dollars.

Mr. Campbell: That is not the basis of my objection. The evidence which exists of the check and check stub show that the amount was a loan and my recollection of Mr. Maundrell's testimony is also that it was a loan.

Mr. Avakian: May I read Mr. Maundrell's testimony?

The Court: We will excuse the jury until tomorrow morning at 10 o'clock.

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(Jury and alternate jurors admonished and excused at 3:30 p.m.)

(In the absence of the jury.)

(NB 339—PP 72-74.)

February 5, 1952, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BRADY

resumed the witness stand on further

Cross-Examination

By Mr. Avakian:

Mr. Avakian: I might state, your Honor, that Mr. Lohse was tied up with another matter this morning which he could not conveniently avoid and to substitute for him his partner, Mr. Fry, is here this morning.

Mr. Campbell: If the Court please, at the close of the session yesterday there was pending a question, to which objection was made. The objection was subsequently withdrawn by the government and the record will so show.

Mr. Avakian: I understand, your Honor, then that I may put that question to the witness at this time, and with your Honor's permission I will read the question to the witness.

Q. You will recall, Mr. Brady, that I was ques-

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(Testimony of A. V. Brady.)

tioning you with respect to the Brice-Silverman matter, which is shown on Exhibit 183. The question put to you was as follows: Now Mr. Brady, will you assume these facts for the purpose of answering this question—assume that the 12 thousand dollars paid by Mr. Remmer to Brice and Silverman was not a loan, but rather was an investment with Brice and Silverman in a business; assume further that during the year 1945 that business [2532] failed and assume further that as a result of the liquidation of that business, after it failed, Mr. Remmer at some time before the end of the year 1946 got back eight thousand dollars. Now on those assumptions, Mr. Brady, isn't it true that it would not be proper to show the four thousand dollars as an asset that is listed on Exhibit 183 as at the end of 1946?

A. Well——

Mr. Campbell: I wonder if it would assist if the witness had before him the question, which is rather lengthy, in its written form.

Q. Do you have difficulty in understanding the question?

A. I would appreciate it. (Witness is handed question.) Well, Mr. Avakian, I think before I can answer that question yes or no, there are certain facts that should be taken into consideration. For instance, if Mr. Remmer advanced 12 thousand dollars as an investment, we would want to know the corporation he was investing in, whether the assets that represent the 12 thousand dollars, what they

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(Testimony of A. V. Brady.)

consisted of. If they consist of a long-term lease, for instance, even though the business had failed, we would want to know the date in which the business opened and in which the business failed, and there are a number of facts, I think, that would have to be considered before the account could be wiped off entirely. For instance, supposing there was a long term lease, the business itself might fail but the lease might have a substantial value, so there would [2533] not be a four thousand dollar loss and would still represent part of that investment.

Q. So in order to answer that question correctly, you would need more facts than are in evidence here?

Mr. Campbell: Just a minute—I object to that as calling for conclusion of the witness.

The Court: Objection sustained.

Q. You would need to have before you, in order to answer that question correctly, the facts pertaining to various items that are included in your answer, is that right? A. I would say yes.

Q. It is true, is it not, Mr. Brady, that an investment which an individual makes in a business, which he operates either as an individual or as a joint venture with other partners, which fails and which, as a result of that failure, results in a loss to him, provides the basis for a deductible loss for income tax purposes?

A. If the loss was claimed and determined, yes;

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(Testimony of A. V. Brady.)

if a definite loss had been determined, it would be deductible loss.

Q. And in computing net income on net worth method, it would not be proper to include any assets of the taxpayer in the amount which represented an investment in a business of that kind which did fail before the end of the year and which, as a result of that failure, did produce a loss, is that true?

Mr. Campbell: Just a minute—objected to, if the court [2534] please, as a hypothetical question and as the same question to which the witness has stated he would have to have certain additional factors to answer.

The Court: I do not quite understand it that way. You may answer the question.

A. Well, Mr. Avakian, I believe that the question sounds very similar to the other one, in that you know that the business failed. The money that was invested in the business is represented by certain assets. Now if one of those assets was say a long term lease, it might have failed in that particular business, but they could reopen at that location with another business.

Q. Let me ask you this question, Mr. Brady, so we can see whether we can get the distinction between loan and investment in connection with computation of income on net worth method. If I loan you some money, let us say 12 thousand dollars, which you invested in a business, which you operated yourself and in which I had no interest as

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(Testimony of A. V. Brady.)

an operator, and that business failed, the failure of your business would not provide me with any deductible amounts on account of the loan that I had made to you, except possibly by way of a bad debt, isn't that true?

A. I don't follow you, Mr. Avakian.

Q. You do not understand that question, all right. If I loaned you 12 thousand dollars and you invest it in your own [2535] business and then your business failed, the loan which I had made to you would still be carried as an asset of mine in my net worth statement, even though your business failed, isn't that true? A. Well, yes.

Q. Unless, as I say, you had become so bankrupt that your obligation could be wiped out as a bad debt.

A. Yes, unless it was determined a bad debt.

Q. If on the other hand, instead of loaning you money to use in your business, you and I joined forces in a joint venture, and I put some of my money into that business, in which you and I are going to have a joint interest, and then that business fails, I would then be entitled to a deductible loss to the extent that the failure of that business left me without any assets after its failure, isn't that true?

A. For instance, if there was no possible recovery of the assets, I would say yes.

Q. Now in your Exhibit 183, Mr. Brady, you have shown certain figures as assets of Mr. Remmer with respect to the 21 Club. Will you refer

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(Testimony of A. V. Brady.)

me to any particular exhibits or testimony upon which that is based, for my clarification?

A. I believe Exhibit 106 of Revenue Agent Gould.

Q. Perhaps you could assist me, Mr. Brady, in referring me to the particular figure from Exhibit 106 from which you prepared Exhibit 183 in that respect. Let us take first December 31, [2536] 1943, you have the amount $7676.53.

A. $15,353.07.

Mr. Campbell: What is that figure?

A. That is the balance of the investment account and according to the testimony of, I believe, Mr. Pritchett and Mr. Kessell, they testified Mr. Remmer owned a 50 per cent of that equity.

Q. So you took the total investment shown on Exhibit 106 and took 50 per cent of that figure as representing Mr. Remmer's investment?

A. Correct.

Q. And was that same method used in connection with the amounts shown for the ends of 1944, 1945, and 1946?

A. Here is 1944. Investment account $13,809.87.

Q. And the figure you have on your exhibit is $13,004.93?

A. I took one-half of $13,809.87, $6,904.93, plus notes payable account, $6,100, to arrive at $13,-004.93.

Q. So that to begin with, you took the total investment account of the entire business and took half as Mr. Remmer's share?

A. That is right.

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(Testimony of A. V. Brady.)

Q. And then added the notes payable?

A. Correct.

Q. How did you arrive at the 1945 figure of $10,417.97?

A. Investment account at the end of 1945 shows $3,435.94; one-half of that would be $1,717.97, to which was added notes payable [2537] of Mr. Remmer, $8,700, making a total of $10,417.97.

Q. Then would you explain how you arrived at the 1946 figure?

A. 1946 the investment account shows here $23,027.69; one-half of that, $11,513.85. There is no accounts payable shown at the end of 1946.

Q. So that in the case of the 21 Club, in preparing Exhibit 183, you did give effect to the partnership between Mr. Remmer and Mr. Pechart and Mr. Kessell? A. Yes, sir, I did.

Q. Now the next item is the San Diego Social Club, and can you tell me the sources from which the figures shown on Exhibit 183 were obtained for that? A. We took Exhibits "T" and "V."

Q. And those are copies of the return of Revenue Agent Gould, who testified here earlier in this case? A. Yes.

Q. And by using those figures you likewise gave effect to a partnership between Mr. Remmer, Mr. Pechart and Mr. Kessell in that enterprise?

A. Yes, sir.

Q. Now, Mr. Brady, for your assistance in following this question that I am going to ask you, I am going to hand you a sheet of papers, so that you

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(Testimony of A. V. Brady.)

can make notes on the amounts that I mention in my question as we go along. For the purpose of this question, Mr. Brady, will you assume the following facts: [2538] Assume that instead of the amounts shown for December 31, 1946, as Mr. Remmer's equity or net worth on Exhibit 183, you substituted the following figures taken from sources which I will state in the question—first of all, with respect to the B. & R. Smoke Shoppe, for the purpose of my question eliminate the bank roll of 20 thousand dollars shown on Exhibit 169, which Mr. Weaver said was inserted in Exhibit 169 on his assumption that the bank roll at the end of 1945 remained in existence until the end of 1946.

Mr. Campbell: Just a minute—I am going to object to an argument of counsel in the hypothetical question. A hypothetical question might be proper, assuming all of the facts in evidence, but to discuss the evidence, by whom it was given, and the nature of the testimony, I do not believe is proper in a question of this kind.

Mr. Avakian: I only intended, your Honor, to identify the factual matter involved in the question.

The Court: You might state the hypothetical question without referring to any particular portion of the testimony or evidence, as long as it is based on the evidence, or a reasonable inference of evidence.

Mr. Avakian: Very well, that is agreeable.

Q. Did you follow that first adjustment that my question calls for, Mr. Brady, the elimination from

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(Testimony of A. V. Brady.)

the B. &. R. Smoke Shoppe bank roll from December 31, 1946, the sum of $20,000? [2539]

A. I have a note of that.

Q. Secondly, assume that in lieu of the figure $28,643.47 shown for the Day-Night Cigar Store, you used as Mr. Remmer's share of the net worth of that business the figure of $8,012.15. Next for the 110 Eddy Street, in lieu of the net worth figure on Exhibit 183 of $33,210.35, use the sum of these two figures, the amount of $8,824.53 and $5,985.44. Next, with respect to the Menlo Club, in lieu of the figure of $192,836.47 shown on Exhibit 183, use the figure from Exhibit 165 of $39,508.60. Next, with respect to the Transit Smoke Shoppe, adjust the figure of $32,641.46 shown on Exhibit 183 by the amount of $16,005.50, which is shown in Exhibit 120. Next, with respect to the item of cash, eliminate the 65 thousand dollars shown on Exhibit 183. Next, with respect to the Brice-Silverman transaction, eliminate the four thousand dollar asset shown on Exhibit 183, and finally add, as a liability at the end of 1946, an obligation of 50 thousand dollars to Robert L. Jeffers, and after you have made computation, will you tell me if that adjustment would result in a net worth figure at the end of 1946, of $135,325.82, rather than the figure of $482,690.89 shown on Exhibit 183?

Mr. Campbell: I object to the question as incompetent. It does not purport to be a hypothetical question, but to ask the witness to make certain computations which, if they are relative, should be

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(Testimony of A. V. Brady.)

made in the defendant's case. So far as [2540] the result of such computation is concerned, if the Court rules that the question is competent or material, I will accept counsel's computation of what the result would be. It is a question of adding or subtracting figures, but I do not believe it is proper cross-examination or within the scope of direct examination.

The Court: Objection will be sustained.

Mr. Avakian: Could I explain to your Honor the basis for the figures contained in the question, because they are all taken from the evidence.

The Court: No.

Mr. Avakian: Your Honor, we would like to explain to your Honor, either in the presence or absence of the jury, why we feel it is proper cross-examination. We can cite authority that in cross-examination of an expert witness it is proper——

The Court (Interceding): Very well, I will give you an opportunity. We will excuse the jury.

(Jury and alternate jurors admonished and excused at 10:30 a.m.)

RE: HYPOTHETICAL QUESTION

(Feb. 5, 1952—Notebook 339—pp 83-88.)

Mr. Campbell: It may save time, your Honor—I have no doubt that each of the figures that Mr. Avakian referred to were drawn from one or another document put in evidence in the case, so my

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objection is not on that ground. I thought I would save time in making that statement.

Mr. Avakian: In view of Mr. Campbell's agreement, your Honor, that the question is based on the evidence in the record, we have simply the problem of whether it is proper in cross-examination, a witness who has made a net worth computation, to ask him on cross-examination what the net worth would be on the basis of a different set of facts which are covered by the evidence. In other words, the cross-examination simply calls for a computation before the jury of the results of a net worth computation based on other facts in the evidence, aside from those in the particular set which the witness selected.

Now we have the basic proposition, your Honor, that in cross-examining one who takes the stand as a skilled witness, the cross-examination may include hypothetical questions put to him on the basis of any set of facts covered by the evidence which the jury may reasonably conclude are the true and correct set of facts. That rule, which we stated earlier to your Honor, is found in Wigmore 3rd Edition, Volume 2, Sections 684 and 682 read together.

In addition, your Honor, in income tax cases it has been held that where a witness testifies to a computation of income and of tax due on the net worth basis, a government witness, it is proper to challenge his computation on cross-examination by showing what the results would be if he based his computations on another set of facts that the evi-

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dence covers. I might say to your Honor that is a customary practice followed by trial courts in cases with which I have been familiar throughout the country in tax cases.

The Court: I agree with you. Now you have in mind perhaps cases where a medical expert has given an opinion. I think that would be an illustration of your idea. Certain symptoms, and so on, are presented in a hypothetical question and the doctor gives an opinion. On cross-examination there may be evidence in the record as to other symptoms by some other doctor and the doctor on the stand has disagreed with this other doctor. Then it would be proper to propound a hypothetical question to the doctor under cross-examination, based upon other and different symptoms than his testimony was based on, but this is merely a hypothetical calculation you are using your figures on. For instance, two plus two equals four. Now you are asking the witness, does two plus one equal four.

Mr. Avakian: No, your Honor, that is not my point at all. Mr. Brady has done more than simply add up two plus two. He has also selected the particular items that he is going to include in his addition, and to use a specific illustration, he has assumed that——

The Court (Interceding): After all, I don't see where there is much to argue about. I think I will permit the question.

Mr. Avakian: Thank you, your Honor.

The Court: It is a matter of one of us taking a certain set of figures and arriving at a certain

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result and then the same witness presented with a different set. The question is, will he come to the same or a different result.

Mr. Avakian: That is right, to illustrate a different result from a different description of the facts.

Mr. Campbell: May I point this out to your Honor as the vice of this particular question, without quarreling with your Honor's ruling in any way. An effort is made, based upon certain theories of the defense, as to the partnerships, to show the results only as they would exist for one year. Now if the same adjustments were made as to all the years, an entirely different picture would be presented, but here he is only applying his theory to one year. The question is so involved and he specifies so many figures that the witness should not be expected to come up with a computation in a couple of minutes with the use of pencil and paper on the stand. He should have an opportunity to put down these figures and make proper computation in that regard.

The Court: If the witness wants time——

Mr. Campbell: But if counsel states, in making those adjustments which he proposes in his question, it comes out to a certain result, as I say, I will not challenge his result. If he wants the witness to compute it, he should have an opportunity to do so.

Mr. Avakian: I used the adding machine.

The Court: I am in no position or inclined to reject the question, whether or not it should be answered, on condition he might ask one or two

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other questions. I can't do that. As to these other years, that is a matter for counsel to decide whether he wants to present a different computation of other years. That is his province, not the Court's, so I am going to permit the question and if the witness needs time to make the computation he may have time. Call in the jury.

Mr. Campbell: Pardon me, may I make one further objection with respect to the contents of the question, and that is as to the Robert Jeffress note, which is assumed to be a liability at the end of 1946. I submit there is no evidence in the record to support that assertion. As to the others, I have no doubt there can be found some basis for counsel's contention.

Mr. Avakian: Would your Honor like to hear me on that point?

The Court: Yes, on that point I would like to have some argument.

Mr. Avakian: I think there is even more basis for inferring the existence of that loan at the end of 1946, than there is for inferring the existence at the end of 1946, of the 65 thousand dollar asset which your Honor permitted to be included in Exhibit 183. You recall that the 65 thousand dollar asset was simply a check payable to Kyne. Remember in November of 1946, Mr. Kyne said he cashed the check, put the money in Box 48——

Mr. Campbell: Got thousand dollar bills and personally turned over to Mr. Remmer at 50 Mason Street.

Mr. Avakian: We have then money in Mr. Rem-

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mer's possession early in November in 1946, and no evidence it was in his possession on December 31st. Now your Honor ruled in substance that it would be a permissive inference for the jury to assume that that money, which was last identified early in November as being in Mr. Remmer's hands, was still in his hands at the end of 1946. Now if that is a permissive inference, your Honor, then we submit it is likewise a permissive inference, even more so, that a loan, evidenced by a note on September 27, 1946, was still in existence at the end of 1946, particularly in view of the two things: One is the fact that there was a payment in July, 1947, of some 23 thousand dollars, which permits the inference the loan had not yet been repaid prior to that time, and secondly, your Honor, there is the rule that in a criminal case the just must resolve all reasonable doubts in favor of the defendant, so that the jury, in drawing inferences as to whether that loan was in existence at the end of 1946, must resolve all doubts in favor of the defendant, and in view of that rule, it would be proper for them to infer and conclude that that loan was still in existence at the end of 1946, so that we have here, your Honor, a situation which is in a sense comparable to the 65 thousand dollar item which your Honor permitted the prosecution to include on the permissive inference basis and in view of the rule of doubts being resolved in favor of the defendant, we think we are in stronger position to support our contention.

The Court: The jury may or may not infer that

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that loan was still outstanding at the end of 1946.

Mr. Avakian: I think that is right, your Honor.

The Court: I will permit that to be included in the questions. We will call in the jury.

10:50 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BRADY

resumes the witness stand on further [2541]

Cross-Examination

By Mr. Avakian:

Mr. Avakian: I understand your Honor has ruled the witness may answer the question.

The Court: Yes, the witness may answer the question.

Mr. Avakian: I wonder if we may have the question read, so the answer will be intelligent.

(Question read.)

Q. Have you made that computation, Mr. Brady? A. Yes, I did.

Q. What was the adjusted net worth figure resulting from the assumptions made on that question?

Mr. Campbell: I object to the question in that form—adjusted net worth. He can state the figure.

Q. What was the figure that resulted for the end of 1946, from making those adjustments?

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(Testimony of A. V. Brady.)

A. Assuming the figures you gave me, and the balances, the net worth would be $135,325.82.

Q. Now, Mr. Brady, in order to properly compute the net income by the net worth method for each of the years, 1944, 1945, and 1946, the making of the adjustments which I assumed in my question for the year 1946, would call for making of comparable type adjustment for each of the other years, in order to reach a consistent conclusion on net worth increase income?

Mr. Campbell: That is assuming that the adjustments were correct in your question. [2542]

Mr. Avakian: Yes, are comparable type of adjustments as called for.

A. Any adjustment that we would make to the previous net worth would affect the increase, yes.

Q. Now isn't it true, Mr. Brady, that if during each of the years involved in this indictment you had given effect to the partnerships in the B. & R. Smoke Shoppe, the Day-Night Cigar Store, 110 Eddy Street, Menlo Club, and Transit Smoke Shop, and if you eliminated the cash on hand at the end of 1946, of 65 thousand dollars, and if you included in the liability at the end of 1946, a 50 thousand dollar obligation to Robert L. Jeffers, the amount of income computed on the net worth method, on the basis of giving effect to those factors, would be approximately the same for the three-year period as a whole as Mr. Remmer reported in his income tax returns?

Mr. Campbell: That is objected to as calling for

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(Testimony of A. V. Brady.)

certain legal conclusions of this witness. That is a general statement giving effect to partnerships which calls for interpretation on the part of this witness, particularly in relation to the Menlo Club, as to the meaning of the agreement entered into in July of 1946.

Mr. Avakian: Your Honor, I am only asking him to assume for that question the matters which are testified to by every witness the prosecution has called, namely, that they were partnerships and that partnership income was reported by the [2543] different partners on a proportionate percentage basis and tax paid on that basis.

The Court: You may answer the question.

A. Before answering that question, I believe it would only be fair to make a computation of this.

Q. Have you ever made such a computation, Mr. Brady? A. No, I have not.

Q. That would be a lengthy job, would it not?

A. Well, I wouldn't want to do it right off-hand here, because I want to be correct.

Q. During the period that you have been assigned to this case, since you were first assigned to it in 1950, you have never made such a computation?

A. Never made the computation that you mentioned, no.

Q. By that do you mean, Mr. Brady, that you have, during that period, made computations for these three years different in any respect from computations shown in Exhibit 183?

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(Testimony of A. V. Brady.)

Mr. Campbell: Objected to as not proper cross-examination.

The Court: Objection sustained.

Mr. Avakian: I can cite you some authority on that, your Honor.

The Court: Well, the objection is sustained.

Mr. Avakian: Do you care to listen to the authority, your Honor? [2544]

The Court: No, proceed.

Q. Now, Mr. Brady, in Exhibit 183 for the year 1945, you have computed an understatement of income at the very bottom line of the exhibit, which you have designated as difference in amount, of $11,747.04, isn't that correct?

A. That is the amount that year, yes.

Q. Now, Mr. Brady, if we left Exhibit 183 exactly as it is, except for this one change of counting in the B. & R. Smoke Shoppe bank roll only 5 thousand in cash and excluding the 15 thousand in accounts receivable, there would be no understatement of income then on Exhibit 183 for that year, 1945, isn't that correct?

Mr. Campbell: Objected to as calling for his conclusion as to whether or not there would be an understatement of income. I think the witness can be asked to make the computation, but to draw his conclusions is not proper.

The Court: Yes, objection is sustained.

Q. Very well. Mr. Brady, take Exhibit 183 exactly as you have prepared it, with this one change, for the year 1945 eliminate from the B. & R. Smoke

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(Testimony of A. V. Brady.)

Shoppe bank roll the 15 thousand dollars in markers. What would be the total income computation for the year 1945 with that adjustment?

Mr. Campbell: Just a minute—I also object to the question on the same grounds, that it is calling for a conclusion. I will stipulate with counsel if you eliminate [2545] $11,747.04, or any amount in excess of that, from that column of figures there would be nothing.

Mr. Avakian: Your Honor, the importance of the question is, in the B. & R. bank roll the testimony is there was five thousand cash and 15 thousand accounts receivable. Now Mr. Weaver has testified he used those two together in the 20 thousand bank roll figure, although the evidence——

The Court: Answer the question.

A. I think before we answer that, I think we have to take into account the same factors for the previous years. In other words, if there were accounts receivable in 1944 and accounts receivable in 1945 eliminated, both of those, why I do not think we could come up with that same picture.

Q. You know, do you not, Mr. Brady, that the first time any testimony relating to accounts receivable, as distinguished from cash, in the B. & R. Smoke Shoppe bank roll is Mr. Pritchett's testimony as of the end of 1945?

Mr. Campbell: Objected to as argumentative.

Mr. Avakian: That is evidence, your Honor.

Mr. Campbell: And counsel's statement of the evidence.

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(Testimony of A. V. Brady.)

The Court: Objection sustained.

Q. Now with respect to the item in Exhibit 183 shown as to Gene Schriber, which is the last liability item that appears for the first time in Exhibit 183 at the end of the year 1945, does it not? [2546]

A. That is correct.

Q. And you have taken the figure of 100 thousand dollars from Exhibit 140, have you not?

A. Yes.

Q. If, in lieu of the 100 thousand dollar liability figure shown on Exhibit 140 you had used the figure of 125 thousand dollars shown on Exhibit 125C, is it not true, Mr. Brady, that the amount of income computed for the year 1945 on Exhibit 183 would then be less than the amount reported by Mr. Remmer. A. Yes, that is correct.

Q. That one adjustment alone would completely eliminate any understatement of income for that year?

Mr. Campbell: Just a minute—that calls for his conclusion.

The Court: That may go out.

Q. Now, Mr. Brady, you made the statement that the books and records of some of these enterprises were not entirely complete. In the course of your investigation and examination in this case since you were first assigned to it, have you examined books and records or other papers of any of the enterprises listed on Exhibit 183, other than the books, records and papers which have been presented here in court during this trial?

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(Testimony of A. V. Brady.)

Mr. Campbell: I am going to object. I recall no testimony by which this witness characterized any of the books [2547] and records in the case. His sole testimony has been, aside from matters which he picked up, have been figures which——

Mr. Avakian: I can read it here.

The Court: Counsel says he can read it to us. Maybe he can.

Mr. Avakian: From page 2511, in answer to the question:

"And that is true of each of the businesses that are enumerated, isn't that so, Mr. Brady?"

he said:

"Well, I don't know. I would like to see the other exhibits because I believe some of these books did not show all the assets, so it would be pretty hard to get a correct net worth from the books."

Now, your Honor, other witnesses have said that the books and records are inaccurate, so we would like to find out what they are, we would like to find out how inaccurate these books are.

The Court: Objection sustained.

Mr. Avakian: We would like to make an offer of proof, your Honor.

The Court: Yes, do you want to send the jury out now?

Mr. Avakian: Could we send them out a few minutes early of the noon recess, send them out at that time, your Honor?

The Court: All right.

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(Testimony of A. V. Brady.)

Mr. Avakian: Your Honor, except for that one point, that [2548] would conclude my cross-examination of Mr. Brady, so unless your Honor would permit me to go into it, I would be through with him.

The Court: We will excuse the jury for about 10 minutes.

(Jury and alternate juror admonished and excused at 11:10 a.m.)

(In the absence of the jury.)

RE: QUESTION TO BRADY

(Feb. 5, 1952—Notebook 339, pp. 93-99.)

The Court: I would like to have the question read.

Q. (Read): Now, Mr. Brady, you made the statement that the books and records of some of these enterprises were not entirely complete. In the course of your investigation and examination in this case, since you were first assigned to it, have you examined books and records or other papers of any of the enterprises listed on Exhibit 183, other than the books, records and papers which have been presented here in court during this trial?

The Court: What is your objection to that question, Mr. Campbell?

Mr. Campbell: It is this, your Honor. At the cross-examination of Mr. Brady yesterday his attention was called on Exhibit 163, a chart, he said he took the net worth figures of 110 Eddy Street

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(Testimony of A. V. Brady.)

from and put them on this chart. His attention was directed to, in the lower portion of Exhibit 163, the statement: "Capital accounts per books," and he was asked this question: "Now in preparing Exhibit 183 * * * 'which is the chart,' * * * you did not take the amount of Mr. Remmer's capital account shown on the lower portion of that exhibit, but rather took the figure shown as total net worth of the entire business, did you not?

"A. Yes, we took the net worth as shown on the business for Mr. Remmer.

"Q. And that is true of each of this businesses that I enumerated a few moments ago, isn't that true, Mr. Brady?

"A. Well, I don't know, I would like to see the other exhibits because I believe some of these books did not show all the assets, so it would be pretty hard to get a correct net worth from the books."

Now my point is this—that this is not a matter of the adequacy or inadequacy of the books which was gone into on direct examination of this witness. He testified as to the source of these figures and instructions he received to put them in here. Now we have come in through other witnesses in detail whether the books contained all the assets or did not. It seems to me that here where after that matter has been covered by witnesses and is not within the scope of the direct examination of this witness, that we should not take the time to again go through these matters, if my objection is valid, and I am sure it is valid, and I make it upon the grounds it is not within the scope of direct examination.

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The Court: Here is the thought that occurs to me now. He made a statement here that he made computations based upon certain exhibits in the record and he produced a computation.

Mr. Campbell: Yes, your Honor.

The Court: It would seem to me perfectly proper for counsel to inquire if he had used any other material than the material inquired about on direct examination.

Mr. Campbell: That is not the question.

The Court: That is what I understand to be the question. Let us have the question read.

(Question read.)

The Court: I think if we eliminated that introductory part of that question, it might obviate your objection.

Mr. Avakian: My question is broader than that. May I have a moment to state my position on it.

The Court: What is your question? How does it extend any farther than what was just read?

Mr. Avakian: It does not extend farther than it was read, but it does extend farther than it would if that first part were eliminated. In other words, I do not want to leave the question in the manner you have stated because what I want to get at is this—the witness has testified that the books and records were inadequate. Now it is a rule of law that the net worth method can be used only, your Honor, if the books and records maintained by the taxpayer are inadequate and insufficient to prepare computation of income on the book method and if

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the net worth method on the basis of all the available evidence is a better acounting method than the book method. Now that, we anticipate, will be an instruction which your Honor will give to the jury. Now the jury would have to decide, your Honor, as a preliminary matter, whether they are going to use the net worth method or the book method. In deciding that, they are going to have to know whether books and records maintained by these businesses were adequate and sufficient to permit computation of income on the book method and they can not determine that, your Honor, unless they know what was in existence. Now we have heard Mr. Brady, Mr. Weaver and other prosecution witnesses make the statement that the books and records are inadequate, but your Honor, we want to show that that charge is not being made in good faith because they have on the third floor of this building books and records of these businesses which they are not producing in court, they are not allowing the jury to see what was being maintained to let the jury decide what was adequate. They sit here and make statements and won't produce books and allow us to see them. It isn't fair to the defense to let these witnesses, who know they have these books and records upstairs, cartons of them, who know that, to get up here and say the books and records are inadequate but you can't look at all the books and records that are here, you have to take my word for it.

Now we want to show that the books and records and other papers maintained by these witnesses are insufficient from an acounting point of view, we

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want the jury to decide whether they are insufficient or not; we want these witnesses, when they say the records are inadequate, to produce records kept by these businesses, maintained by these businesses, in the course of business. Let us produce them in court. Why all this mystery? Why statements the books are inadequate and yet refusal to bring them in? It is a matter of fairness to any defendant to let the jury decide directly from the facts, rather than conclusions and opinions of a witness.

The Court: You said you wanted the jury sent out to make an offer of proof. This is an argument on whether or not this question should be permitted. What is your offer of proof?

Mr. Avakian: My offer of proof, your Honor, is to show that the prosecution has in its possession the books and records and other papers maintained by these various businesses shown on Exhibit 183 in the regular course of business in regard to the years 1944, 1945 and 1946, which books, records and papers are in the possession of the prosecution in this building and have not been produced in the court room.

We offer to prove further that the statement of the witness, Mr. Brady, and others, that the books, records and papers maintained by these businesses were inadequate and insufficient is not true and is not correct because there are these additional papers which have not been produced. We offer to show that the statements of the proosecution's witnesses, to the effect that the books, records and papers are inadequate, are not made in good faith. That is the purpose of our offer.

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The Court: That is a proper matter for your case in chief.

Mr. Avakian: One thing more, your Honor. And as a part of that offer of proof, your Honor, we want to show that the production of all those papers, books and records now in the possession of the prosecution would show the adequacy of the business records and accounting methods maintained by these different businesses.

The Court: That is proper on your own case.

Mr. Avakian: These are government witnesses, your Honor. It is only through government witnesses we can show that.

The Court: All right, they are government witnesses.

Mr. Avakian: They testified in their examination and all we are doing is challenging on their testimony.

The Court: Let me have this question again. I am not going to permit this offer of proof on cross-examination of this witness, but I do not mean by that I would not permit you to make such proof in your case. Let us have the question.

(Question read.)

The Court: Whether it is testified as to whether the books are inadequate or not, it seems to me would be immaterial. You may ask the part of that question that has to do with whether or not he examined any other books or records than the exhibits in evidence.

Mr. Campbell: I think the question also should

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be directed to examining them in connection with the preparation.

The Court: In connection with Exhibit 183.

Mr. Avakian: That is not the point I am interested. The offer of proof is what I am interested in.

The Court: I will not deny your offer of proof, but it is not proper at this stage of the examination.

Mr. Avakian: You are denying it so far as this witness is concerned?

The Court: Denying it on the government's case.

Mr. Avakian: In view of that ruling, may we move to strike the testimony of Mr. Brady, page 1125 of the transcript, reading as follows: "Well, I don't know. I would like to see the other exhibits because I believe some of these books did not show all the assets, so it would be pretty hard to get a correct net worth from the books."

The Court: Motion denied. So bring in the jury.

11:25

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. BRADY

resumes the witness stand on further

Cross-Examination

By Mr. Avakian:

The Court: Counsel may inquire of the witness whether, in preparing or formulating Exhibit 183, he had recourse to any other than the records and exhibits in evidence in this case.

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(Testimony of A. V. Brady.)

Mr. Avakian: I understand the ruling on sustaining objection to the question I asked stands.

The Court: No, it does not stand. It is modified to the extent just mentioned.

Mr. Avakian: But as the question was asked, the objection stands sustained?

The Court: Read my question.

(Court's statement read.) [2549]

The Court: You may propound that question.

Mr. Avakian: That wasn't the question I was interested in.

The Court: Then you don't have to propound it.

Mr. Avakian: Then, your Honor, in view of your Honor's ruling on the question and in view of your Honor's ruling on the offer of proof, we have no further cross-examination.

The Court: Very well.

Mr. Campbell: No redirect.

The Court: You may be excused.

Mr. Thompson: Your Honor, I would like to make a statement for the record. Certain witnesses have been subpoenaed and have not appeared to testify.

Mr. Golden: Of course, we don't know what Mr. Thompson is going to say, your Honor, but if he is not going to take the stand, I don't think we ought to take statements now.

Mr. Thompson: I intend to refer to part of the clerk's file in the case. If I make any statement prejudicial to the defendant, I have no doubt——

Mr. Golden: If there is any chance—and I be-

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lieve from what Mr. Thompson says there will be a chance——

The Court: Suppose you have a conference and find out what it is, and if there is any objection, approach the bench and we will see what the situation is.

(Conference between counsel outside of hearing of jury.) [2550]

Mr. Thompson: We would like to take this matter up with the Court, your Honor, in the absence of the jury.

The Court: Very well, the jury will be excused.

Mr. Golden: Just as a practical matter, I understand from Mr. Thompson, after we have disposed of this matter, the prosecution intends to rest. If that is the case, there are certain legal matters we have to take up with the Court, which will take some time and only because of the present hour and as a practical matter, it might be practical to dispose of this matter and then excuse the jury for the balance of the day, if your Honor sees fit to do so, because we have certain matters which will take a little time.

The Court: I do not feel like excusing the jury for the balance of the day. I will excuse them until two o'clock.

Mr. Thompson: There are other criminal matters set for today.

The Court: From one to two.

Mr. Golden: Would your Honor like me to tell you privately what I have in mind?

The Court: Yes.

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(Conference at the bench between Court and counsel.)

The Court: We will excuse the jury just for a short time now.

(Jury and alternate jurors admonished and excused at [2551] 11:30 a.m.)

(In the absence of the jury.)

(Defendant present with counsel.)

Mr. Golden: If the Court please, perhaps if I say something first it might shorten the matter. I understand from Mr. Thompson that the statement he wished to make, without going into the detail of it, was to cover this subject matter, that a subpoena was served on Albert Villaudy at a particular date, and there are some letters here from doctors indicating his health would prevent him coming, and, secondly, a subpoena was served on William E. Fricker, and there was an affidavit from his wife and a doctor's certificate apparently that he was unable to be here; and third, that a subpoena was served on Masse Ditto and for medical reasons he also is unable to be here, and fourth, that some time last month that a subpoena was issued for a man by the name of Oscar Nelson and they were not able to serve the subpoena.

Mr. Thompson: As to Oscar Nelson, subpoenas were issued throughout the months of November and December, and finally a warrant was issued for him.

Mr. Golden: Anyway our point is this—we agree it is proper in a case to put on a witness, a sheriff

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of Washoe County or a police officer, whoever it may be, to testify as to his efforts to locate a witness who has not been produced in court and, of course, then the defense is entitled to [2552] cross-examine that public official as to his efforts and extent of them, and so on.

Now we would have no objection to stipulating that the first three persons I named had subpoenas served on them and for medical reasons did not appear here, that the checks of Mr. Villaudy were admitted in evidence by stipulation. As to the witness Nelson, in view of the hullabaloo which appeared in the press, which may or may not have come to the attention of some people on the jury, we are apprehensive that any statement made by Mr. Thompson, even though not so intended may be prejudicial to the defendant. We would be willing to stipulate that a subpoena was issued to Mr. Nelson and not served, but if it is going farther than that, we would want the man who says he couldn't find him to become a witness so we could cross-examine him.

The Court: Why wouldn't that be sufficient?

Mr. Thompson: That is satisfactory.

The Court: So now we understand that counsel will stipulate that the first three witnesses named, due to illness, can not be produced here, is that correct?

Mr. Golden: Yes, your Honor.

The Court: And as to the witness Nelson, the subpoena was issued and the witness was not found by the officer, is that satisfactory?

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Mr. Thompson: That is satisfactory. [2553]

The Court: That is the whole situation. Now we will call the jury back.

Mr. Golden: I think the stipulation should include that two checks of one of those persons were admitted by stipulation.

The Court: That is up to Mr. Thompson, if he wants to accept that.

11:35 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

The Court: Mr. Thompson?

Mr. Thompson: Your Honor, I understand it has been stipulated that subpoenas were served on the following witnesses: Albert Villaudy, William E. Fricker, and Masse Ditto, to appear to testify at this trial; that each of those three persons is unable to attend for medical reasons. It has also been stipulated that subpoena has been issued for Oscar E. Nelson and the officer was unable to serve the subpoena, that he could not find Mr. Nelson, and in connection with Albert Villaudy, Mr. Golden has requested me to mention that two checks were admitted in evidence by stipulation of the defense which had been received from Mr. Villaudy.

Mr. Golden: That is correct, your Honor, we so stipulate.

Mr. Thompson: We rest, your Honor.

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(Jury and alternate jurors admonished and excused until tomorrow morning at 10:00 [2554] o'clock.)

(In the absence of the jury.)

RE: MOTION TO STRIKE—MOTION FOR ACQUITTAL

(Febr. 5, 1952—Notebook 340—pp. 4-34.)

Mr. Avakian: Your Honor, we desire at this time to make a number of motions to strike, with respect to testimony and exhibits which we feel have not been properly connected up or not properly in evidence. They will relate to approximately a dozen matters and then after that we desire to make——

The Court: I do not believe we have encountered that procedure before. It seems to me after testimony is given and after objection it was admitted in evidence—the evidence was not admitted subject to any motions to strike.

Mr. Avakian: There were a number of matters in which, in overruling our objections, your Honor stated if the matter was not connected we could make motions to strike. There are a number of them in that category.

The Court: We will see what they are.

Mr. Avakian: In most instances that are unrelated to each other and I do not know whether your Honor would like to have me run through them or rule one at a time.

The Court: We had better take one at a time.

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Mr. Avakian: Very well. First of all, with respect to Exhibits 17, 18 and 19, which are insurance policies introduced by the witness Scollin, and the related testimony of Mr. Scollin, begins at page 49 of the transcript and continues for a number of pages. I call your Honor's attention to the fact that the prosecution did not use any of this evidence in totalling Exhibit 183, the over-all statement of net worth. There is no showing in the evidence that the insurance payments were non-deductible expenditures and the prosecution did not attempt to use them in that way in 183. There is no showing as to the cost of the articles which are mentioned in the insurance policies and statement in the policies of the insured value would be misleading, in the event the jury should take the exhibits in the jury room; and likewise no showing as to the date of acquisition which would be essential in order for them to enter into computation of net worth. That is the motion in respect to those factors, your Honor.

The Court: I will hear counsel in opposition.

Mr. Thompson: In that connection the government is entitled to argue that the standard of living maintained by this defendant, in connection with his personal expenditures in chart, Exhibit 183, have not been computed at any definite figure, but which the jury is entitled to take into consideration in determining whether or not this defendant did report his true income, as computed on the net worth basis. These insurance policies are connected with the actual personal expenditures proved to have

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been paid by the defendant during the years in question, in that he paid the premiums on the policies and the policies themselves further show that they covered personal property, floater insurance on articles as mink coats, valuable items of jewelry, and matters of that sort. It appears to us that they are very relevant and material in a case of this character and that, although the government has not attempted to fix the defendant's non-deductible personal expenses at a certain figure each year, still the jury is entitled to take into consideration, in deciding this case, the standard of living maintained by the defendant.

Mr. Avakian: Your Honor, I think the answer to Mr. Thompson's argument is there is no showing that any of these articles were acquired during the years 1944, 1945 and 1946. Unless they were acquired during those years, they would have no bearing. The burden being on the prosecution to establish the guilt of the defendant, it would not be proper to leave room for speculation as to when they were acquired, and in fact I think the testimony of the witness was that these were renewal policies, indicating that some items, at least some of them, were insured prior to 1944.

The Court: The motion to strike Exhibits 17, 18 and 19 is denied.

Mr. Avakian: The next, your Honor, relates to the testimony and also to Exhibit 42, which is Mrs. Badovinatz's testimony. Your Honor will recall that Mr. Badovinatz testified in February of 1947, which is after the indictment period, her husband,

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now deceased, told her he was going down to the bank to buy a cashier's check for five thousand dollars to send to Mr. Remmer to repay a loan. At the time that conversation was admitted into evidence, the prosecution stated that they expected to connect that up. Subsequently, through the Bank of America's representative, Exhibit 42 was introduced and that is cashier's check for five thousand dollars, issued in February of 1947, payable to Mr. Remmer and at that time, in connection with our objection, the prosecution stated that they expected to connect that matter up by relating it to some transaction that occurred during the indictment period and your Honor stated at that time, page 172 of the transcript, that you might reconsider a motion to strike in the event it were not connected. Now the only questions that were asked of any witnesses thereafter regarding that loan was inquiry of Mr. Kyne, pages 1024 and 1025 of the transcript, as to whether he knew anything about such a loan and he said he had no knowledge regarding it, so that as the record now stands there has been no showing whatsoever as to the date at which that money was loaned to Mr. Badovinatz, and of course it would be immaterial if the money were loaned after 1946. It would likewise be immaterial if the money were loaned prior to 1944. In other words, this could be material only if the loan were made during 1944, 1945 or 1946, and there is nothing in the evidence from which any inference could be drawn as to the date on which the loan was made, and I call again to your Honor's attention the fact that in Ex-

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hibit 183, the prosecution regarding the Badovinatz loan has just entered a loan for each of the years, indicating that they have not attempted to use that loan in making their computations in Exhibit 183 and we feel it has not been connected up and for that reason ask your Honor to reconsider the matter and to grant our motion to strike.

Mr. Thompson: With reference to that loan, your Honor, I believe that Mr. Avakian's recitation of the testimony in evidence is substantially correct. Your Honor will note that the loan was repaid February 7, 1947. It would have to have been made within a period of 38 days prior to the repayment for the date not to be material in this case. That is, if the loan was made in the year 1946, 1945 or 1944, it would be material, also if it was made prior to December 31, 1943, it would be material in setting the starting net worth of the defendant. As I understand a case of this character, the government makes a thorough investigation and lists at the starting point all of the assets of the defendant which its investigation discloses the defendant owned at that time. Now the only question of materiality relates to whether or not it can reasonably be inferred that this loan was made prior to December 31, 1946. Now your Honor has noted from Exhibit 183 that the government has not attempted to include that loan as an amount in net worth computation. Nevertheless, we believe it can well be argued from the testimony of Willie Kyne, who testified, as I recall it, that Mr. Badovinatz had an interest in Calvada Lodge, which is adjacent to

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Cal-Neva Lodge at Lake Tahoe, that the opportunity of Mr. Remmer, who managed Cal-Neva Lodge, to see Mr. Badovinatz would have occurred during the season of 1946, or at least during one of the summer seasons when those places are open, they being closed normally after Labor Day of each year. It is not an especially important item in this case, your Honor, but we think the evidence is present from which a reference can reasonably be drawn that the loan was made prior to December 31, 1946.

Mr. Avakian: Now, your Honor, I do not know of any evidence in the record, other than at page 1024, from Mr. Kyne regarding Mr. Badovinatz, and that is simply that he was acquainted with him, his first name was Arley, I believe; he lived most of the time in Stockton or Fresno (reads from page 1024 of transcript). That is all the testimony I have been able to find.

The Court: My recollection is there was some testimony about his being up at the Lake.

Mr. Avakian: There was testimony of Mrs. Badovinatz, I believe, that her husband had an interest in Calvada Lodge, not Cal-Neva, with which this defendant has no connection. Your Honor, we do not think the jury could properly infer, in a case in which they are required to resolve all reasonable doubts in favor of the defendant, any proper inference could be drawn by the jury that the loan repaid on February 7th was negotiated during the years covered by the indictment. There is no proper basis on which any inference can be drawn as to the time.

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Mr. Thompson: I would like to make one further suggestion, your Honor. I think the evidence in the record is material to show the scope and thoroughness of the investigation conducted by the government agents and the effort made to cover every possible item of asset or liability during the period in question, and in view of the treatment that the government has accorded this particular subject, that is, that it has not been included in the net worth statements, it seems to me that the evidence in the record is material on the basis that I mentioned.

Mr. Avakian: We disagree with that. They are assuming matters here. If your Honor wishes, I will go into it further, but in view of the time, if your Honor is satisfied you have points from both sides, I am willing to submit the motion.

The Court: Motion denied.

Mr. Avakian: Next, in respect to Exhibit 15 and Exhibit 60, which are Cal-Neva floor stock tax returns. I believe that one return is typical of another, except one has attached to it an inventory of the Gallagher and Burton whiskey which was in storage in Reno. Those, your Honor, are returns of Cal-Neva, Inc., and not of the defendant. There is no showing whatsoever that the defendant paid the tax shown on those returns and no showing whatsoever that whoever did pay the tax paid that on behalf of the defendant, and in the absence of such a showing, I respectfully suggest that the matter has not been properly connected and move it be stricken.

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Mr. Thompson: If the Court please, in that connection it has been shown that the whiskey upon which tax was paid belonged to the defendant and that he paid to Mr. Pete Barengo some sixty thousand dollars out in cash for that whiskey. There are no indications on the books of Cal-Neva that the money was paid by Cal-Neva or by Mr. Remmer on behalf of Cal-Neva and credited to his account with that corporation. Inasmuch as the whiskey, upon which the tax was paid, belonged to Mr. Remmer and the floor tax returns show on their face that tax in the amount of some seven thousand odd dollars was paid in cash, that there was no entry in the books of Cal-Neva, indicating that that payment was made by Cal-Neva, Inc., we think it is a fair inference from the evidence that Mr. Remmer paid that money himself. He is the one who signed the return, and it also can be argued that it is conceivable that the reason the return was made in the name of Cal-Neva, Inc., rather than Elmer Remmer was that Mr. Remmer may not have had a wholesale liquor dealer's license at that time, while Cal-Neva may have had such a license.

Mr. Avakian: Well, the evidence does not bear out what Mr. Thompson states. It is all speculative, and the rule is clear that a jury may not draw inferences on the basis of speculation. It must be based on evidence.

The Court: The motion will be denied.

Mr. Avakian: Next, your Honor, is the matter which appears at page 821 to 824 of the transcript, in which Mr. Campbell called a Mr. Lando, asked

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him if he knew certain people whom he named, among others Sacramento Sam and Crying Mac. At that time the defense asked that this be stricken. The witness answered he did not know them, and we asked that these questions be stricken, that the answers be stricken, for the reason that it was our belief that the prosecution, in questioning his own witness about this matter, probably knew that he did not know these people and was asking the questions with respect to these particular names for the purpose of providing some ridicule. The Court at this time and counsel engaged in this conversation with the Court: (Reads from page 821 of the transcript.) Now, your Honor, there was no further testimony in the case with respect to these names. As far as we can tell, there has been nothing offered here by the prosecution which shows any significance in the names of Sacramento Sam and Crying Mac. There has been no evidence we can find which connects up that testimony with any material issue in this case and in view of the fact it not having been connected up on the expectations of the prosecution, we believe that the evidence in that connection should be stricken.

The Court: The witness stated he didn't know either one of these men?

Mr. Avakian: That is right.

The Court: It merely resolves itself to straightening out a question and the motion will be denied.

Mr. Avakian: The next, your Honor, Exhibit 58, which is a ledger sheet of Bullock & Jones, together with the related testimony of the witness,

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Gillingham, beginning on page 289 of the transcript. That exhibit and testimony related to account of Mr. Remmer with Bullock & Jones, by far the greater portion of which was made up of merchandise orders and no evidence whatsoever, your Honor, that any of the expenditures reflected by that exhibit and testimony were non-deductible expenditures and, of course, if they are deductible they are not material. The burden of proof is on the prosecution and it is the duty of the jury——

The Court (Interceding): I do not see that argument, whether they are deductible or non-deductible. If the defendant had a considerable sum of money to spend for an item, would it make any difference in the over-all whether the money went for deductible or non-deductible.

Mr. Avakian: Yes, because of the unusual method of computing on net worth. The government agents themselves testified on the stand in computing net income what we are concerned with was non-deductible expenditures. Deductible expenditures are ignored and are of no consequence. It is only the non-deductible expenditures. They may be added to the increase in net worth in determining income by the net worth method.

The Court: Wouldn't it be some corroboration to have a chart here or exhibit showing a computation or testimony made from exhibits in the case of certain income at a certain period of time? Wouldn't it be some corroboration to show that he had considerable money to spend at that time?

Mr. Avakian: No, your Honor, because the net

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worth method deals not with the flow of money during the year, but rather with the changes in total net worth from the beginning to the end of the year in comparison. Not what happens during the year, your Honor, but rather the amount of change when you compare the end with the beginning of the year. What happens in the interim is immaterial unless it is reflected in some way in the assets on hand at the end. That is the peculiar thing about net worth method of computing income. Once you have computed the difference in the amount of net worth at the end of the year in comparison with the beginning, it is proper to add to that increase the amount of any non-deductible expenditures which the taxpayer has made during the year, but it is not proper to add any deductible expenditures which have been made in computing net income. That, your Honor, is the vice of leaving before the jury evidence of expenditures which have not been shown to be of a non-deductible nature, because the jury may mistakenly add those expenditures to the increased net worth, whereas, the matter is clear that only type of expenditures that may be added to net worth figures is non-deductible type of expenditures and the burden is on the prosecution to show the expenditures that they want the jury to consider are of a non-deductible nature. In other words, your Honor, a federal income tax payment is a non-deductible expenditure and it is proper to add federal income tax during the year to increase the net worth. On the other hand, a business expenditure, such as

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travel expenses or promotional expenses, the money spent for developing in some way, in cultivating patrons of business, anything of that kind that you would classify as business expenditure and, therefore, would be deductible, should not be added to the increase of net worth in computing the net income on the net worth method.

Mr. Thompson: I might point out in this connection Mr. Remmer kept no personal records. This is shown to be a personal account of Mr. Remmer with Bullock & Jones and the things which he purchased were merchandise orders. Now technically Mr. Avakian is correct when he states that deductible expenses can not be taken into consideration in computing income on a net worth basis, and conversely that non-deductible expenses, such as living expenses, can be taken into consideration, but such expenses are taken into consideration at any income tax computation only when they are claimed and proved by the taxpayer. Mr. Remmer's personal income tax returns in this case have no indication of claim of a business deduction or business expenditures of merchants orders purchased from Bullock & Jones. Presumably any purchases of that character are personal expenses. The best the government can do is to prove the expenses. We have gone into every record available, as shown by the testimony of the agents, and have identified these matters as best they can be identified. The presumption is, as I say that this is a personal expense. Normally merchants orders are purchased as gifts and generally the only gifts that are de-

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ductible under the income tax law are charitable contributions, and we suggest that the only fair inference that can be drawn from the evidence now before the Court is that this account of Mr. Remmer's with Bullock & Jones, a men's furnishing store, was a personal account and that the expenses which he paid in connection with that account were personal rather than business expenses. No taxpayer is entitled to any business deductions unless he claims them and proves them and he has to keep books and records to show them.

Mr. Avakian: I think Mr. Thompson overlooks the fact that in a criminal case the presumption is not against the defendant, but rather in his favor, and there is no proper basis upon which the jury could treat any expenditure as strictly personal. On the contrary, the jury in criminal cases are required, under the established rules, to treat all presumptions in favor of the defendant and to resolve all matters of that kind in his favor, unless they are overcome by evidence which removes all reasonable doubt. Insofar as these things are concerned, I specifically recall the testimony of Mr. Cavani that he used one of these orders to purchase a suit. Mr. Cavani was a business associate of Mr. Remmer's and a most proper inference to be drawn from that is that the merchants order here was given to him in the capacity as a business associate and that would be, or could be, properly a deductible business expenditure and if it could properly be, the jury would be entitled to draw that inference, your Honor.

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The Court: The motion is denied.

Mr. Avakian: Next Exhibit 89 and the related testimony at page 299 of the transcript. This is the account with Sulka and I believe your Honor will recall there were purchases of neckties in large quantities. I believe on one occasion 400 neckties were ordered on one date early in December of that particular year and the testimony of Mr. McCaffery was that they did a large business with people who used their neckties to give as presents in their business. The testimony of various witnesses indicates, I believe Maundrell and Lando first and Kyne, and even others, was that the Sulka neckties were given as presents to patrons of these businesses and that they helped pick them out and in some instances they recommended to Mr. Remmer the names of patrons to whom the neckties should be given and I think the manner of ordering the neckties, 400 at a time, and the testimony in the record as to the use made of them, and also the time of the year they were purchased, all, your Honor, tends to treat the purchase of these neckties as a business expenditure. There is no evidence whatsoever to the contrary, so we believe there is no proper basis, except speculation, which is improper, there is no basis upon which the jury could properly question that these should be treated as non-deductible expenditures.

Mr. Thompson: In the first place I would like to take issue with Mr. Avakian as to the testimony. I think that the only persons who testified they received a Sulka tie were Mr. Kyne, Mr. Lando and

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Mr. Maundrell. Each one of them is alleged to be a partner of Mr. Remmer's, and perhaps Mr, Cavani also, but he is a partner, too, and you would have to go a long way to hold that a gift to a business partner is a business deduction. I think most of us are in the habit of making Christmas presents to our business partners and members of our firm and I doubt if any one of us claims that as business deductions. In addition, it is my recollection that the ledger account of the Menlo Club shows that the bill for Sulka & Company was paid by the Menlo Club out of Mr. Remmer's personal account, rather than as a business expense of the Menlo Club. Whatever books are available of the 110 Eddy Street and Day-Night Cigar Store, do not indicate any charges on those books of payments to A. Sulka & Company as promotional or advertising expense. The returns of Mr. Remmer do not show any claimed deduction for those items. A person is entitled to make gifts to whoever he pleases and if he does so, he is spending his money as personal expenditures unless it can be clearly shown it was a matter of advertising of some particular business, and I think it is immaterial how many Christmas gifts a man purchases—some people give many gifts and some people few, but nevertheless those gifts are not recognized under income tax matters as deductible business expenses.

Mr. Avakian: I think Mr. Thompson overlooks the testimony of some witnesses that they recommended the names of patrons to receive these ties

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and helped pack them, wrap them up or deliver them.

The Court: The motion is denied.

Mr. Avakian: Next Exhibit No. 71 and related testimony on page 469 of the transcript. That is the account of the custom tailors of New York. The only testimony in the record of the use made of the suits purchased there was the testimony of Mr. Maundrell that he received one of those himself, and he being a business associate, partner as Mr. Thompson calls him, of Mr. Remmer's in the Menlo Club, the use of the money for that purpose could properly be classed as an expenditure of ordinary and necessary business nature and would then be deductible, and in view of the rule, the jury would have to resolve doubts in favor of the defendant, there would be no proper basis on which they could do otherwise.

The Court: Motion denied.

Mr. Avakian: Next, your Honor, is the Blackstone Hotel account ledger sheets in Chicago, Exhibits 100 and 100A, together with the related testimony of Mr. Strong, transcript page 699. The sole evidence on record is that Mr. Remmer stayed at that hotel on certain occasions and incurred and paid certain bills in connection with it. There is no showing whatsoever that those expenditures were of a non-deductible nature and so on the basis of the argument in support to other motions, we submit it should be stricken.

The Court: Motion denied.

Mr. Thompson: I might interrupt to point out

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in connection with the last item, I do not recall any reservations of a motion to strike in connection with that testimony.

The Court: I do not think so.

Mr. Avakian: Well, I have in the first place the practice to which we have been accustomed to. That is not an answer——

The Court: Well, this is the first time I have ever seen it done this way.

Mr. Avakian: To be frank, this is the first time we have ever heard it should not be done this way. It is just we have been accustomed to different practices, apparently.

The Court: How many more do you have?

Mr. Avakian: I have two more of this expenditure nature and two others as to which I believe there was a reservation, your Honor, for motion to strike.

The Court: All right, let us have them.

Mr. Avakian: The next is Exhibit 101, ledger sheet of Shreve & Company, with related testimony commencing on page 710. Our motion is again based on the fact that there is no evidence in the record to show non-deductible nature.

The Court: What was the article purchased?

Mr. Avakian: There were a number of items, I believe, I believe some repairs to jewelry, there are some wallets, I believe, and I forget the exact total of it.

The Court: Motion denied.

Mr. Avakian: Next is Exhibit 16 of the Stanley Furniture Company, testimony of Mr. Hill. We

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move to strike that exhibit and testimony on the same grounds.

The Court: That had to do with some house at El Cerrito?

Mr. Avakian: Partly and partly office furniture.

The Court: Motion denied.

Mr. Avakian: Next, your Honor, is the testimony of Mr. Ezralow, with respect to the charts that were marked for identification as Exhibits 154, A and B. Your Honor will recall when Mr. Ezralow was on the stand, he presented some blue and red colored charts which purported to show a number of related cases, cases related to this one, and over our objection that there were numerous names of individuals and firms mentioned on those charts which had not been shown in this evidence to be in any way connected with Mr. Remmer, your Honor suggested that the charts should be revised, Mr. Campbell related that he would have them revised but that was never done and we feel that the testimony that was given by Mr. Ezralow with respect to those charts, which have never been admitted in evidence and never been revised, should be stricken.

Mr. Thompson: Those charts are not in evidence and can not be used and I do not recall that Mr. Ezralow gave any testimony of the contents of those charts.

The Court: The charts are not in evidence.

Mr. Avakian: My motion goes to his testimony in respect to the matter.

The Court: The names were not disclosed?

Mr. Avakian: The names were not disclosed but

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there was testimony preparing the charts with respect to many related cases.

The Court: Motion denied.

Mr. Avakian: Then, your Honor, this final one. A group of exhibits and related testimony relating to the 186 Club, and your Honor will recall that we objected to evidence relating to the 186 Club returns on the ground the 186 Club was a corporation and that unless and until it was shown that Mr. Remmer received income from the 186 Club over and above the amount of salary which he reported in his individual return, testimony regarding that matter would be immaterial. There is in evidence, offered by the prosecution, returns of the 186 Club, which are Exhibits 87, 87A, 88 and 88A. There is a chart prepared by Mr. Mooser, Exhibit 166. There is a letter to Mr. Boland, Exhibit 167; there is the Silverman-Kyne escrow relating to the purchase, Exhibit 43; there is the employment tax returns, Exhibit 131, and then there are various poker sheets which are Exhibits 110 to 110F inclusive. In preparing Exhibit 183, your Honor, the prosecution has not shown any amount as an asset to Mr. Remmer for the 186 Club. There is simply a dash after each year, although the club is listed in the various businesses mentioned. Now, there is no evidence whatsoever, your Honor, that Mr. Remmer had any net worth in the 186 Club. On the contrary, the evidence is the money, the purchase price, was put up by Kopstake and Nealis and was repaid to them. There was no testimony, there is no exhibit, that would indicate that Mr. Remmer had any invest-

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ment at any time in the 186 Club and the prosecution has not attempted to set forth any investment of Mr. Remmer in the 186 Club in preparing their summary, Exhibit 183, and so we move your Honor to strike all those exhibits, together with the related testimony of the witnesses Kyne, Maundrell, Casselini, Busterna, Mooser, Ezralow, Lando and Silverman, on the ground that those exhibits and that testimony have not been connected with any issue in this case.

Mr. Thompson: With relation to the 186 Club, your Honor, this is not included in Exhibit 183 net worth statement because there is no evidence in the case that that asset cost Mr. Remmer anything, and inasmuch as it is, and has been, recognized as a corporation for income tax purposes, well it would be immaterial throughout the three-year period what figure you would put it in at; it would be the same figure right through the three years. However, that evidence relating to the 186 Club is very relevant and material in the case to prove a source of income to Mr. Remmer. Although the reports of income were made as a corporation, it is very apparent that it is a very peculiar type of corporation. There was no stock; it was incorporated as a social club, a non-profit corporation under California law. The actual beneficial owners of the club after the first year, as disclosed by the evidence, were Mr. Remmer, Mr. Kyne, Mr. Busterna, and Mr. Lando. Mr. Lando and Mr. Kyne testified that they did not get anything out of the club. Mr. Busterna testified he got his salary each year and a bonus, that is, he

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got a bonus each year and $25 a day salary and in addition to that there was another partner, Mr. Casselini, who also did not get anything out of it. Mr. Busterna testified the club made money every year while he was acting manager, from 1944, 1945 and 1946. The club kept no books. There is no indication of what happened to the money that was made, other than testimony to the effect that each day a representative of Mr. Remmer's, either Mr. Kyne or Mr. Busterna or Mr. Lando, would go to the club in the morning and pick up the receipts and take them to the office of 50 Mason Street.

The Court: The motion will be denied.

Mr. Avakian: Now, your Honor, that completes the motions to strike and at this time I would like to make a motion for acquittal, based on the grounds that the prosecution's evidence does not make a prima facie case which would warrant submission of the case to the jury.

The Court: That motion will be denied.

Mr. Avakian: Would your Honor care to be heard? There are some cases we think are squarely in point on the facts in this case, dealing with the defect——

The Court: What is the law?

Mr. Avakian: I will refer specifically to two cases which I would like to discuss in connection with the motion. One is the case of Bryan vs. United States, which was decided by the 5th Circuit Court of Appeals in 1949, 175 Fed. (2), 223, and the other case which we believe is right on the point is United States vs. Fenwick, decided by the 7th Cir-

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cuit Court of Appeals in 1949, 177 Fed. (2), 488.

The Court: What is the point in the Bryan case?

Mr. Avakian: The point in the Bryan case is specifically this, that government agents admitted that at the starting point of the indictment period—it was a net worth case—they admitted that their computations did not include all of the cash that might have been in existence, but they said they simply included the assets as to which they determined the value. Now, your Honor, the case——

The Court (Interceding): Is that the point you made here because they couldn't show the amount of money in the safe or safety deposit boxes?

Mr. Avakian: On that particular point, that is it exactly.

The Court: That would be putting a premium on proving your money?

Mr. Avakian: No, your Honor, there is no obligation under the law for anybody to refrain from using a safety deposit box, nor is there any obligation under the law to keep any record for future use as to what you have in safety boxes.

The Court: If that is the point, I am not going to entertain it. What other point?

Mr. Avakian: That is one. This is case on appeal and conviction was reversed with the statement motions should be measured——

The Court (Interceding): I am not going to entertain that one.

Mr. Avakian: Your Honor, that is supported by

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the general rule applied to the 9th circuit also. If your Honor does not care to hear argument further——

The Court (Interceding): On that point, no.

Mr. Avakian: Well, your Honor, our presentation would be necessarily more than that but specifically that would be the most important item, I believe. As a procedure matter, I might say the appellate courts have indicated to some extent in connection with motions for acquittal that in respect to any error that might have occurred in ruling on motion for acquittal, that the basis of the motion should be made to the trial court, so the trial court could exercise its judgment on it and in order that we might not be prejudiced in that respect, in the event the question should ever arise, your Honor, we would like either the opportunity for full presentation of our position, or we would like to have your Honor rule that, although we have made that request, you do not wish to take the time to entertain it; either way, so we won't be prejudiced.

The Court: I can not see how a Court could reverse a case of this kind because investigators could not determine what was kept in a safe deposit box or a safe.

Mr. Avakian: Would you like to have me read to you where they hold motions of acquittal should be granted?

The Court: If it is on that ground, I would be glad to hear it.

Mr. Avakian: Yes, your Honor, that is what I

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have been trying to show, it is on that ground, and in order to show, let me give you the facts.

The Court: Let me inquire if the Bryan and Fenwick cases are the law of this circuit?

Mr. Avakian: Absolutely, because really these cases are simply a particularization of this type of computing income on the net worth method on the general proposition that in a circumstantial evidence case, the case should not be submitted to the jury unless the evidence excludes every reasonable hypothesis of innocence. The Circuit Court of Appeals for the Ninth Circuit has continuously said that that is the rule of the circuit.

The Court: In other words, all that would be necessary to void the effect of all the other evidence of the case would be for the defendant to show that he had a safe deposit box somewhere and no one else knew what was in it except himself. That is what that would amount to.

Mr. Avakian: Your Honor ignores the burden of proof and circumstantial evidence rule, and let me give you the facts in the Bryan case because I think it fits so exactly, insofar as this point is concerned. In the Bryan case the indictment alleged evasion for the years 1943 and 1944. The government sought to prove its case on the net worth expenditures method, and the Court said:

"The net worth-expenditures method of establishing net income, sought to be applied in this case, effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

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Now, then, your Honor, in computing the defendant's proper net worth, the revenue agents gave him no credit for cash on hand at the beginning of the period, except what was in his bank account, and here is the testimony, your Honor. This question by the Court:

"Q. If you overlooked any assets that this defendant had, in your calculations, then your calculations would be in error or subject to revision?

"A. Yes, sir."

The Court: Wouldn't such erroneous calculations be in favor of the defendant?

Mr. Avakian: No, your Honor. It would depend. If the amount in cash was not included in the opening net worth and that amount was used to make inventory later, the omission of that cash from the opening net worth would work to his disadvantage. That is the point of the case. Here, for example, in this case we have evidence in December of 1943 $17,000 was put in this safe deposit box. There is nothing reflected for 1943 and these agents have admitted they couldn't determine the amount and for that reason put nothing in. The testimony is there was at all times money there. We do not mean that if they told us at the time they were going to compute on the net worth method, records could be kept, but the income tax law says you can compute income on the basis of receipts and disbursements or the net worth method and they come along six years later and try to put a man in jail because he doesn't at that time have records to show what he had in the safety box on December 31, 1943. There

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is nothing in the law that requires that records be kept.

In the Bryan case the questioning went on:

"Q. And you don't mean to say that he had no money whatsoever other than what is shown on that bank account, shown on January 1, 1941?

"A. I didn't say that.

"Q. Doesn't your audit assume that?

"A. That is all the money we could account for."

Then skipping down a few questions:

"Q. And yet you assume that the only monies he had were in the bank on the first day of January, 1941? A. That is all we took into account.

"Q. You don't know whether he had a lot of other money, or not? A. No, sir."

Now that is the end of the questioning, your Honor, and then the opinion of the appellate court goes as follows:

"These admissions are serious in this case because the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in from the operatior of his night clubs and gambling enterprises. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. The jury no doubt disbelieved, and had the right to disbelieve * * *"

I might say in this case his wife testified that he

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had approximately 180 thousand dollars in cash at the time. And the Court says the jury disbelieved that and had a right to disbelieve her:

"* * * but in view of the auditor's admissions that he was not able to say that his computation included all of the assets of the Defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the Defendant as to the lack of additional assets at the beginning of the tax period, the evidence, in the light of the bill of particulars, was insufficient to make out a prima facie case against the Defendant on the net worth expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income."

Now the Fenwick case, your Honor——

The Court: What page is that in 177 Fed. (2)?

Mr. Avakian: The case commences at page 488, your Honor. Now, in the Fenwick case, after reviewing the facts there to show that the evidence of the government did not include the possibility of their being other assets in existence at the beginning of the period, the Court made this statement—and, of course, this is a case in which there was a conviction and in which the court reversed the conviction:

"The weakness of the government's position, stressed by defendant, is the uncertainty of the pro-

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priety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence." Citing a number of cases.

Then continuing:

"By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943."

And then as they discuss that the Court made this statement:

"There is no proof that he had not accumulated cash, or assets of other character over the 25 years during which he had been engaged in business."

Now I point out, your Honor, that in this case *the is in* even stronger position because here there is proof that there was cash in existence at the beginning of the period, which the prosecution's net worth computations did not take into account.

The Court: What proof is there of cash?

Mr. Avakian: Mr. Kyne's testimony, your Honor, that throughout this entire period there was cash in varying amounts in the safety deposit boxes and safes. And there is, as I pointed out a moment ago, of course, the testimony of Mr. Maundrell and Mr. Pechart also, but particularly with respect to the starting point, there is in addition to that general testimony, the fact that less than a month before the end of 1943, $17,000 was put in the safe deposit box at one time. Here is the conclusion, your Honor, of the Fenwick opinion:

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"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt.

"The judgment is reversed."

Now, your Honor, we are not making this motion simply to be wasting time. We are making this motion in all sincerity and we would like to have your Honor consider it in that light, because we are convinced, your Honor, on the basis of this record, the submission of this case to the jury would be reversible error.

Now, let me back up a minute, in the light of the wording of these cases, as to the law, to turn for a moment to what the circumstances are for the use of

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the net worth method. The net worth method of computing income is an unusual method, your Honor. It is not the method that is ordinarily used, either by taxpayers or by the government. It is not the method that is contemplated by the income tax form. It is something that is unusual, it is used in particularly unusual circumstances, and the method can not be used unless those circumstances are present. Now, one of those circumstances which is essential to the use of that method is that the beginning net worth be established accurately. Now, these are not only rules that are applied——

The Court: I appreciate your sincerity in this argument but what you are saying to me is simply unless the government can tell you and this jury the number of dollars and cents in a safe kept by this defendant, that this case must fall.

Mr. Avakian: Your Honor——

The Court (Interceding): I will not go along on any such theory.

Mr. Avakian: That is not what I am saying, your Honor. If I may state to you what my position is——

The Court (Interceding): Why isn't that a fair statement of your position?

Mr. Avakian: I am trying to explain and maybe your Honor will see the difference.

The Court: All right.

Mr. Avakian: My position is before the government may use the net worth method of trying this defendant for tax evasion, as distinguished from other methods, they must, under the cases—and this

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is not my idea, your Honor, I am quoting to you from cases—the cases hold, not only the Circuit Court of Appeals, but tax court in civil cases, hold the same thing—that before the government may determine income on net worth as distinguished from other methods, it must establish, with reasonable accuracy, the opening net worth. Your Honor, there has not been one iota of evidence in this case that there was a dollar's worth of income that wasn't entered in the books of these enterprises. The books were made available, they have not found one business transaction which was not entered in the books, so if we use the book method of determining income, your Honor, there would have to be an acquittal here and it is for that reason that the government is not using the book method, but is trying to use this unusual net worth method. It is fundamental, your Honor, that you can not wear a shoe unless it fits, you can not wear a hat unless it fits, and you can not use the net worth method unless the requirements set down by the courts are present. Now, the tax court in civil cases, where the burden is on the taxpayer and not the government, the tax court has said a deficiency assessed on the basis of net worth method, where there is no accurate established starting point, must fall, even though the taxpayer has the burden of proof. (Reads from 7 Tax Court Memorandum Decisions, page 847.) Your Honor, that is not my language. That is the tax court, which deals only with tax cases.

So, your Honor, what I am saying to you is this,

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that the prosecution's proof itself shows that the circumstances which would permit the use of the net worth method are not present here. They are not present because the evidence shows that there was an existence at the beginning of this period of at least one asset, namely cash in safety deposit box, which can not at this date be determined as to amount. That being so, the net worth computation can not accurately be made, and you will recall that the agents of the government were frank enough to admit on cross-examination that their computations of net income on the net worth method would be accurate only if they have all assets and all liabilities and that to the extent that there was knowledge in existence, which they did not reflect in their net worth statements, their computations were inaccurate. Your Honor, I am sure, from what you have said, has been of the impression that that requirement was not present. I am sure your Honor would not have dismissed me so summarily when I started to make this motion had you been fully aware of the rules of these cases.

If I may be indulged by your Honor to develop that further, I would like to point this out to your Honor, that income tax evasion cases fall in two categories.

The Court: I will give you time tomorrow. We will be in recess until tomorrow morning at ten o'clock.

(Recess taken at 4:00 p.m.)

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(In the absence of the jury.)
(Feb. 6, 1952—Notebook 340A—PP 1-27.)

Mr. Avakian: At the end of yesterday's session, I was about to state to your Honor that in tax evasion cases there are generally two types of proof of tax evasion that are referred to; namely, direct proof of unreported income, and the other is indirect proof of unreported income.

Now in cases where there is direct proof of unreported income, your Honor, there is a situation where, for example, the prosecution will present testimony to the effect that the defendant had a particular transaction which was not entered in the books or in his returns. For example, proof will be offered that at such and such a time the defendant received some income from Mr. A and the evidence in the record shows that Mr. A paid some income to the defendant at a particular time and then the evidence shows that that particular transaction, that particular receipt of income, was not entered in the defendant's books or was not reflected in the returns. There you have an example, your Honor, of direct proof of unreported income.

The Court: May I ask you a question. Do we find any note or record or entry in any of the records, books or exhibits here in evidence, of any amount of cash being in any of the safe deposit boxes or in the safe?

Mr. Avakian: The amount, your Honor, no, there is no evidence whatsoever as to the amount at any particular time.

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The Court: Then that suggested to me again the thought which I questioned yesterday. There has been no entry of an estimated amount of any amount of cash in safes or boxes on this Exhibit 183.

Mr. Avakian: That is right, your Honor, that is the vice of it.

The Court: And your complaint is that there should have been?

Mr. Avakian: No, I don't see how there could be, your Honor, because we don't know the amount.

The Court: All right, then what is your point?

Mr. Avakian: My point is in view of the fact that we can not determine the amount of that asset, we can not accurately determine the net worth and if you can not accurately determine net worth, you can not use net worth method.

The Court: Do you dispute the statement which you heard made by Mr. Weaver, maybe one of two witnesses, and Mr. Brady, that the net worth method is used when books are not adequate?

Mr. Avakian: That is not quite true, your Honor. The law is this in the Internal Revenue Code of Regulations, that the income shall be determined by the methods used by the taxpayer, which is the books, your Honor, unless they will not clearly reflect the income, in which case the cases hold, under the law and regulations, it is then permissible to use another method, if that other method will more clearly reflect the income.

The Court: What other method?

Mr. Avakian: The other method the government is trying to use here is the net worth method and my

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point, your Honor, is the evidence is such that the other method the government is trying to use, the net worth method, does not permit us to clearly determine the income, because you can't determine the starting point net worth.

The Court: What is the alternative?

Mr. Avakian: The alternative then in the state of this record is to use the books.

The Court: In other words then, in a charge of this kind, the mere fact that there existed a depository for money and that no one knew, except the defendant himself, what the amount of money was placed in that depository from time to time and so the books were inadequate, how then would you determine the income of the individual?

Mr. Avakian: Well, in a criminal case—I assume——

The Court: I am asking you that question, whether criminal or civil.

Mr. Avakian: Because the answer differs, that is why I make that distinction. In a civil case the burden of proof would be on the defendant and as long as the Commissioner charged a deficiency which had some reasonable foundation, the burden would be on the defendant to come forward and prove that the deficiency was wrong, but in a criminal case the burden is never shifted to the defendant, the burden is on the prosecution and unless the prosecution can show the starting net worth, they may not use the net worth method.

The Court: Let me ask another question. There is evidence in this record, is there not, that sums of

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money in some amount were placed in this safe from time to time and in these boxes?

Mr. Avakian: That is right, your Honor.

The Court: And the mere fact that the government has no way, or has been unable, to determine the exact amount and can find no figure which it could use as a so-called starting point, then they can not use this present method of determining net income?

Mr. Avakian: It is for that reason that in the Bryan and Fenwick cases the Court held it was reversible error.

The Court: But in civil cases that could be done?

Mr. Avakian: In civil cases the burden of proof is reversed and it is up to the defendant to prove that deficiency assessed by the Commissioner is wrong, so you have a different picture. Even in a civil case though the tax court has held that where deficiency is based on an inadequate starting point it falls.

The Court: Now I want some more information. We have a legal argument here. You say this method is not the proper method, in view of the fact that we have no evidence as to the amounts of money in these depositories.

Mr. Avakian: Correct.

The Court: What method would be the correct method, in your opinion?

Mr. Avakian: On the basis of evidence in this record?

The Court: Yes.

Mr. Avakian: On the basis of evidence in this

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record, the proper method would be the use of the books, for this reason, your Honor, and this is what I was going into when I talked about direct and indirect proof.

The Court: But the books do not show any amount of cash in these depositories.

Mr. Avakian: That is immaterial in determining income on the book method. That is the point. Let us go back to the time you were engaged in law practice—use me for an example, engaged in private law practice. I keep books and records of all money received and expenses paid out, but I do not keep books and records on the amount I have in the bank or in my wallet or loan to people or people have loaned to me because in determing income on the method of receipts and disbursements it is immaterial how much money you have on hand somewhere; the important thing is what did you collect as income, what did you pay out as expenses. Suppose, your Honor, you were trying to determine my income on the net worth method. I couldn't tell you now what my net worth was ten years ago. I would have no way now of proving that to you because of the fact I have never kept any record of the assets and liabilities in that form. The only records I have kept, your Honor, are items of income and items of expenses. I have loaned money to people, my brother and my father and friends, people have loaned money to me from time to time——

The Court (Interceding): Well, it is a crime

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to fraudulently hide assets or make false income tax returns.

Mr. Avakian: No question, but let us not assume that conclusion.

The Court: It is a crime.

Mr. Avakian: Oh, yes.

The Court: Then any one who wants to violate the law in that respect, all that person would find it necessary to do would be to get hold of a safe somewhere and keep it in his office, if your theory is correct? That is your view?

Mr. Avakian: Absolutely not, your Honor, because the cases are full of convictions which have been sustained for tax evasion in instances of that kind, where the government has been able to prove that there was direct proof of unreported income, they proved that the defendant had transactions with Mr. A which he did not report, so they prove a starting point. They show, for example, that the defendant went through bankruptcy, which shows zero, or show that the defendant submitted financial statement to his bank at or about the time of the starting point, which fixes the starting point, or the defendant admitted to the agents what he had, which fixes the starting point.

The Court: What is your suggestion as to determining the starting point in this case?

Mr. Avakian: At this time in this case I do not see how any starting point can be determined. That is why I say you can not use the net worth method without a starting point.

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The Court: Then the only alternative would be to accept the defendant's books as correct and determine from the entries in those books.

Mr. Avakian: And that is exactly the point of the Bryan and Fenwick cases. When the government is proceeding on circumstantial evidence——

The Court: If their statement is the correct statement of law, you have opened the door wide to fraud.

Mr. Avakian: No, I disagree and intend to show you that this same rule is applied by this circuit as to the burden of the prosecution in a circumstantial evidence case, and that is what I was going to go into, your Honor.

The Court: Very well.

Mr. Avakian: I think in the background of all this, your Honor, we have to remember the rules of burden of proof in a criminal case and we have to remember the rules of circumstantial evidence, because this whole question——

The Court (Interceding): I have those rules in mind. Do not waste time in arguing those rules.

Mr. Avakian: I gather from your Honor's remarks that you are afraid the rule of the Bryan and Fenwick cases would permit the defendant to avoid taxes unless the courts forced him to come forward, which——

The Court (Interceding): The mere fact the defendant has under his control, or in his possession a depository for money and the government is unable to ascertain the exact amount, that they are forestopped in proving a case of this kind——

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Mr. Avakian: That is right, your Honor.

The Court: ——I can not go along with that.

Mr. Avakian: That same thing applies in a murder case. They can not force the defendant to come forward and testify as to his knowledge. The government has to prove the case. Now, your Honor, in a direct income case, as I mentioned a moment ago, the burden is that of showing that there was some particular income transactions which were not put on the books. Now in this case, your Honor, we have a number of businesses. All these businesses were managed and operated by persons other than the defendant, that is, other people had direct supervision and control. The records of these businesses were maintained by these other people, Mr. Maundrell, Mr. Kyne, etc., Mr. Slater and Mr. Ayton, who unfortunately now are dead. The entries in the books were maintained, in most instances, by some of the employees. For example, for the Menlo Club, there were some of the cashiers that made out the poker sheets for each shift and Mr. Weaver admitted that the books of the Menlo Club contained every penny shown on the poker sheets for the year 1946, where sheets were available. Now, your Honor, in spite of that fact and in spite of the fact that if there were any income which by-passed the books, it would have had to be done with the knowledge and connivance of this large number of other people, in spite of the fact that the government has investigated the case for five years, they haven't come forward with proof of one penny of income which by-passed the books. They have not produced

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one cashier who says, "Although we took in $500, I have only $400." They haven't produced a single transaction that is not in the books. So we do not have any evidence, your Honor, after over thirty days of trial, five years of investigation of a case in which all of the transactions were handled by parties other than the defendant, by a large number of them, we do not have one iota of proof of direct evidence of unreported income. Instead the government says, "We think there was unreported income because we contend the net worth increase is more than the amount reported." Now, your Honor, they can't say that until they have accurately determined the net worth increase and they can't accurately determine the net worth increase until they get all the assets and all the liabilities.

Now your Honor is worried that the rule of the Bryan and Fenwick cases impose an unbearable burden on the government. Let us look at it the other way——

The Court (Interceding): It isn't that, but it opens the door for people evading just taxes.

Mr. Avakian: It is the same thing. You are saying the government can not prove fraud with the Bryan and Fenwick cases if the defendant has money in safe deposit boxes. Look at the other side. What about the burden upon the defendant if what you contend the rule should be true. Here comes the government. They say, eight or nine years ago you had these assets that we know as to amount and these liabilities that we know as to amount and there was another asset, the amount of which we do not

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know, and it is up to you then to satisfy the jury what you had on hand eight or nine years ago—suppose, for example, that nine years ago I bought a house and paid a five thousand dollar down payment. Let us suppose I had that five thousand dollars in my safe deposit box before I made that payment. Now actually the making of the down payment on that house would represent no net worth increase whatever. It is simply a transfer of money from my safe deposit box into another asset, but the government would be saying, under your rule, that "You have a five thousand dollar increase in net worth and it is up to you to prove to the jury's satisfaction that you had that five thousand dollars in your safe deposit box."

Now, your Honor, if the government had said to me ten years ago that "It is required that you keep a record of money that you have in safe deposit box," then perhaps it would be justifiable to put that burden on me now, but when the law says all I have to do is to report the items of income that I receive and the items of expenses I pay out and then nine years later the government comes to me and says, "Now you must prove, I am telling you, for the first time, that you must prove what you had in your safe deposit box nine years ago," how about an unbearable burden placed on the defendant? That is why the Bryan and Fenwick cases say you can not use net worth method unless you establish net worth starting point.

The Court: Your statement may be a correct statement of law, but I do not think it applies. The

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government has not asked the defendant to come forward with any proof.

Mr. Avakian: Your rule would require—it would say you explain to the jury what you have, instead of making the government prove.

The Court: If this estimate, or the conclusions, of net worth of this defendant, as determined by these expert witnesses, had to do with or depends in any way upon any amount of money in the safe or in the deposit boxes, then I think there might be some merit to your argument.

Mr. Avakian: Your Honor, if I may accept your Honor's statement at face value, then I think you will have to direct an acquittal here, because the uncontradicted evidence is that there was some amount, and when you have an asset at the beginning of the period and you don't take its value into account, you can't determine what the increase was between the beginning and end of the period. In other words, your Honor, if there is an asset there of undetermined value, then you have not determined the net worth. The net worth is the difference between all the assets and all the liabilities. You can't take a partial list of assets and partial list of liabilities and subtract one from the other and say that is net worth. The definition of net worth, as every government agent testified, is the difference between all the assets and all the liabilities.

The Court: There is another question involved here. The government is required to prove beyond

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reasonable doubt the allegations of this indictment.

Mr. Avakian: That is right.

The Court: Does it make any difference by what means those allegations are established, whether net worth or some other? Are they confined to base their testimony on that point to any particular method?

Mr. Avakian: That is all they offer. The net worth method is all they offer. We haven't selected that method; we haven't told the government, "You are limited to anything," yet in over thirty days of trial they rely only on the net worth method.

The Court: How can we say that when they use entries and the books as the basis of some of these —Exhibit 183?

Mr. Avakian: They use the books not to determine income, only to determine assets. They have used the net worth method of determining income and gone to certain selected entries in the books for the purpose of attempting to evaluate assets and disbursements. In the opening statement of Mr. Pike, he said, "We are going to use the net worth method" and the only method he said they were going to use and the only method they have tried to use. I told your Honor a moment ago in this Circuit the rule of circumstantial evidence that governs the law of criminal cases is applied and the basic rule is in a circumstantial evidence case the case must not be submitted to the jury unless the circumstantial evidence excludes every reasonable hypothesis——

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The Court: That is an instruction I am going to give to the jury in this case. There is no argument on that.

Mr. Avakian: Let me then demonstrate the application of that rule by the Ninth Circuit to a case which, although it is not a tax case, is along similar lines in its problem to what we have here. Karn vs. United States, decided by the Ninth Circuit in 1946 and reported in 158 Fed. (2), page 568, a decision by Justice Bone. In that case, your Honor, there was a conviction for stealing the sum of approximately $1079 in currency and silver from a cash register in a place known as the Chena Bar, I believe in Alaska. The evidence showed the defendant had been at that bar earlier in the evening, that later that same evening he had borrowed an insignificant amount of money at another club from Gilbertson, used a part of that borrowed loan that same evening to repay a $10 loan, and next morning when he was arrested he had in his possession $377 in currency, including in which there was a soiled ten dollar bill. There was testimony from the bartender of the Cheno Bar that prior to the robbery there was in the cash register a soiled ten dollar bill similar to the one found next morning in the defendant's possession. The defendant did not take the stand. The State produced the man Gilbertson, from whom the defendant borrowed money that evening to repay his loan, to testify how much the defendant borrowed from him. After the conviction, the Circuit Court, the Ninth Circuit,

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reversed the conviction and held that the Court should have granted a motion for acquittal——

The Court: I agree with that too, if that is the state of the evidence, no question in my mind.

Mr. Avakian: Then, your Honor, let us see how that bears here. What your Honor is saying is, if the government can't determine the amount of cash he had in the safe deposit box, it will be opening the door to evasion if the government was barred from using the net worth method. In the Karn case the government was required by the Circuit Court to establish itself in order to make out a case——

The Court (Interceding): I can't see where that has any application here?

Mr. Avakian: Let me read to you from the Court's statement, quoting now from the opinion:

"The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of accused as to exclude every reasonable hypothesis but that of guilt. (Citing cases.) Our considered judgment is that the evidence in this case falls far short of meeting this exacting standard."

Then the Court commented, your Honor, on the prosecution's proof, that the circumstances that the night of the robbery, before his arrest, the defendant had borrowed money. He had used borrowed money to pay back a loan and he had in his posses-

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sion next morning $377 and included in which was a soiled bill similar to the one in the register. Now the government argued that those circumstances were such as to permit the jury to infer that the night before he did not have any money because he had to borrow and the fact he had $377 in his possession the next morning indicated that he might have stolen the money, particularly since there was a similar bill. Now, the Court rejected that. The Court said that that is not sufficient circumstantial evidence, it must exclude every reasonable hypothesis.

The Court: I am well aware of that and I am going to instruct the jury to that same effect.

Mr. Avakian: Now your Honor has undoubtedly had personal experiences in working this rule and you know from your own experiences that with prosecutions that they are many cases in which there are circumstances pointing to the guilt of the defendant, but unless the circumstances are so complete as to exclude every reasonable hypothesis, you can't go to the jury on it. Now, your Honor, one of the circumstances here, which every case I know of says is an essential circumstance, is getting the starting point of the date accurately.

The Court: Sometimes you can illustrate a point by a ridiculous example. You can carry your idea along a little farther and instead of putting the money in the safe, put it in the defendant's pocket.

Mr. Avakian: Some of it could have been there. I have some money in my pocket and I assume your Honor has.

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The Court: And because it would be impossible for a third party to determine how much money you have in your pocket, your income can not be estimated, on your theory.

Mr. Avakian: If what you are saying, the Bryan and Fenwick rules are ridiculous——

The Court (Interceding): Personally I think they are.

Mr. Avakian: Let me call to your Honor's attention that those ridiculous rules, as your Honor describes they, were enunciated by the Circuit Court of Appeals by appellate judges, and furthermore, let me call this to your attention, in the Bryan case the defendant went up to the Supreme Court on another point, and although the case went to the Supreme Court, the Department of Justice did not appeal the holding of the court that no starting point had been established, so apparently the Department of Justice does not think that is a ridiculous rule and I might say to your Honor that I have been employed in the Department of Justice in the tax division and I have passed on the matter of prosecuting cases involving inadequate starting point, but not only I, but other lawyers in the Department of Justice, charged with the responsibility of prosecuting income tax cases, have to my knowledge always felt that you couldn't prosecute an income tax case on the net worth basis alone without direct evidence of unreported income, unless you did establish the starting point. Now maybe we are all ridiculous, your Honor, but I call that to your

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attention to evaluate whether or not that rule is ridiculous.

Now it seems to me, your Honor, that the ridiculous thing to do would be to say that the jury may speculate just how much money he had. There is no proof on it, but the jury may speculate and if they speculate one way, they can convict, and another way they can acquit, but the rule is in a circumstantial evidence case the jury may not speculate and the case may not be submitted to them unless there is a solid foundation of evidence, rather than speculation.

The Court: No, the instruction I am going to give in this case on circumstantial evidence is, if the jury believe the facts as shown by the evidence in this case are all consistent with the supposition that the defendant is guilty, and can not reconcile the circumstances produced in evidence with any other supposition than that of guilt, it is their duty to find the defendant guilty, but if they do not so believe, they should find the defendant not guilty.

Mr. Avakian: Your Honor, the Ninth Circuit held such an instruction erroneous because it did not include additional language——

The Court: We will argue that later.

Mr. Avakian: In the instruction though it must exclude every reasonable hypothesis of innocence. That is the language that was given in the case of Paddock v. United States, 79 Fed. (2), page 872, an opinion by Judge Wilbur.

Now, your Honor, there is one decisive point in

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connection with this motion for acquittal that I want to make, and that is the point, your Honor, that the prosecution has placed the Court in a dilemma which would require, on either alternative, an acquittal. One part of the dilemma that the prosecution has placed the Court in is the combined matter of whether there were partnerships and whether the books and records which have been introduced in evidence were legally and properly obtained and used in this case.

Now Mr. Thompson stated, in answering a motion to strike, referred to Maundrell and Kyne and possibly others, as partners. Yet the theory of their case is that these men were not partners. Now the prosecution can not ride both sides of the fence on that proposition. Either these men were partners or they were not. If these men were partners, your Honor, the case should be withdrawn from the jury because the case falls unless partnerships are ignored. If they were not partners, your Honor—and that is the basis on which they are asking that it goes to the jury—then it is now clear that the books and records which they obtained and used in part, and in part still have in their possession, were illegally obtained, because the evidence shows that they were obtained, not from the defendant, but from these other parties. Now if these other parties were not partners, were simply employees, the government had no right to take those books without the defendant's consent. They have the right to take books with the consent of Mr. Kyne and Mr. Maundrell only if Kyne and Maundrell, as

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partners, had a proprietory interest in those books. If Mr. Kyne and Mr. Maundrell were simply employees and the books then belonged solely to the defendant, the government had no right to take those books without the defendant's consent and the Court had no right to order us to produce the portion which had been returned to us against our wishes, for the reason, your Honor, no other party but the defendant had any right to surrender these books to the government.

Your Honor will understand we are simply pointing out the dilemma that the prosecution has brought into the case. It is our contention, of course, that these were partnerships, but if these were not partnerships, your Honor, then under the established rules, and I can cite your Honor——

The Court (Interceding): You say it is your contention that these are partnerships?

Mr. Avakian: Yes.

The Court: Then you argue that the failure of the Court to grant your motion to suppress this evidence—such motion could only be based on the theory that they are the defendant's books.

Mr. Avakian: No, I did not make myself clear, your Honor. What I am saying is this, that either these were good partnerships or not. If they were good partnerships, our motion to acquit should be granted, for the reason that there is then no offense. If they were not good partnerships, if the partners were ignored, then, your Honor, it was illegal to take the books.

The Court: Then when you made your motion

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to have the records returned to you, you had the theory at that time that these were not partnerships?

Mr. Avakian: No, your Honor; oh, no; because your Honor, even though they are partnerships, each partner has a proprietory interest, each partner can demand the right to inspect the books, each partner has the right to possession of them, so our motion was based consistently with the partnership theory. We were simply coming in as one partner, namely the one charged with crime, and asking for the opportunity to examine books in which our client had a proprietory interest as a partner. Your Honor denied that motion, your Honor denied our motion for an opportunity to examine the records still in the possession of the plaintiff, on the theory, as I understood your Honor's ruling, that the government had properly obtained possession of the books from third parties who turned them over. Now that would be proper, your Honor, only if those third parties were partners. If they are not partners, as the prosecution contends, they had no authority to turn those books over, the government had no authority to take them from those people, so that is the dilemma, why our motion for acquittal includes the ground that if the prosecution is correct in its contention that these are not partnerships, then the case should be withdrawn from the jury, because the only possible basis on which it could be submitted to the jury shows evidence illegally obtained from third parties prior to the trial and illegally obtained from us prior and during the

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trial. That is the additional ground of our motion to acquit, including the net worth starting point I was discussing before, and for your Honor's consideration I would refer, as authority on this additional ground, Wigmore on Evidence, 3rd Edition, Section 2325 and related sections, including 2292, and a book entitled, "Fraud Under Federal Tax Law," by Harry Graham Balter, 1951, the use of which I would be glad to make available to your Honor if you desire. (Reads from book.) That last part would not be applicable; the first part would bear directly on our motion—the possession of which we desired to obtain because its use becomes important to use in the preparation of the trial. Now your Honor's justification for that ruling was that these releases had been obtained originally by the government from third parties who had agreed that the government could have them. Now, your Honor, that agreement of those third parties, which was the basis for your Honor's ruling, would have no legal effect whatsoever unless those third parties had a proprietory interest in these books as trustees.

The Court: Or an authorized agent.

Mr. Avakian: There is no evidence they were authorized in any respect to turn these books over by the defendant Remmer. No evidence whatsoever about that; in fact, they said when the agents came in and asked for them, they turned them over. That is all the evidence, your Honor. If I may call your attention to Mr. Campbell's statement on

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the hearing on motion to inspect these books November 15, 1951, in Las Vegas——

The Court: I will tell you again it was made a short time before, on the eve of this trial, which would have necessitated a postponement, and you had five years to make the motion.

Mr. Avakian: No, your Honor, that is not true. We never were denied access to these books until November 7th or 8th, 1951, and we immediately filed the motion.

The Court: Well, that is the reason I denied the motion.

Mr. Avakian: The correspondence was before your Honor, showing that Mr. Campbell in November, 1951, for the first time, gave us the double talk that we could examine the books provided we got the consent of third parties, and he wouldn't name them.

The Court: I don't think that should remain in the record.

Mr. Avakian: It is in the record now, in the affidavit.

The Court: That statement you made about Mr. Campbell's double talk may be stricken.

Mr. Avakian: His letter is in the record.

The Court: I will admonish you not to make references of that kind.

Mr. Avakian: The defense have been accused of a lot of things.

The Court: I don't know anything you have been accused of.

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Mr. Avakian: Yes, of withholding records and——

The Court (Interceding): Are we trying the defense or Mr. Remmer? Proceed with your argument.

Mr. Avakian: By defense, I mean Mr. Remmer.

So, your Honor, we submit, first of all the motion for acquittal should be granted, for the reason that the prosecution has not established a proper starting point for net worth, and if your Honor cares, I can go through numerous cases showing the distinction the courts draw; and, secondly, we submit to your Honor that the motion for acquittal should be granted on either alternative of this situation, that if the partnerships are recognized, then there is no showing upon which the jury could find the defendant guilty, and if the partnerships are not recognized, then the case of the prosecution is based, of necessity, upon evidence illegally obtained and retained, which does not furnish a proper basis for submission of the case to the jury, and I again would request that your Honor consider that it is not a dogmatic matter as to whether the defendant must come forward with proof as to what was in the safety deposit boxes. On the contrary, it is putting an unbearable burden upon him, or anybody else, to try to determine now what was in the safety boxes eight or nine years ago and to directly or indirectly apply a rule of law which would impose that burden upon the defendant would violate the fundamental proposition that the defendant would be presumed to be innocent, that

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he need not come forward with evidence of innocence; on the contrary, the government must prove guilt beyond a reasonable doubt and any circumstantial evidence case must, in order to warrant submission of the case to the jury, present evidence which excludes every reasonable hypothesis of innocence and present evidence which is inconsistent with any theory of innocence and is consistent only with the theory of guilt.

Mr. Campbell: If the Court please, it is the contention of the government that the principles relied upon by defense counsel in the Bryan and Fenwick cases are not good law. They are not the law of this circuit and if they were the law of this circuit, it would be time that that law be changed.

In that connection I first wish to refer your Honor to the very strong language of Judge McCord in the Bryan case in dissenting vigorously, and I do so because some of the language is very similar to that stated by your Honor in the criticism of that case. Judge McCord says as follows, reading from page 227. The case, of course, is reported at 175 Fed. (2), 223. This is from the dissenting opinion:

"The majority predicate their reversal on the sole ground that the evidence was insufficient to make out a prima facie case against the defendant on a net worth-expenditure basis, for the reason that the testimony of the government auditor did not expressly exclude the hypothesis that some of the large expenditures by defendant 'might have been from sources other than current business income.'

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This is sheer speculation and conjecture, and an unwarranted presumption in favor of defendant's innocence after he has been fairly tried and convicted. Moreover, it is an unreasonable hypothesis which has already been rejected by the jury as manifestly incredible and unworthy of belief. The ultimate effect of the decision is to shackle the government to a practically insurmountable burden of proof in net worth-expenditure cases concerning matters which are peculiarly within only an evading defendant's knowledge.

"In all cases, such as here, where a defendant has either destroyed his records, or they are otherwise unavailable, the government must of necessity resort to other indirect methods of proving unreported income, such as (1) by an analysis of the defendant's bank deposits; (2) by showing an increase in net worth on the net worth-expenditure basis; or (3) by evidence of purchases, expenditures and investments made during the tax years on which the prosecution is based. Many tax offenders of the worst type would go unwhipped of justice if the government were not allowed to establish unreported taxable income by this type of circumstantial evidence. Each of the above methods is predicated upon the sound legal proposition that evidence of a large amount of unexplained funds or property in the hands of a defendant during the tax years under scrutiny establishes a prima facie case of understatement of income during that period. (Citing cases.) It is then incumbent upon the defendant to go forward and offer proof in explanation of this unreported excess income, much in the

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same manner as would be required under the 'possession of recently stolen goods' rule. (Citing cases.) It would be manifestly unreasonable to require the Government to give such a defendant a bill of particulars on his own hidden and unreported income, or to offer proof to exclude the possibility that such other secret income does not in fact exist. (Citing cases.)

"The unusual contention on behalf of a defendant in this type of case is that the unexplained increase in net worth results from expenditure of funds accumulated and secreted in earlier years, for which prosecutions are then barred by the statute of limitations. Obviously, because of the difficulty and inaccessibility of such proof, the Government could not possibly wholly rebut such a contention, as only the defendant himself knows whether the defense is made in good faith. In such instances, after the Government has offered all proof available, the defendant should not be permitted to stand silently by and thwart a conviction on the claim that a failure to prove unknown assets does not satisfy net worth requirements. Manifestly, the truth and good faith of such a defense is for the jury alone." (Citing cases.)

And so the Court goes on in similar manner.

Now I attempted to secure, before appearing here this morning, a recent article in the Georgetown Law Review, but I found it was inaccessible in the legal reprints and we communicated with Mr. Bible and others who are graduates whom we thought

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might have the article available. It discusses the Bryan and Fenwick cases and points out among the circuits which do not subscribe to the holdings in those cases, as demonstrated by other decisions, are the 2nd, 4th, 6th, 8th and 9th circuits. Now the case in the 9th circuit which sets forth the method to be followed in these cases, and which has previously been cited to your Honor and which I will not read again, is that of Barcott v. United, reported at 169 Fed. (2), 929, in which the decision was written by Judge Orr.

I do wish to read to your Honor, however, some of the decisions of circuits commenting upon the Bryan and Fenwick cases and to the soundness of the rules which they attempt to enunciate. The first case to which I wish to refer is that of Gariepy vs. United States, Sixth Circuit, decided May 28, 1951, reported in 189 Fed. (2), at page 459. Reading from page 462:

"From 1938 on, according to the computations of the Treasury agents, the appellant's practice materially increased, as did the net worth of his assets. In an exhibit reflecting their computations and indicating the reported income and net worth increases, the table shows a net worth at the end of the tax year 1945, of $128,938.52. It is here reproduced and set forth in the margin.

"The transactions upon which this computation was made are all sustained by evidence. They were not successfully controverted. It is true that appellant's counsel made vigorous attacks upon the accuracy of the computation. At best it was, of

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course, but an estimate, but as an estimate it was entitled to the consideration of the jury because based on substantially the entire evidence in the record. (Citing cases.) The principal attack of the appellant upon the evidence which sustains this computation is two-fold. The first is the challenge to the accuracy of the appellant's net worth, or lack of it, at the base period, and secondly is the contention that each item of evidence must be so fully and accurately established that it permits no reasonable doubt as to the fact upon which reliance is placed." Then skipping over certain matters which are not related here, setting out some general rules, the Court goes on:

"The appellant's reliance upon Bryan v. United States, 5 Cir. 175 Fed. 2d 223 and United States v. Fenwick, 7 Cir. 177 F. 2d 488, is of little avail to him because there was no such comprehensive investigation either as to the net assets at the base period or subsequent increases as was here undertaken. Moreover, in the Bryan case, a vigorous dissent weakens the conclusion there arrived at, and the Fenwick case appears to be in conflict with United States v. Hornstein, 7 Cir. 176 Fed. 2d 217, decided by the Seventh Circuit but a few months prior to Fenwick."

The Fenwick case also being a Seventh Circuit case.

"Judge Miller of this court, writing in Brodella v. United States, 6 Cir. 184 F. 2d 823, had no difficulty in distinguishing the Bryan and Fenwick cases

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from cases involving facts similar to those here produced."

The Court: Unless the defendant wants to offer something in addition, I am ready to rule on this motion.

Mr. Avakian: I would like to comment on the Barcott and Gariepy cases.

The Court: You may do so.

Mr. Avakian: The Barcott case, to begin with, Mr. Campbell did not mention to your Honor that the prosecution witnesses, in their net worth computation, set up as cash in safe deposit boxes at the starting point the sum of twenty-three thousand dollars. They did not leave a blank, a question mark, they set up an amount, twenty-three thousand dollars, which asset reflected in favor of the defendant. Secondly, in the Barcott case there was evidence of attempt by the defendant to bribe the revenue agent who was investigating him and the Ninth Circuit relied on that as circumstance indicating guilt which would warrant submission to the jury.

In the Gariepy case, decided last fall by the Sixth Circuit, the significance there to distinguish it from this case is that Gariepy had just gone through medical school and interneship and just completed that at the time it the starting point in his case and there was evidence that he borrowed money to go through medical school and set up his practice at the time of the starting point, your Honor, so you do not have the situation there factually that you have here. Here, your Honor, we have a case in which it is admitted, and part of the uncontradicted evidence,

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that there was some cash. There is an asset. Suppose, for example, your Honor, there had been a house instead of cash in safe deposit box, but the government said, "We can't determine what the cost of that house was that you had at the beginning point, we can't determine it, so we won't give you any credit for it."

The Court: Wouldn't there be an accounting of that to determine the cost of that house if you didn't have actual evidence of the transaction? Isn't there an accounting of that by which the fair cost of that may be known?

Mr. Avakian: Not cost. Value, yes, but there may be many instances in which the cost of a house could not be determined seven or eight years ago. In most instances it could, of course, but I am assuming those instances in which there is an asset, namely a house, of a value that can not be determined. Without determining your value, you can not determine net worth——

The Court (Interceding): But you cannot hide a house in your pocket or safety deposit box.

Mr. Avakian: But if you do not know the value, it is the same thing. Nobody was hiding money and your Honor's statement indicates your Honor has pre-judged. The use of the word "hiding" is not a correct term.

The Court (Interceding): Just a minute—I do not intend to be assailed by you, or any other lawyer. I have not pre-judged the case. You had better be careful about making those remarks to

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me. Now don't say any more. You can't say another word.

Mr. Avakian: If I can't say any more, I won't.

The Court: Are you through with your argument?

Mr. Avakian: Well, your Honor, I have stated the points upon which the motion for acquittal is based and I have stated the basic legal propositions upon which we rely. There is exhaustive discussion which could be undertaken, of course, but at this moment I will submit the motion, unless your Honor cares to have further discussions.

The Court: The motion is denied. It stands submitted and is denied.

Wednesday, February 6, 1952—2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Gillen: We will call as our first witness, your Honor, Mr. William Remmer, the brother of the defendant.

WILLIAM REMMER

being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Your name is William Remmer?

A. Yes.

Q. Will you relate to us, please, what is your address?

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(Testimony of William Remmer.)

A. 50 University Drive, Oakland.

Q. That is in California? A. Yes.

Q. What is your business?

A. I am an automobile dealer.

Q. Will you state the name of your firm and where it is located?

A. Remmer & Jordon, 3927 E. 14th Street, Oakland.

Q. Mr. Remmer, you have the agency for some nationally known automobile?

A. That is true, the Pontiac.

Q. How long have you and Mr. Jordon been in business in that firm? A. About 22 years.

Q. You are a married man, Mr. Remmer, and make your home with your wife in Oakland at the address given? [2555] A. Yes.

Q. Are you acquainted with the defendant, Elmer Remmer? A. Yes, I am.

Q. He is your brother, is he not?

A. Yes, sir.

Q. And during the period of time between 1944 and up to the present time, did your brother, Elmer Remmer, ever take from your place of business any automobiles? A. Yes.

Q. Will you tell us, as near as you can recall, what type of automobile, the value of the automobile and approximately when it was purchased?

Mr. Campbell: May I inquire if he brought any record with him in that regard?

Mr. Gillen: I don't know. I am asking him if he can recall.

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(Testimony of William Remmer.)

A. Yes, I can recall—during this particular time?

Q. During the period of time from 1944 until the present time. A. Yes.

Q. Will you relate, as near as you can remember, what those transactions were?

A. He bought a used Dodge pick-up from me and I believe it was $465.

Q. And when was that?

A. I think that was in 1944. [2556]

Q. You say a pick-up, by that you mean a truck, do you not? A. Yes.

Q. Now, did he buy any other car in 1944 from you? A. No.

Q. Did he pay for that car? A. No.

Q. Did he pay for it up to the present time?

A. No.

Q. Did he buy any other automobile from you in 1945? A. No.

Q. Did he buy any automobile from you in 1946?

A. Yes.

Q. And what was that, Mr. Remmer?

A. He bought a 1946 Pontiac sedanette—either a sedanette or convertible.

Q. What was the price approximately?

A. Approximately $1600.

Q. And directing your attention to the same year, did he buy another automobile from you in that same year? A. Yes.

Q. And what was that automobile, the second automobile he bought in 1946?

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(Testimony of William Remmer.)

A. A Pontiac sedan or sedanette.

Q. Was there any trade-in or arrangement made between your firm and him with regard to the original Pontiac sedanette [2557] he bought earlier that year?

A. Well, I do not recall which one it was, but there was a trade-in involved in one of the two Pontiacs that he bought.

Q. Now, did he pay for either of those automobiles or on the trade-in did he pay the differential or any part of the purchase price?

A. Well, the trade-in was clear; he gave me that as part of the purchase price, but the balance, no, he did not.

Q. The automobiles were not paid for, the Pontiac? A. That is correct.

Q. The original Pontiac was not paid for in 1946 and whatever was the differential on any trade-in with the second Pontiac, that was not paid?

A. That is correct.

Q. Now, with regard to the Dodge pick-up used truck, which you say was purchased by your brother from you in 1944, what was done, insofar as your company was concerned, with the charging up of that amount?

A. Well, at the end of the year my partner and I adjust our own personal accounts and that item was charged to my account and I paid for it.

Q. In other words, you paid it into your firm?

A. That is right.

Q. It was charged to your account and you paid

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(Testimony of William Remmer.)

your firm for that obligation, so that formed a personal obligation between [2558] your brother and yourself? A. Correct.

Q. And was that likewise the situation in regard to the transaction involving the two Pontiacs in 1946? A. That is correct.

Q. Your partner and you adjusted between you and it was charged to your account and you paid your firm, is that correct? A. That is correct.

Q. So that became an obligation between your brother and yourself, is that correct, a personal obligation? A. Yes.

Q. Now, between the year 1945 up until the year 1950, did you make any loans to your brother, Elmer Remmer? A. Yes.

Mr. Gillen: I am sorry, let me withdraw the question.

Q. Between the years, or let us say, during and between the years commencing in 1944 to and including the year 1950, did you make any loans of money to your brother, Elmer Remmer?

A. Yes.

Mr. Campbell: Objected to as immaterial, so far as the years after 1946 are concerned.

Mr. Gillen: It is really. I will then reframe my question.

Q. Let me ask you if from the beginning of the year 1944 until and including the end of the year 1946, you made any loans to [2559] your brother, Elmer Remmer? A. Yes.

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(Testimony of William Remmer.)

Q. And were they in different amounts and at different times? A. Yes.

Q. Did you usually make those loans by cash or by check? A. Check.

Q. Were they your personal check or company check? A. Personal check.

Q. And could you give us the approximate amounts—I mean, a good average of the amounts that would be borrowed?

Mr. Campbell: Objected to—the checks would be the best evidence.

Q. Well, do you have the cancelled checks?

A. No, I do not keep checks that long.

Q. You do not keep checks that long?

A. No.

Q. Can you tell us from your own personal recollection the usual amounts of money he borrowed from you, or the aggregate amounts?

A. Well, I know the total amount, but I don't know, because I would do work on his car and if it was not covered by insurance—as I say, once a year my partner and I settled our accounts, that would be charged—I know the total amount, but I don't know how much I gave him at individual times, no.

Q. Can you tell us the total amount your brother now owes you? [2560]

Mr. Campbell: Objected to as immaterial what he now owes him. It is what he owed him as of December 31, 1946.

Q. All right. Can you tell us the total or ap-

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(Testimony of William Remmer.)

proximate total, amount that he owed you as of the year 1946?

A. Well, I would say between eight and ten thousand dollars.

Q. Now, did that eight or ten thousand dollars include the automobile transactions or exclude the automobile transactions and only cash?

A. It includes them.

Q. And the automobile transactions would involve slightly between two thousand and $2500?

Mr. Campbell: Objected to as leading question.

The Court: Sustained.

Mr. Gillen: I think it was a summarization of what he already testified to, your Honor. I will ask it in a different form if counsel objects to it.

Q. You stated you believed that your recollection is that the pick-up truck was $460, is that correct? A. $465.

Q. Can you tell us what the first Pontiac was?

A. Well, I don't know exactly the equipment, but in 1946 the automobile that he bought would be approximately between 15 and 16 hundred dollars.

Q. And a trade-in of an automobile the same year, would there be a very great [2561] differential? A. I beg your pardon?

Q. A trade-in——

A. No, I would say on that particular car that was involved there was approximately $500.

Q. Five hundred dollars additional on the trade-in transaction? A. Yes, additional.

Q. So would you say that it would be a fair

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(Testimony of William Remmer.)

estimate that the automobile transactions for the period between the beginning of 1944 and end of 1946 between your brother and yourself amounted to approximately $2500? A. Yes.

Mr. Campbell: Objected to as leading and suggestive.

The Court: Objection sustained. The answer will go out.

Q. Can you tell us how much?

A. Approximately $2500.

Q. And the difference between that and eight or ten thousand dollars, would that have been money loaned to your brother?

A. Some was money loaned and some of it was repairing and servicing his cars.

Q. What is your recollection with regard to the extent, the amount and extent of the servicing of cars?

A. I couldn't make a distinction between it.

Q. Now, Mr. Remmer, you were subpoenaed here by the prosecution at the outset of this case, were you not? [2562] A. Yes.

Mr. Campbell: Objected to as immaterial.

The Court: The answer may stand.

Q. And you came to Carson City twice under direction of the prosecution of this case?

A. Yes.

Q. And then you were excused without being called, is that correct? A. That is correct.

Mr. Gillen: I think that is all.

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(Testimony of William Remmer.)

Cross-Examination

By Mr. Campbell:

Q. Now, Mr. Remmer, have you described all of the automobiles which you turned over to your brother in the period 1944 to 1946?

A. I think so, yes, sir.

Q. Now, you have book records, do you not, for those years? A. Yes, sir.

Q. And have you brought those records with you?

A. I have them in the hotel in Reno, yes, sir.

Q. And do those records set forth the details of the transactions which you have testified to on direct examination? A. Yes, sir.

Q. And do they also include the details of the repairs and servicing items which you say you advanced to your brother Elmer? [2563]

A. Yes, I believe they would; yes, I am certain.

Q. And in addition to that, would those books disclose the details and amounts of any sums of money which you may have personally advanced to him? A. No, sir.

Q. Those are company records?

A. Company records.

Q. And relate only to the automobile agency?

A. Relate only to the automobile agency.

Q. Now, did Elmer Remmer owe you anything as of January 1, 1944? A. Yes, sir.

Q. How much did he owe you then?

A. Oh, I don't know.

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(Testimony of William Remmer.)

Q. Well, you say he owed you eight to ten thousand dollars at the end of 1946. What is your best recollection as to what he owed you in January, 1946?

A. I don't know—as of the first of January?

Q. Yes.

A. I could get the information. I am familiar with the information pertaining to this period because you told me to bring my records up when I came up for you and I have recollection, looking at my records, it would be fresh in my mind.

Q. But you don't have that in your mind?

A. I believe we are required to keep our records six years. [2564] No, I might not have it, Mr. Campbell, but it is possible we have it.

Q. (By Mr. Campbell): I am going to ask then, Mr. Remmer, with the exception of one matter, I am going to ask the Court if further cross-examination may be deferred until tomorrow morning, at which time I will ask the witness to bring his records with him.

Mr. Gillen: May I say, your Honor, I think this is very unfair and I am going to ask your Honor to deny counsel's request, for this reason—Mr. Remmer is very anxious to get back to business; (2) he is an ill man and about to go for an operation——

The Court: I am compelled to grant the request.

Mr. Gillen: May I point something out?

The Court: You may, yes.

Mr. Gillen: All of these matters were taken up

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(Testimony of William Remmer.)

with Mr. Remmer, were scrutinized when he appeared before the——

The Court: The Court has no knowledge of that.

Mr. Gillen: Well, I am telling you. Of course, I wouldn't lie—I am an officer of the court.

The Court: I am going to give counsel an opportunity to cross-examine if he wants to. Those records could be brought over from Reno easily.

Mr. Gillen: They were brought twice and they were scrutinized. [2565]

The Court: The ruling will stand.

Mr. Gillen: That is all right, I am going to be here any way, your Honor—it will not discommode me.

The Court: The ruling will stand.

Mr. Gillen: When do you want the man back—you might accommodate him somewhat?

Mr. Campbell: Possibly there is some way the records could be gotten down here——

Mr. Gillen: Are your records in Reno?

A. Yes.

The Court: If there is going to be any further inquiry about this, it could be very well made between counsel in the absence of the jury.

Mr. Gillen: I was going to say we might arrange——

The Court: Take it up with counsel privately. I do not want this record filled with immaterial matters.

Mr. Gillen: You are excused so far as the defense is concerned.

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(Testimony of William Remmer.)

The Court: When do you want him back?

Mr. Campbell: Whenever the records are available.

Mr. Gillen: If we could have a five minute recess, we might find out if we have some people who are coming over who could bring them. That is what I was trying to convey to your Honor.

(Jury and alternate jurors admonished and recess taken [2566] at 2:00 o'clock.)

2:10 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

WILLIAM REMMER

resumes the witness stand on further

Cross-Examination

By Mr. Campbell:

Mr. Campbell: Now, if your Honor please, during the recess I stated to counsel that I would go ahead with cross-examination of this witness and that counsel will bring down his records tomorrow and if those records are material, we will enter into stipulation regarding what they show.

Mr. Gillen: That is entirely agreeable.

Q. Now, Mr. Remmer, let us take the first car, the Dodge pick-up, which you say that you sold your brother for $465, for which he did not pay

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(Testimony of William Remmer.)

you, is that correct? A. That is correct.

Q. And which you paid for yourself at the end of 1944? A. That is correct.

Q. Now, in connection with that transaction, did you give him the pink slip or ownership certificate on that Dodge pick-up? A. Yes, sir.

Q. And did you cause the ownership name to be changed on the State records?

A. You mean did I put a transfer through?

Q. Yes, sir. [2567] A. Yes, sir.

Q. And in what name was that put through?

A. I believe it was put through in the name of Cal-Neva Lodge.

Q. And do you know whether or not your brother continued to have that car at the end of 1946? A. No, sir, I don't.

Q. Now, do you know whether at the time that this Dodge pick-up—incidentally, a pick-up is a truck, is it not?

A. Yes, it is a light commercial vehicle.

Q. Do you know at that time whether or not your brother had other automobiles? A. Yes.

Mr. Gillen: Objected to as incompetent, irrelevant and immaterial, not within the scope of direct examination. We just asked him about transactions between his brother and himself.

The Court: We will see what the answer to this question is.

Mr. Campbell: He said yes.

The Court: The answer may stand.

A. I don't know whether they belonged to him,

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(Testimony of William Remmer.)

but I know he used them. I don't know whether he used them

Q. How many cars? A. Oh, I don't know.

Mr. Gillen: Just a moment, Mr. Remmer, please, I want [2568] to offer an objection.

A. Excuse me.

Mr. Gillen: The answer to that is in. I move it be stricken.

The Court: It may go out.

Mr. Gillen: Now, I offer the objection it is incompetent, irrelevant and immaterial and not within the scope of direct examination, therefore improper cross-examination.

The Court: Objection overruled. The answer may be reinstated.

Q. During this period of time, 1944 to 1946, when you say you were doing repair work for which your brother had not paid you, but for which he owed you, was that on cars other than the Dodge pick-up truck and the Pontiac sedans which you sold to him?

A. I don't believe I ever saw the Dodge pick-up truck after it left my place of business. The Pontiacs would come down for service.

Q. Were other cars brought in for service by your brother? A. There might have, yes.

Q. Was that during 1945, 1946, and 1946.

A. Yes, he might have sent in one or two cars, I don't know.

Q. Do you recall the makes of the cars?

A. Yes, I do. I recall one he had, it seems to me

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(Testimony of William Remmer.)

a 1941 Chrysler station wagon. Whether it was his or not, I don't [2569] know, but I did some work on it.

Q. That was included in these repair bills?

A. Yes, sir.

Q. Do you recall any other cars?

A. No. During that particular time?

Q. During that particular time I am talking about. A. No.

Q. Now, you say the first Pontiac you sold him was in 1946, is that correct?

A. That is pertaining to the time you are asking about?

Q. Yes. A. Yes, sir.

Q. Well, had you sold him any Pontiac before 1946? A. Yes, sir.

Q. When?

A. I sold him a Pontiac in, I believe, 1941.

Q. Do you know whether or not he still had that Pontiac as of January 1, 1944?

Mr. Gillen: Of course, I think we are getting pretty far removed from the scope of direct examination.

The Court: This might be a preliminary matter. Is it some preliminary matter?

Mr. Campbell: Yes, I am going into the disposition, if he gives the disposition.

The Court: Well, you may answer the [2570] question.

A. I don't know whether he had it or not, I don't know.

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(Testimony of William Remmer.)

Q. At any rate, getting to 1946, the first Pontiac that you sold him, which you stated was sold to him for approximately $1600?

A. That is correct, yes, sir.

Q. And did he pay any money down or turn in anything on that Pontiac?

A. Mr. Campbell, I don't know whether it was the first or second, but on one car there was a trade, and to my recollection the trade—it was on one of the two Pontiacs there was a trade, and to my recollection the trade represented $1050.

Q. Now, do you recall, Mr. Remmer, an occasion on or about January 5, 1951, when you made a statement, question and answer statement, at 100 McAllister Street Building in San Francisco?

A. Yes, sir.

Q. And there were present on that occasion, were there not, in addition to yourself, your attorney, Theodore Golden, as well as special agents Whiteside and Weaver and a stenographer, do you recall that?

A. I recall my attorney was with me. There were some government men, one of them is sitting over there.

Q. You are referring to Mr. Weaver sitting here? A. That gentleman, yes.

Mr. Gillen: May the record show who he pointed to? [2571]

The Court: The record will show it is Mr. Weaver.

Mr. Gillen: While I am interrupting, I would

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(Testimony of William Remmer.)

like to clear up one thing. Mr. Theodore Golden is an attorney practicing in Oakland, is no relation to my associate Mr. Golden. He is not related.

Mr. Campbell: He is not related, I understand.

Q. Were you subsequently, Mr. Remmer, shown a typewritten copy of the statement which you gave on that occasion?

A. You mean at the time?

Q. No, afterwards, a few days later.

A. I don't recall.

Q. Do you recall an agent coming to you and showing you the statement and you making certain corrections or changing of your answers?

A. Oh, yes, I do; yes, that is correct.

Mr. Campbell: May this document be marked 184 for identification?

Q. Mr. Remmer, was a copy of, or the orginal copy of that statement left with you?

A. I don't know, I don't remember, Mr. Campbell, whether it was or not. I am inclined to believe it was; I can't remember.

Q. All right. I am going to hand you this 184 for identification, and ask you to look it over, not only for the purpose of seeing if this is the statement which you gave at [2572] that time, but in the event it is that you examine it for the purpose of refreshing your recollection, if it needs refreshing, as to certain questions I am about to propound.

Mr. Gillen: I am going to move the last remark of counsel be stricken.

The Court: It may go out.

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(Testimony of William Remmer.)

Mr. Gillen: There is nothing in this record——

The Court: I have granted the motion.

Mr. Gillen: I was going to go into another matter——

The Court: Well, there is nothing before the Court.

A. I think this is approximately.

Q. Now, Mr. Remmer, at the time you made that statement, did you have with you and before you the records of the automobile company to which you referred, reflecting the transactions with your brother and which you said are presently up in Reno?

A. Yes. Yes, invoices, I believe I had. I do not know what these records are that I have up in Reno. You required me to bring some records when you were there and they were in a rubber band and I put them in the desk and when I came up this time I just put them in my grip. I presume——

Q. At any rate, at the time you gave this statement on January 5, 1941, you had the records before you? A. Yes.

Q. And I am going to direct your attention specifically to [2573] 4 of this document and ask you if this refreshes your recollection as to the date, the precise date, upon which you sold Elmer Remmer the Dodge pick-up?

Mr. Gillen: May I have the question?

The Court: Yes, sir.

(Question read.)

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(Testimony of William Remmer.)

Mr. Gillen: Now I am going to object to the question upon the ground it is not proper cross-examination, because there is no evidence here to indicate his memory has to be refreshed. As your Honor will recall, I did not ask him for precise dates. There is nothing to refresh his recollection about. I asked him for the year 1944 he had a recollection of selling a car to his brother and he mentioned the Dodge pick-up, so it is not a matter of refreshing his recollection.

The Court: Objection will be overruled.

Q. Upon what date did you sell the Dodge pick-up?

A. The date here is July 31, 1944.

Q. Is that your best recollection?

A. Well, I had the records in front of me at the time, so I think that is correct.

Q. What was the selling price? A. $465.

Q. I direct your attention to Exhibit 184 for identification and to the question and answer as to the selling price, and ask you if that refreshes your recollection as to the selling [2574] price?

A. I believe this is typographical error. This says $456 and to my knowledge of 30 years in the business, I never sold an automobile for an odd dollar.

Q. So that your recollection is definite as to $465?

A. I would say it would be $465, and I believe that is a typographical error, that says $456.

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(Testimony of William Remmer.)

Q. Now do you recall in what month it was that you sold to him the Pontiac sedan?

A. No, sir, I don't.

Q. I am going to show you——

Mr. Gillen: In the interest of time, we will stipulate whatever date appears there, since he said the records were before him at that time, would be the date.

Q. All right; I direct your attention to the date April 30, 1946, is that the correct date?

A. Yes, sir.

Q. And I direct your attention to the total cost of $1498.70?

A. That would be the correct amount, sir.

Q. And incidentally, there were odd dollars on that sale? A. That involves sales tax.

Q. And did you receive a deposit of $100 at that time? A. Yes, sir.

Q. And was there any trade-in on that car?

A. On that particular car I would have to see the record; I [2575] don't know.

Q. Well, let me show you here at the bottom of page 4, question and answer, and ask you if that refreshes your recollection there was any trade-in on that car?

A. No, there was no trade-in.

Q. Now at the time you sold that car to him, or subsequently and until December 31, 1946, did you receive anything in addition to that $100 from him on account of that sale? A. No, sir.

Q. At the time you made the sale, on or about

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(Testimony of William Remmer.)

April 30, 1946, did you deliver the pink slip or ownership certificate of that car to him?

A. I presume so, yes, sir.

Q. And do you recall in what name that certificate was issued?

A. I believe it was issued in the name of Helen Remmer.

Q. And that is the wife of Elmer Remmer?

A. Yes, sir.

Q. Incidentally, is she occasionally known also as Libby Remmer?

A. I have only known her as Helen.

Q. Now according to this statement, a second car was sold on June 21, 1946, would that be correct? A. Yes, sir.

Q. And the price was $1716.91, would that be correct? A. Yes, sir.

Q. Against which there was a trade-in of $1300, leaving a [2576] balance of $416.91?

A. Yes, sir.

Q. Would that be correct?

A. That would be correct, sir.

Q. Do you recall what car it was that was traded in on that Pontiac?

A. No, I don't; I don't know. He had a car stolen and the insurance company replaced it and whether it was that car that was stolen—I can't recall, no, sir.

Q. Do you recall whether or not the trade-in on June 21, 1946, was the same Pontiac which you sold him on April 30, 1946?

A. No, it wouldn't be the same Pontiac; no, sir.

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(Testimony of William Remmer.)

Q. The trade-in would not be the same one that you sold him? A. No.

Q. And you don't recall the make of the car that was traded in?

A. No, I have a slight recollection it was a Buick automobile, but I wouldn't want to testify it was.

Q. Would these records Mr. Gillen will bring down help you?

A. No, they would just show the credit.

Q. Do you recall in whose name the trade-in was registered? A. The trade-in?

Q. Yes.

Mr. Gillen: You mean the new car?

Mr. Campbell: No, the one that was [2577] traded.

A. No, Mr. Campbell.

Q. Now at the time you delivered the new car, the second Pontiac, on June 21, 1946, did you deliver the pink slip to him on that?

A. Not at the time of delivery, because we have a different title law in California. The pink certificate is not issued by the dealer, it is issued by the State.

Q. You sent the certificate papers to the State?

A. We are required by law to apply for a license within 24 hours and they in turn would send the title.

Q. Did you cause the title certificate to that car to be delivered to your brother? A. Yes.

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(Testimony of William Remmer.)

Q. And in what name was that car recorded or registered?

A. I don't know; I can't remember.

Q. Do you recall whether or not it was registered in his name?

A. I presume it was, but I can't remember.

Q. Do you know whether or not Mr. Remmer still had both of these Pontiacs as of December 31, 1946? A. Not of my own knowledge; no, sir.

Q. You don't know one way or the other?

A. No, sir.

Q. Now according to your direct testimony, you also, during the years 1944 to 1946, loaned money to your brother, is that correct? [2578]

A. That's correct.

Q. And what was the amount which you lent to him?

A. Well, minor deductions; I don't know the amount of money in cash.

Q. You say amount of money in cash?

A. By check, which is the same as cash I advanced, I don't know; no, I don't know.

Q. Did you keep any record of it at the time?

A. No, sir. I kept a mental record; I know how much money he owes me, but I took it in total amount. You are asking what represents automobiles, etc., repairs, etc.; I don't know how to break it down.

Q. You stated, however, that the amount had reached between eight and ten thousand dollars, in-

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(Testimony of William Remmer.)

cluding automobiles and repairs, by the end of 1946? A. Approximately so, yes.

Q. I believe you stated that you have not kept your checks for this long period of time?

A. That is correct.

Q. Do you at this time have any recollection as to the balances owed by him to you as of December 31, 1943, 1944, 1945 or 1946?

A. You mean as to this transaction?

Q. Yes, the end of the year balances?

A. No. [2579]

Q. Now during the years 1944 to 1946, when you were lending him this money, would he pay you back the amounts, or part of the amounts, from time to time?

A. I got some money back, yes, sir. If he was in a position, he would pay it back; if he wasn't, he didn't.

Q. So there was money going both ways—you were loaning him money and from time to time he would give you back money, is that correct?

A. Yes.

Q. Now do you recall what bank account you drew the checks on, the money which you loaned to your brother?

A. It might have been one of ten.

Q. What is your best recollection?

A. It might have been the American Trust Company, it might have been the Anglo California, it might have been the Bank of America, it might

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(Testimony of William Remmer.)

have been the Central Bank; I have accounts in those banks.

Q. Personal accounts as distinguished from firm accounts? A. Yes, all personal.

Q. Now at the time you gave this statement on January 5, 1951, were these matters fresher in your mind than they are at this time?

Mr. Gillen: Of course, that is very objectionable question.

Mr. Campbell: All right. I withdraw the question. [2580]

Q. Now do you recall, Mr. Remmer, if you were asked these questions——

Mr. Gillen: Is counsel now referring to the statement of January, 1951? If he is, he is doing it improperly. The man should be shown his statement.

The Court: I think he ought to call his attention particularly.

Mr. Gillen: It is 11-page statement, your Honor, it would be pretty hard——

Q. I am going to call your attention to page 6 of Exhibit 184 for identification, and to the questions and answers set forth on that page, and ask you if you will read those over.

Mr. Gillen: Well, now, may it please the Court, I should be happy to have the Court look at these questions and answers. There are quite a number on this page and your Honor will recognize immediately that they refer to matters beyond the scope of direct examination and to early years that counsel objected to being asked about.

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(Testimony of William Remmer.)

The Court: He has merely requested the witness to read over to himself those questions and answers.

Mr. Gillen: Yes, all right.

Q. Have you read those over? A. Yes, sir.

Q. Now I also wish to call to your attention and ask you if you will read preceding that, particularly the second question [2581] and answer on page 4.

Mr. Gillen: May I respectfully urge at this time that the question and answer with regard to whether or not the witness read the questions and answers on page 6 of his statement be stricken?

The Court: If there was a question of that kind, it may be stricken.

Mr. Gillen: The question was, would he read his questions and answers on page 6 and did he read them. I am asking that the question and answer be stricken on the ground——

Mr. Campbell: I want to ascertain if he completed reading that portion because I wanted to read some other portion, also preliminary to any other question.

The Court: It may stand.

Mr. Gillen: I do not want counsel to create the impression before the jury it is to refresh Mr. Remmer's recollection on page 6, which is one of the reasons to ask a man to read a statement he gave at a previous time, or that he is attempting to impeach his own testimony, because page 6 refers to another period of time altogether, refers to a period of time subsequent to 1946.

The Court: He is merely requesting the witness

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(Testimony of William Remmer.)

to read to himself certain parts in that exhibit. I do not believe the jury should draw an inference of any kind from that question. [2582]

Mr. Gillen: There are only two ways of doing that, as your Honor knows, and neither of those ways are apparent in this particular question.

The Court: Of course, I don't know what the object is, but I can't see any harm in asking him to read something.

Q. Now isn't it a fact, Mr. Remmer, that on January 5, 1951, at 100 McAllister Street Building, in the presence of Theodore Golden, your attorney, Special Agents Whiteside and Weaver, and a stenographer, you were asked the following questions and gave the following answers, relative to the years 1943 to 1946, inclusive——

Mr. Gillen: Now may I ask counsel to show me the particular questions, so I may be in position to offer an intelligent objection? I think there is no objection to that. We will stipulate that he gave these answers to these questions and they may be read.

Mr. Campbell: All right, so stipulated.

Mr. Gillen: Up to that line.

Mr. Campbell: (Reads from Exhibit 184.)

"Q. Has he ever borrowed any money from you? A. Yes, sir."

The Court: Point out the questions so Mr. Remmer can follow you.

Mr. Campbell: This is page 5. This, of course,

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(Testimony of William Remmer.)

refers [2583] to Elmer Remmer, is that correct, Mr. Gillen?

Mr. Gillen: Oh, sure.

Mr. Campbell: Reading from page 5 of Exhibit 184 for identification:

"Q. Has he borrowed from you frequently?

"A. At various times.

"Q. Do you have any record of the amounts you advanced to him? A. Some.

"Q. What record do you have?

"A. Well I have a record of his car transactions, repair work that I did for him.

"Q. On automobiles? A. Yes, sir.

"Q. None of which he paid for?

"A. That is correct. Some repairs were paid for but were paid for by insurance companies, but I never was paid by him for any.

"Q. In addition to that you also advanced sums of money to him? A. During these years?

"Q. Yes. A. I can not remember.

"Q. How did you advance these monies to him, in cash or by check? [2584]

"A. No, mostly by check.

"Q. Then that you would be able to ascertain from your checking account?

"A. Not for these years, no, sir.

"Q. Don't you have your checks?

"A. I don't keep my checks that long.

"Q. What amounts did you advance to him?

"A. I can't tell you, sir.

"Q. Was it more or less than a thousand dol-

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(Testimony of William Remmer.)

lars? A. I can't even answer that, sir.

"Q. You mean you do not know whether or not you gave him $1000 altogether?

"A. I have never given him any cash. You mean during these years?

"Q. Yes.

"A. No, I could not—I would not want to make a statement one way or the other.

"Q. You can not even approximate the amount?

"A. I know how much he owes me but I don't know when the debt was incurred."

That is all.

Redirect Examination

By Mr. Gillen:

Q. Now, Mr. Remmer, calling your attention to the same exhibit 184 for identification, I will ask you if you also gave the next two answers to the next two questions on that same page 6? [2585]

Mr. Campbell: Just a minute. I am going to suggest at this time the entire document go into evidence.

Mr. Gillen: It is part of the same statement. It is by way of explanation.

The Court: Have you any objection to this question?

Mr. Campbell: I think it should then include the next four questions and answers.

The Court: You may answer this question.

Mr. Gillen: Counsel suggested the next four questions?

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(Testimony of William Remmer.)

Mr. Campbell: Yes.

Mr. Gillen: We suggest enlarging that to the next nine questions, including counsel's four, which will give a complete explanation, I believe, of Mr. Remmer's recollection.

Mr. Campbell: I will offer the entire document in evidence.

Mr. Gillen: Well, there are other matters, I think, that are immaterial.

The Court: I think we had better go along.

Mr. Gillen: I wonder will Mr. Campbell stipulate, to save time, that we may read the next nine questions and answers?

Mr. Campbell: Yes.

Mr. Gillen: With the Court's permission and counsel's stipulation, I shall read those.

The Court: Yes. [2586]

Mr. Gillen: And with the Court's permission, I will pick up the last question and answer Mr. Campbell read so the jury will be assisted. Mr. Remmer, I am going to read the last question and answer Mr. Campbell read on page 6 and the next succeeding questions and answers.

Mr. Campbell: I will stipulate he gave those answers to those questions.

Mr. Gillen: I accept the stipulation.

Mr. Gillen: (Reads.)

"Q. You mean you do not know whether or not you gave him $1000 altogether?

"A. I have never given him any cash. You mean during these years?

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(Testimony of William Remmer.)

"Q. Yes.

"A. No, I could not—I would not want to make a statement one way or the other.

"You can not even approximate the amount?

"A. I know how much he owes me but I don't know when the debt was incurred.

"Q. How much does he owe you?

"A. About $26,000.00.

"Q. Does that include the sums for these automobile purchases and repair charges, and in addition advances by check? A. Yes, sir.

"Q. When was the bulk of that money advanced to [2587] him by check?

"A. Some last year and some the year before.

"Q. Would it be in—— A. 1950—1949.

"Q. You must have your cancelled checks for those two years so you could determine exactly what your advances were in those years?

"A. By check $15,000.00.

"Q. In 1949 and 1950? A. That is correct.

"Q. The balance of approximately $10,000.00 applies to prior years?

"A. Some car transactions was from in 1947 and including 1947 to the present time.

"Q. About how much of that $10,000.00 would you say arose from car transactions up to the present time—would it amount to $5000.00?

"A. Approximately I suppose. We could go through the process of figuring, but in approximately round figures."

Q. Now, Mr. Remmer, do you have in mind what

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(Testimony of William Remmer.)

was the amount of your brother's obligation to you at the beginning of the year 1944?

A. At the beginning of the year 1944?

Q. Yes. [2588] A. Very slightly.

Q. Do you have any idea now; if you do all right, if you do not, all right.

A. Oh, it might be $300.

Mr. Gillen: I think that is all, thank you.

Recross-Examination

By Mr. Campbell:

Q. Do you have any idea what it was at any other date in the period January 1, 1944, to December 31, 1946? A. What it was——

Q. Yes, at any date during that period.

A. In December of 1946 it was about ten thousand dollars.

Q. Now have you refreshed your recollection from some source since you gave this statement to which your attention has been called? A. Yes.

Q. From what source.

A. Oh, I kept a notebook on it.

Q. Do you have that notebook?

A. No, sir.

Q. Where is that notebook?

A. I don't know.

Q. When did you last see that notebook?

A. Shortly after I appeared here.

Q. Shortly after you gave this statement?

A. Yes, sir. [2589]

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(Testimony of William Remmer.)

Q. When did you last see it prior to the time you gave this statement?

A. Maybe a year or two.

Q. Didn't you tell the government man that you had no record of those personal advances?

A. It isn't a record, Mr. Campbell; it isn't a record.

Q. Is it a notebook in which you jotted down the amount which——

A. It isn't a complete record.

Q. Does it have entries indicating eight to ten thousand dollars as of December 31, 1946?

A. I couldn't tell you. The purpose of the notebook——

Mr. Gillen: May it please the Court, we object, first as argumentative and assuming something not in evidence. The witness testified in this statement that when various amounts were incurred he did not have a record, he had a recollection in his mind of the money owed at that time, and I presume various other times, too. He said it wasn't a complete record, he didn't keep each amount owed completely, but he knew the general amount.

The Court: Read the question.

(Question read.)

The Court: You may answer the question.

A. It showed the total amount. I can explain if I am permitted to. The only purpose of that was that my wife and I have separate holdings and for tax purposes my wife had her [2590] holding prior to our marriage and I had my own individual hold-

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(Testimony of William Remmer.)

ings, and we were allowed a percentage break to bring her community interests up to the point prior to the law of equal division. That was the only purpose of that, was for my tax accountants.

Q. What I am getting at, did you make entries in that? A. As I gave him money?

Q. Yes. A. No.

Q. When did you make the entries?

A. I just made a total of what he owed me.

Q. When?

A. When I discussed it with my tax accountants. When I was permitted to take an equal division in her community property interest and they were trying to get me to establish my own worth prior to marriage.

Q. When did you make the entries?

A. It wasn't a single entry—it was entry of all my assets.

Q. When did you make entry in that book with relation to what Elmer owed you on December 31, 1946?

A. I don't know. It isn't a ledger, just a memorandum, trying to establish my own net worth.

Q. Did that have date as of December 31, 1946?

A. I don't know—it has no date, no. I know it came up after this and I tried to establish my own amount of money I [2591] had accumulated or had prior to my marriage.

Q. Was that after January 5, 1951, that you set that notebook up?

A. Was it after January 5th—oh, no.

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(Testimony of William Remmer.)

Q. When did you set that notebook up?

A. Oh, it was either the year 1946 or 1947, because it was prior to the passing of the law of 50 per cent community property law. So it is a date prior to that. I don't know the date. It was just a memorandum.

Q. Have you destroyed that book?

A. I presume it has been; presume, because it had no value.

Q. When did you destroy it?

A. I don't know it was destroyed.

Mr. Gillen: That is assuming something not in evidence.

The Court: Objection sustained.

A. It would be so much rubbish around the house and I just presume it was destroyed. I didn't keep any permanent record.

Q. Did you have that record in mind when you told the agents at the time of this statement?

A. No, sir.

Q. You wouldn't even assume to say whether it was more or less than a thousand dollars Elmer owed you?

A. I believe when I answered that question whether it was more or less than a thousand dollars, I had the thought in mind that he was trying to arrive at how much money I had [2592] given him at single time and as I read that question, that was my answer.

Q. Did you have that notebook in mind at the time you gave that answer? A. No, sir.

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(Testimony of William Remmer.)

Q. Did you, during the course of this statement, or at any time, disclose the existence of any such book to the government agents? A. No, sir.

Q. Now, Mr. Remmer, if you were advised in 1948 was the first year for which a husband and wife could split their income on their returns, regardless of community property, would that assist you in fixing the date at which you made this entry in the notebook?

A. It would be after that, because I wanted to take advantage of that law.

Q. It was after that law came into force?

A. Wait just a minute—no—January—I didn't get that date that the law came into force.

Q. If you were advised 1948 was the first year for which such returns could be filed?

A. Then it would have to be prior to that.

Q. Prior to the enactment of the law?

A. Yes, because the law automatically accomplished what I am trying to accomplish. [2593]

Q. Now did you ever show that book to any one?

A. I do not believe so, no, because the book wouldn't mean anything.

Q. Did you show it any accountant or attorney?

A. No, I may have gone over it with my wife, but that would be all.

Q. Other than your wife, you can't think of any one you may have shown that to? A. No.

Mr. Campbell: I think that is all.

Mr. Gillen: I think that is all.

(Witness excused.)

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(Jury and alternate jurors admonished and short recess taken at 3:00 p.m.)

3:15 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

ELMER RONALD VACCHINA

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you please state your full name?

A. Elmer Ronald Vacchina.

Q. Where do you reside?

A. 865 Wilkinson Avenue, Reno.

Q. What is your business or occupation? [2594]

A. Assistant Trust Officer, First National Bank of Nevada.

Q. How long have you held such position?

A. Two months.

Q. Have you been with the bank for some time?

A. Four and one-half years.

Q Now, Mr. Vacchina, were you requested to bring here certain records from the Trust Department of the First National Bank of Nevada, relative to a transaction between Elmer Remmer and a man known by the name of J. B. Scarlett, who is also, I believe, known by the name of Jack Sullivan? A. Yes, sir.

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(Testimony of Elmer Ronald Vacchina.)

Q. Do you have those records with you?

A. Yes, I have.

Q. Do you have the original records of the bank? A. All but one, sir.

Q. And that one that is missing is what?

A. It was a check and it is not filed in the escrow folder and was inadvertently left behind.

Q. That can be produced?

A. Yes, it can be.

Q. Did you also bring with you photostatic copies of the original records? A. Yes, sir.

Q. May I see the originals and photostats which you brought with you? By the way, the one document that you were [2595] requested to bring, which you say was inadvertently left behind, the original document, do you have the photostat of that document, the check? A. Yes, I do.

Mr. Campbell: We have no objection to the photostat.

Mr. Gillen: May I see the photostat? When counsel has finished looking at the original document, I am going to ask if it may be stipulated that the three photostatic copies I hold in my hand may be offered in lieu of the originals, so the gentleman may take his original records back to the bank.

Mr. Campbell: We have no objection to the use of photostatic copies. We will have certain objections to the documents at some time.

Mr. Gillen: I will offer these two documents as defendant's exhibit next for evidence. The first document would be the assignment, D-1; the second

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(Testimony of Elmer Ronald Vacchina.)

document will be final escrow receipt release, E-1, and the third document I will offer for identification will be the face and reverse side of a cashier's check of date of March 2, 1949.

The Clerk: F-1.

Mr. Gillen: And may I ask counsel, through your Honor, may I ask he stipulate that these three documents represent true photostatic replicas of the original documents reflecting this particular transaction, kept in the ordinary course of business of the First National Bank of Nevada? [2596]

Mr. Campbell: If you state that as the fact, I will stipulate.

Mr. Gillen: Well, is that the fact, Mr. Vacchina?

A. That is the fact.

Mr. Gillen: In the face of the stipulation and in the face of the answer of the witness, I will at this time offer those three documents in evidence on behalf of the defendant with the numbers and designations they now bear.

Mr. Campbell: To which we object at this time, until further foundation is laid as to the materiality. The documents relate to some transaction taking place—well, one document is dated October 21, 1948, and the other the 2nd of March, 1949, and we make the objection at this time that no proper foundation has been laid for their admission, on the grounds that their materiality has not yet appeared.

The Court: Can you make a little further showing on that matter?

Mr. Gillen: Well, the third document counsel

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(Testimony of Elmer Ronald Vacchina.)

did not mention and that is the final receipt and release. The other two documents go as one transaction.

Mr. Campbell: They all relate to the same thing. I refer to the documents as bearing dated respectively October 21, 1948, and March 2, 1949. They all relate to the same transaction. My objection is that this is a transaction at a time long subsequent to the period here in question, and until the [2597] foundation is laid it relates here to some transaction within the period, I submit that they are immaterial.

The Court: May I inquire if these exhibits have to do with the material which was referred to concerning the same gentleman, Mr. Scarlett?

Mr. Gillen: Yes, your Honor.

Mr. Campbell: We do not know, your Honor, until the evidence is placed in here.

Mr. Gillen: It is referring to repayment of loan made in 1946.

Mr. Campbell: May I ask a question on voir dire?

The Court: Yes.

Q. (By Mr. Campbell): Mr. Vacchina, do you have any personal knowledge of the transaction to which these papers relate?

A. You mean to what went before?

Q. Yes.

A. No, we merely received the assignment from Mr. Remmer and recorded it.

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(Testimony of Elmer Ronald Vacchina.)

Q. And you received this assignment on or about October 21, 1948?

A. Our escrow is active during that period and I assume it was about that time.

Q. Do you have any knowledge of the transaction to which this assignment relates?

A. Not personally. [2598]

Mr. Campbell: I make this objection until further foundation is laid.

Mr. Gillen: I say this in the interest of time, these documents, may it please the Court, relate to the transactions in which there is already testimony in evidence before the Court and will be immediately connected up by a witness who will next be called, in the person of Mr. Woodburn, attorney.

Mr. Campbell: If it is connected up, I will have no objection at that time to it being put in evidence, but I do not think we should have it before.

The Court: We will postpone it until later.

Mr. Gillen: Very well, I will withdraw this gentleman on the witness stand, but in the event I encounter other technical obstacles, I will ask that he remain in the court room, in case we have to use him further.

The Court: Very well.

Mr. Gillen: I presume counsel is refraining from cross-examination.

Mr. Campbell: Well, I have no cross-examination up to this point.

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WILLIAM WOODBURN

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name, please?

A. William Woodburn. [2599]

Q. Where do you reside?

A. In Reno, Nevada, 3 Newlands Circle.

Q. What is your business or profession?

A. I am a lawyer.

Q. How long have you been such in the State of Nevada? A. Well, I was admitted in 1907.

Q. Mr. Woodburn, have you ever held any official positions in connection with your professional calling? A. Yes.

Q. Will you relate what those positions were?

A. Well——

Mr. Campbell: I fail to see the materiality.

The Court: You may answer the question.

A. I was District Attorney of Washoe County for three terms, and then I was United States Attorney in this Court for eight years, and those are the only official positions I have ever held. I have held important positions in bar associations.

Q. Professional honorary positions; is that correct? A. Yes.

Q. Now, Mr. Woodburn, do you maintain a law firm, or are you a member of a law firm in Reno, Nevada? A. Yes.

Q. What is the name of that firm, please?

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(Testimony of William Woodburn.)

A. Well, it is at present Woodburn, Forman and Woodburn. The second Woodburn is my son. [2600]

Q. Now back in the year 1946 what was the name of the firm?

A. It was then Thatcher, Woodburn and Forman. George B. Thatcher was the first name.

Q. Now Mr. George B. Thatcher, your former partner, is now deceased? A. That is right.

Q. And in addition to your own son being a member of the firm, there was another member of the firm in the person of John P. Thatcher, the son of your partner; is that correct?

A. That's right.

Q. Now, Mr. Woodburn, were you acquainted, during his lifetime, with a man by the name of J. B. Scarlett, also known as Jack Sullivan?

A. Yes.

Q. Were you his attorney? I mean, did you represent him on occasions or counsel him on occasions?

A. Yes, he consulted me on a number of legal matters.

Q. And are you acquainted with the defendant in this case, Elmer Remmer?

A. Yes, I have known Mr. Remmer for some years.

Q. Have you, or has your firm, served as attorney and counsellor for Elmer Remmer on occasions?

A. Yes, in one or two matters.

Q. And one of those matters was with relation to a civil liability in connection with his income tax returns; [2601] is that correct?

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(Testimony of William Woodburn.)

A. That is correct.

Q. Now are you acquainted with Mr. William Graham and James McKay? A. Yes.

Q. And did your firm have anything to do with the matter of the transfer of title or the sale of the establishment or resort known as Cal-Neva Lodge in Nevada? A. We did.

Q. Did your firm facilitate the sale of the interests of William Graham and James McKay to the defendant in this case, Elmer Remmer, in the year 1946? A. That's correct.

Q. Now do you have any recollection, in connection with the transfer or sale of the interests of McKay and Graham to Mr. Remmer in the year 1946, of the necessity of those three persons advancing some money to the corporation for the outstanding obligations to the corporation on their part?

Mr. Campbell: That calls for his conclusion.

Mr. Gillen: It calls for his memory.

The Court: You may answer.

A. That is my recollection.

Q. That there were some accounts that had to be paid off to the Cal-Neva corporation?

A. For Cal-Neva debts. Is that what you [2602] mean?

Q. I mean debts from McKay, Graham and Remmer to the Cal-Neva corporation?

A. That's right.

Q. Was it brought to your attention at that time that Elmer Remmer had incurred an obligation in

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(Testimony of William Woodburn.)

the sum of 25 thousand dollars to J. B. Scarlett, your client, for the purpose of assisting Elmer Remmer in cleaning up his account in the Cal-Neva corporation?

Mr. Campbell: Objected to as leading and suggestive, obviously calling for hearsay, and that it is incompetent.

The Court: The objection will be sustained.

Q. Let me ask you this—did you have any conversation in the year 1946 at about the time that Cal-Neva interests of McKay and Graham were being transferred to Mr. Remmer, with your client, Mr. J. B. Scarlett? A. Yes.

Mr. Campbell: Objected to as immaterial and incompetent.

The Court: The answer may stand.

Q. Your answer is yes, you did have a conversation? A. I did.

Q. As a result of that conversation, Mr. Woodburn, did you, two years later, prepare any document in the form of an assignment acknowledging an obligation from Elmer Remmer to J. B. Scarlett, also known as Jack Sullivan? [2603]

Mr. Campbell: I am going to again object as leading and suggestive.

The Court: Objection sustained.

Q. Well, let me ask you this—did you ever prepare an assignment from Elmer Remmer to the benefit of J. B. Scarlett?

Mr. Campbell: Same objection.

Mr. Gillen: I do not think that is improper.

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(Testimony of William Woodburn.)

The Court: Objection overruled. You may answer the question.

A. Yes.

Q. And did the assignment that you prepared refer to the matter contained in the conversation that you had with your client, Mr. Scarlett, in 1946?

Mr. Campbell: That is objected to, if the Court please, as incompetent. It is an attempt to produce a hearsay conversation and contents of the conversation by indirection.

Mr. Gillen: No, may it please your Honor, it is asking if a document he prepared as a lawyer at a certain time related to a conversation with Mr. Scarlett at a prior time, related to that same matter.

The Court: You may answer the question.

(Question read.)

A. It did.

Q. I am going to show you, Mr. Woodburn, a photostatic copy which has been stipulated to be a true replica of the [2604] original document kept in the ordinary course of business of the First National Bank of Nevada, and I will ask you whether or not that is the assignment that you prepared for Elmer Remmer and your client, J. B. Scarlett? A. I am certain it is.

Mr. Gillen: I will offer that in evidence.

A. Pardon me—that was in October, 1948. I recall preparing the assignment.

Q. Do you recall in October, 1948, there was any other transactions afoot or any other deal afoot for the sale of Cal-Neva by Mr. Remmer?

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(Testimony of William Woodburn.)

A. That is correct.

Q. And do you recall to whom Mr. Remmer was selling his interest to?

A. Yes, to the Adler interests.

Mr. Gillen: I offer the document in evidence.

Mr. Campbell: Objected to as no proper foundation, no materiality shown.

The Court: Objection sustained.

Q. Do you recall what the nature of the assignment was which you prepared for Mr. Scarlett?

Mr. Campbell: Objected to on the grounds the document speaks for itself.

The Court: Objection sustained.

Q. What was the purpose in preparing the document for [2605] Mr. Remmer and Mr. Scarlett?

Mr. Campbell: Objected to as incompetent and calling for hearsay.

Mr. Gillen: It is not calling for hearsay at all.

The Court: If the answer is intended to bring out the substance of the conversation with Mr. Scarlett, it is hearsay. Objection sustained.

Mr. Gillen: No, it is not for that purpose at all, may it please the Court. I am asking a lawyer who prepared the document what was the purpose of the document he prepared.

The Court: It was prepared partly as result of conversation with Mr. Scarlett.

Mr. Gillen: He testified, your Honor, it related to conversation with Mr. Scarlett and the transaction referred to in the conversation with Mr. Scarlett.

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(Testimony of William Woodburn.)

The Court: Let us have the question.

(Question read.)

Mr. Campbell: I submit, there is no ambiguity in the document itself which requires explanation.

The Court: That is not the question.

Mr. Campbell: The question is what was the purpose. The document speaks for itself unless there is some ambiguity.

The Court: Objection sustained.

Mr. Gillen: Counsel is saying there is no ambiguity and calling for its production at the same time. That is a [2606] highly technical ground.

The Court: The question I am interested in before the Court was in regard to the purpose of preparing that document, and the document was obviously in part the result of conversation with Mr. Scarlett.

Q. All right. Mr. Woodburn, when you prepared this document, did Mr. Remmer sign that document?

A. He did.

Q. And is that his signature upon that document? A. So far as I know, he did.

Q. And what did you do with that document after it was executed by Mr. Remmer?

A. I handed it to the Trust Department of the First National Bank of Nevada.

Q. And directing your attention now—I will leave that document in your hands for a moment—to defendant's Exhibit F-1 for identification, that is the check, cashier's check, I will ask you if you

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(Testimony of William Woodburn.)

will look at this exhibit, which has been stipulated is a true picture of the cashier's check issued by the First National Bank of Nevada, and tell us whether or not you recognize that instrument as ever having come to your attention in your professional capacity?

A. Well, of course, I can't be absolutely certain, but I will say this, that after the assignment was delivered to the Trust Department of the First National Bank, that one of the officers [2607] of the Trust Department handed me at or about this time the cashier's check of the First National Bank of Nevada in favor of J. B. Scarlett in the sum of 25 thousand dollars, which was the identical amount of the assignment of Remmer to the account of Sullivan was to the bank.

Q. Do you know from what funds that assignment of 25 thousand dollars was to be taken?

Mr. Campbell: Objected to—the record is the best evidence. The record is here, I believe.

The Court: If the record is here, it is the best evidence.

Mr. Campbell: If it will facilitate, I will stipulate the check which he holds in his hand was paid from funds deposited in escrow No. 1541, which funds was deposited on or about December 31, 1948.

Mr. Gillen: We will accept that stipulation. Now will counsel stipulate also there was funds payable to an escrow in favor of Remmer from Adler for the sale of Cal-Neva?

Mr. Campbell: Without stipulating to the ma-

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(Testimony of William Woodburn.)

teriality of the transaction, which I wish to object to these documents, I will agree that that was the source of the funds.

Mr. Gillen: Now we might crystallize it in a form the jury may better follow, because it has been chopped up here. Counsel will stipulate that an assignment was made in favor of Scarlett by Remmer for the payment to Scarlett out of [2608] the escrow funds which should be derived from the sale of Cal-Neva and money paid by Adler to the account of Remmer, the sum of 25 thousand dollars; that as a result of that assignment being deposited, Mr. Woodburn, at a later date received the cashier's check which is defendant's Exhibit F-1, and I do not know whether he said this or not, but I believe turned it over to his client, Mr. Scarlett.

Mr. Campbell: When the transaction is linked up to the period set forth in the indictment, I will enter into such stipulation.

Mr. Gillen: Then counsel declines to stipulate. Then we will struggle along in our own way.

Q. Mr. Woodburn, I refer to photostat which is designated as defendant's E-1 for identification, which I will identify by the heading of "Final Escrow Receipt and Release," and which has been identified and stipulated to be a true picture of an official record kept in the ordinary course of business of the Nevada First National Bank, and I will ask you whether or not, at the time you received the cashier's check, which you hold in your hand, defendant's Exhibit F-1, that you had your client,

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(Testimony of William Woodburn.)

Mr. Scarlett, sign that release and receipt for the First National Bank of Nevada? A. I did.

Q. And you recognize your former client's signature, J. B. Scarlett? [2609]

A. That is correct. I remember particularly for the reason that the 25 thousand dollar cashier's check was handed to me by an officer of the Trust Department and I called Mr. Sullivan, whose true name was James Scarlett——

Mr. Campbell: I am going to object, if the Court please, to the voluntary release by Mr. Woodburn of these comments. He answered the question.

The Court: Yes, the question has been answered.

Q. Very well. Following the receipt of that cashier's check, did you summon your client, Mr. Scarlett, to your office?

A. Well, I telephoned him and he was a little crippled at that time, walked with a cane, and he said he would appreciate it very much if I would bring it down to his office, and I did.

Q. And you went to his office with it?

A. Yes.

Q. And did you have with you also at that time the receipt release for Mr. Scarlett to sign so you might return it to the bank for their records?

A. Yes, I recall he started to sign his name like it appeared here, J. B. Sullivan, and got "Sull" and then wrote his true name of Scarlett. Sullivan was his business name.

Q. These matters all related to the transactions

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(Testimony of William Woodburn.)

that were brought to your attention in the year 1946? A. That is correct.

Mr. Gillen: I make the offer. [2610]

Mr. Campbell: Objected to as no foundation laid for the materiality of these documents.

The Court: Read the question.

(Question read.)

Mr. Campbell: I did not get the question. I would have objected to the question if I got it, as being incompetent. I ask the answer be stricken.

The Court: The answer may be stricken.

Mr. Campbell: And I make my objection the question is incompetent.

The Court: What is there in the record to connect this transaction with the periods involved in this indictment?

Mr. Gillen: I believe we have some evidence given by young Mr. Woodburn at an earlier time here, I think we can show your Honor, with relation to the matter of the handling of repayment of debt incurred in 1946 by Mr. Remmer to Mr. Scarlett, which debt was repaid in 1949 following an assignment made in 1948, from the first money that accrued from the sale by Mr. Remmer to Mr. Adler of Cal-Neva Lodge, all of which was handled through the office of Mr. Woodburn and by Mr. Woodburn.

Mr. Campbell: I recall Mr. Woodburn's testimony. He stated that he knew nothing whatsoever about the transaction except 25 thousand dollars was paid out of the sale of Cal-Neva, and I do not believe the record—— [2611]

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(Testimony of William Woodburn.)

Mr. Gillen: I believe I can correct counsel on that.

The Court: You may check it during the recess.

Mr. Gillen: Mr. Woodburn, Jr., testified here as a witness for the prosecution and he related the instance of the repayment of the debt of 25 thousand dollars by Mr. Remmer to Mr. Scarlett through his law firm's office, and his testimony was recollection concerning the preparation of papers, etc., by his office and by his father, but he did not recall or have information on the date of the incurring of the debt by Mr. Remmer to Mr. Scarlett. Now Mr. Woodburn has testified that at a subsequent conversation in 1946, at a time when Mr. Remmer and Mr. McKay and Mr. Graham were paying personal obligations on their accounts to Cal-Neva, in preparation for the transfer of their interests, that as a result of the conversation at that time with his client, now deceased, whom we cannot produce, that he subsequently prepared certain documents and prepared the assignment.

The Court: Prepared the assignment—that is why I ruled the assignment is not admissible.

Mr. Gillen: Prepared the assignment——

The Court: That is why I ruled the assignment is not admissible.

Mr. Gillen: That he prepared the assignment and not only prepared the assignment, but he subsequently delivered the assignment to the bank, received from the bank at a later date [2612] the

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(Testimony of William Woodburn.)

check and release, delivered them to his client, and returned the receipt and release to the bank showing the payment of this obligation. Now I think we have everything there, your Honor, for more than a substantial foundation. So there may be no question in anybody's mind, may I call your Honor's attention to page 1506 of the transcript in this case?

Mr. Campbell: May I suggest this be done out of the presence of the jury?

The Court: We will excuse the jury until tomorrow.

Mr. Gillen: I do not think this should be done out of the presence of the jury. The jury has already heard this.

The Court: We will excuse the jury until tomorrow morning at 10:00 o'clock.

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.) [2613]

Thursday, February 7, 1952—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

JOHN P. THATCHER

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name?

A. John P. Thatcher.

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(Testimony of John P. Thatcher.)

Q. And state your address?

A. 1310 Lander Street, Reno, Nevada.

Q. With whom do you reside there?

A. With my wife and children.

Q. What is your business or profession?

A. I am a lawyer.

Q. How long have you been such?

A. Twenty-one years.

Q. And that, of course, is in the State of Nevada? A. Yes.

Q. Were you formerly a member of the law firm of which your father was senior member?

A. Yes, Thatcher, Woodburn and Forman.

Q. And your father's name was what?

A. George B. Thatcher.

Q. And he is now deceased? [2614] When did he die? A. 1946.

Q. Are you acquainted with the defendant in this case, Elmer Remmer, who sits at the counsel table?

A. Yes, I have known him for some years.

Q. During the year 1948, in your professional capacity as a member of the firm of Thatcher, Woodburn and Forman, were you called upon to, and did you, do any work in connection with an income tax problem of Elmer F. Remmer?

Mr. Campbell: Objected to as immaterial, if the Court please, and not competent as to matters occurring in 1948.

The Court: Objection overruled.

Q. Do you wish the question read?

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(Testimony of John P. Thatcher.)

A. The answer is yes.

Q. Are you acquainted with a man by the name of Harold Maundrell? A. Yes, I am.

Q. And during the month of March or the early part of April of 1948, in connection with the income tax problem of Mr. Remmer, did you have a conversation, or conversations, with Mr. Remmer and with Mr. Maundrell, concerning the Remmer enterprises or enterprises in which Mr. Remmer was interested? A. I did.

Q. And from your conversation with Mr. Maundrell and Mr. Remmer—was it more than [2615] one conversation?

A. Just one with Mr. Maundrell.

Q. And did you learn Mr. Maundrell's capacity in connection with the enterprises in which Mr. Remmer was interested in that conversation?

Mr. Campbell: Objected to as incompetent and calling for hearsay.

The Court: Objection sustained.

Mr. Gillen: I am asking him if he learned of Mr. Maundrell's capacity.

The Court: The objection has been sustained.

Q. All right. From your discussion with Mr. Maundrell concerning the enterprises in which Mr. Remmer was interested, did you determine whether or not Mr. Maundrell was acquainted with Mr. Remmer's businesses?

Mr. Campbell: Objected to as calling for hearsay.

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(Testimony of John P. Thatcher.)

The Court: Objection sustained.

Q. All right. Now on April 8th, calling your attention to the date of April 8, 1948, I will ask you whether or not, by previous arrangement made with you, you met with any representatives of the Internal Revenue Department?

A. Yes, on that day I met with Mr. Weaver, Mr. Morgan, and Mr. Harkness.

Q. Where did that meeting take place?

A. It took place in my office, 206 North Virginia Street, Reno. [2616]

Q. What time in the day, do you recall, was that meeting scheduled for?

A. It is my recollection it was scheduled for two o'clock in the afternoon.

Q. And prior to the arrival of the men you have mentioned from the Internal Revenue Department, did you see that Mr. Remmer that day?

A. Yes, I had Mr. Remmer come over at 1:30.

Q. Did you have a conversation with Mr. Remmer that day?

A. Yes, I spoke to Mr. Remmer with Mr. Woodburn in Mr. Woodburn's office.

Q. In that same suite of offices?

A. In that same suite of offices.

Q. Now following your conversation with Mr. Remmer and Mr. Woodburn, did Mr. Remmer remain in your suite of offices, or did he go elsewhere?

A. Following that conversation in Mr. Woodburn's offices, he remained in Mr. Woodburn's office for a while and then he went in the library.

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(Testimony of John P. Thatcher.)

Q. When the Internal Revenue men arrived, where did you receive them?

A. In my room, No. 206.

Q. Who came into the room first?

A. I think Mr. Morgan, followed by Mr. Weaver and Mr. Harkness. [2617]

Q. Was anybody else with them at that time?

A. They had a typist, stenographer, with them at that time.

Q. Was that a man or woman?

A. It was a woman.

Q. Did you have a conversation with Mr. Weaver or the other gentlemen at that time?

A. Yes, I did.

Q. Was Mr. Remmer in your private office at that time? A. No, he was.

Q. Throughout that entire meeting was Mr. Remmer ever in your presence, in the presence of Mr. Weaver or Mr. Morgan or Mr. Harkness?

A. He was not.

Q. Did the lady who was the stenographer remain in your private office during the conversation you had with the Internal Revenue men?

A. No, after a short while she left and went out to the reception room.

Q. What was the conversation you had with Mr. Weaver, Mr. Morgan and Mr. Harkness at that time, and if you will relate as near as you can, recall who did the talking.

A. The arrangement for the meeting was that Mr. Weaver, Mr. Harkness and Mr. Morgan wanted

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(Testimony of John P. Thatcher.)

to talk to Mr. Remmer and ask him some questions. When they came into the office they three sat in front of my desk, about three or four feet in [2618] front of it in three chairs, and Mr. Morgan asked if Mr. Remmer was present, and I said yes, he was in the office.

Q. By office, what did you mean by that, the same room or elsewhere?

A. I meant in the suite of offices, and I then asked Mr. Morgan what was the purpose of the questioning, and Mr. Morgan or Mr. Weaver, I don't know which, said that they just wanted to ask him some questions about his income tax. I then asked if they had any particular year in mind and they said no, and then I asked if there were any particular items of income as to which they desired to question Mr. Remmer and they said they did not desire to commit themselves on that, they just wanted to ask him questions, and then I asked if their purpose in coming was to obtain evidence for criminal prosecution, and Mr. Weaver, I think, said he could not say as to that at that time, and I then questioned them at some length regarding the purpose of the questions of Mr. Remmer. As to the answers to all my questions they were non-commital.

Q. They gave you no information other than they wanted to question him?

A. None whatsoever.

Q. Now how long would you say the interview that you have in mind here consumed?

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(Testimony of John P. Thatcher.)

A. Oh, not more than 15 or 20 minutes.

Q. At the conclusion of that interview, or at any time during that interview, did you hand to anyone of the Internal Revenue [2619] men a typewritten prepared statement, expressing your position in the matter, as attorney for Mr. Remmer?

A. Yes, I did.

Q. And to whom did you hand that?

A. I think Mr. Weaver.

Q. Do you have a copy of that statement?

A. I do.

Q. Will you produce it, please?

Mr. Gillen: I will have this marked for identification, with the Court's permission.

The Clerk: G-1.

Q. Now, Mr. Thatcher, when was it, if you recall, that you handed Mr. Weaver the prepared typewritten statement now identified as defendant's G-1 for identification? Was it at the conclusion of your interview?

A. At the very conclusion of the interview.

Q. Now prior to handing the prepared statement over, did you express your position orally to the three Internal Revenue men?

A. I did. I told Mr. Weaver that under no circumstances would I permit the agents of the Bureau to question Mr. Remmer on a fishing expedition.

Q. Then at the conclusion, as I understand it, you handed them this prepared statement?

A. I did. [2620]

Mr. Gillen: Now I will offer this statement, may

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(Testimony of John P. Thatcher.)

it please the Court, as defendant's exhibit next in order in evidence.

Mr. Campbell: No objection.

The Court: It may be admitted. G-1.

Mr. Gillen: With the Court's permission, I should like to read this statement to the jury.

The Court: You may do so.

Mr. Gillen: (Reads Exhibit G-1.)

Q. Now, did you also assure the agents of the Internal Revenue at that time——

Mr. Campbell: I am going to object to leading question, which this obviously is going to be.

The Court: I can see it is going to be leading and try to avoid leading questions.

Mr. Gillen: I thought it was more a summarization what he previously testified.

The Court: Well, it is leading.

Q. All right. In your oral discussion with the agents of the Internal Revenue Department, did you on that date, in your office, in substance relate to them what was in this statement?

A. In substance, yes.

Q. And did you include in that that you would make Mr. Remmer available in the event that some specific charge——

Mr. Campbell: Objected to as leading, if the Court please. [2621]

The Court: Objection sustained.

Q. Look at the last paragraph of this document and tell me if you said anything to them of the general nature contained in that last paragraph?

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(Testimony of John P. Thatcher.)

A. Yes, I said I would make available to them such books and records of Mr. Remmer's business as I could and I did so.

Q. You did so at some subsequent time?

A. Yes, I gave Mr. Weaver all of our files on the income tax problem.

Q. Did you say anything about ever making Mr. Remmer available to them or not?

A. I don't recall whether I did orally or not.

Q. Of course that was contained in the statement which you prepared? A. Yes, sir.

Q. Now, after this incident that you have related took place, I take it that the three Internal Revenue men withdrew from your office?

A. Yes.

Q. And it was at some later time that you turned certain files and books to Mr. Weaver?

A. Yes, it was following that conversation, at a later date.

Q. Now, Mr. Thatcher, Mr. Weaver has testified here that on April 8, 1948, that he and the other two agents mentioned, were in your office at the address you gave and present in your [2622] office at that time was Mr. Remmer, the defendant in this case, and that you were also present and that you introduced Mr. Remmer to the three agents and that a discussion was had, at the conclusion of which you stated to the agents that you were advising Mr. Remmer to answer no questions or make no statements, and Mr. Weaver further testified that he then personally addressed Mr. Remmer

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(Testimony of John P. Thatcher.)

and asked Mr. Remmer, in effect or words, "Is what your attorney stated your attitude, that you will make no statements and answer no questions?" and that Mr. Remmer said that that was his attitude, that he would make no statements and answer no questions. Now, Mr. Tatcher, I am going to ask you whether or not such an incident as was described by Mr. Weaver took place in your office on April 8, 1948, or at any other place at any other time, or at all? A. It did not.

Q. Was Mr. Remmer, to your knowledge, ever in the presence of these three agents in your presence and sight? A. He was not.

Q. Mr. Thatcher, were you acquainted in his lifetime with a man by the name of Robert Jeffers?

A. Yes.

Q. And directing your attention to the year 1949 or 1950, did you ever have a conversation with Mr. Jeffers concerning a 50 thousand dollar promissory note from Mr. Remmer to Mr. Jeffers?

Mr. Campbell: Objected to as calling for hearsay. [2623]

The Court: Objection sustained.

Mr. Gillen: As to the answer to this question, your Honor, I believe there is no hearsay involved. He can state whether he had a conversation, yes or no.

The Court: The question incorporates the subject matter of the alleged conversation. I think the two together you would have hearsay.

Q. Well, let me put it this way. Did you, in the

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(Testimony of John P. Thatcher.)

year 1949 or 1950 have any conversation with Mr. Jeffers regarding any transaction between himself and Mr. Remmer?

Mr. Campbell: Objected to as calling for hearsay and immaterial.

The Court: Answer the question yes or no.

A. Yes.

Q. Can you tell us what that conversation was?

Mr. Campbell: Objected to as calling for hearsay.

The Court: Objection sustained.

Mr. Gillen: May it please the Court, I should like to be heard on that matter because I have at this point in the examination of Mr. Thatcher a matter that pertains to an admission against interest by Mr. Jeffers.

The Court: I will not take the time, Mr. Gillen. It is the same subject we have discussed before and the ruling will stand.

Mr. Gillen: May I say this to your Honor respectfully? [2624]

The Court: The ruling will stand.

Mr. Gillen: I wish to say further, your Honor——

The Court: I am not going to have any further discussion on this question. The ruling has been made and will stand and we will proceed to the next question.

Mr. Gillen: I was just going to tell your Honor——

The Court: I do not want you to.

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(Testimony of John P. Thatcher.)

Mr. Gillen: You don't know what I am going to say. I might say something that is enlightening to you.

The Court: There is nothing before the Court and we are not going to have anything in this record except questions and answers to questions.

Mr. Gillen: We are supposed to have some——

The Court: Proceed.

Mr. Gillen: Then I ask at this time to be permitted to make an offer of proof.

The Court: Well, we will excuse the jury.

(Jury and alternate jurors admonished and excused at 10:25 a.m.)

(In the absence of the jury.)

OFFER OF PROOF RE: JEFFRESS NOTE

(Feb. 7, 1952, Notebook 341, pp. 3-18.)

Mr. Gillen: Now, may it please the Court, we have here a situation of an admission against interest by Mr. Jeffress, against his own interest, to Mr. Thatcher. We offer to prove in the year 1949 or 1950 that Mr. Thatcher and Mr. Robert Jeffress, now deceased—I believe it will be fixed as the year 1951 that Mr. Jeffress died—it may have been the end of 1950—we offer to prove that Mr. Jeffress had a conversation with Mr. Thatcher, in which Mr. Jeffress discussed the fact that he had loaned in 1946—of course your Honor knows there is evidence to that effect already in the record—Mr. Remmer fifty thousand dollars and that he had

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obtained from Mr. Remmer a note for $50,000 and that in connection with the income tax indebtedness and problems Mr. Thatcher was then handling for Mr. Remmer as attorney for Mr. Remmer, that Mr. Thatcher requested that Mr. Jeffress turn over to him the promissory note for the $50,000, so that it could be taken up with the accountant, and further that in this conversation it was admitted and revealed by Mr. Jeffress to Mr. Thatcher that the $50,000 obligation, evidenced by that note, had been paid by Mr. Remmer to or on behalf of Mr. Jeffress.

Now, while we recognize the well-founded rule, may it please the Court, that conversations out of the hearing or presence of persons interested in the case is hearsay, there are several exceptions to the hearsay rule and one of the exceptions, may it please the Court, is the exception of which the prosecution in this case took advantage and upon which your Honor ruled favorably for the prosecution. The statement on which your Honor ruled is found on page 89 of the transcript, where Mr. Thompson addressed your Honor and said: "Your Honor, I would like * * *. I am saying that generally * * *," and the Court then interrupted and said: "Have you authority. Let us hear the authority."

Now this situation arose, your Honor will recall, in the instance of the appearance on the witness stand of Mrs. Badovinatz, who testified, and your Honor first heard the testimony out of the presence of the jury, in order to enable your Honor to pass on the efficacy of the contentions of the prosecution. Mrs. Badovinatz testified that in February,

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1947, her husband, then deceased at the time she appeared on the witness stand, had told her he was going to the bank in Fresno to get a cashier's check to repay Bones Remmer five thousand dollars he owed him. Your Honor heard that testimony and determined that that was a declaration against interest on the part of this defendant by way of acknowledgment of an indebtedness to Remmer, and having heard that matter out of the hearing and presence of the jury, your Honor then called in the jury and permitted her to testify and, of course, your Honor will recall further objection was made by me on the grounds there was no showing when the indebtedness was incurred, but that is not the problem here. Subsequently there was other evidence in support of that declaration against interest brought here in the form of cashier's check. Your Honor will recall they had one obtained by Mr. Badovinatz made payable to Mr. Remmer in the sum of $5,000. Now, here we have evidence already in the record concerning the transaction of the borrowing and we are now reaching the point of payment of the $50,000 obligation.

The Court: Let me ask a question. You thought there was error at that time on the part of the Court to admit that testimony of the lady.

Mr. Gillen: We thought it was error for this reason, that there would have to be a showing here whether the obligation was incurred within the period of time involved in the indictment here.

The Court: Did you at that time make an objection on the ground that it was hearsay?

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Mr. Gillen: Yes, we urged the hearsay objection.

The Court: If you were right, then are you right now? My thought is if the Court has erred in that testimony, I will strike it and strike any exhibit introduced in relation to it.

Mr. Gillen: Your Honor refused to do it.

The Court: I am always happy, if you can point out where I have made any error throughout the course of this trial, I will be glad to hear you and back track, so when we are finished we will have a record as free of error as humanly possible for me to have. So that presents this problem, and I think it is the duty of the Court, if it appears at any time during the course of the trial that the Court has made an error in ruling and admission of any testimony or exhibits, that the Court should strike those matters from the record.

Mr. Gillen: Well, this is our position in regard to the Badovinatz matter, your Honor, and this is what was urged the other day by Mr. Avakian in his motions to strike certain portions of the transcript. We think, and we are satisfied from a reading and research of the authorities, that there is an exception to the hearsay rule, where an admission against interest has been made by a person who is either deceased or beyond the control of the court, to appear and testify in person. However, in the Badovinatz matter, we had the other problem involved, that it not being possible to establish when the obligation was incurred—we have no promissory note to give us the date of the incurrence of the

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obligation as we have in this instance here in the Jeffress case—we contended—your Honor will recall Mr. Thompson remarking the other day there was only about 31 or 32 days that this obligation should have been incurred before February 8th to bring it in, and he told your Honor he thought your Honor should be allowed to speculate on when the loan was made. Our strenuous objections, which we still urge, and our contention it was error to allow it in, which we still urge, was not upon the point that it was not proper under the exception to the hearsay rule declaration against interest of a deceased person, but rather there was no connection made to show when the obligation was incurred.

Now, Mr. Golden reminds me that we further urged at that time that it was privileged conversation between husband and wife, which your Honor thought was not meritorious at that time, so we feel that we have here a situation that is squarely within the rule and on which your Honor properly can rule is an exception to the hearsay rule and that the other objectionable aspect that was present in the Badovinatz matter is not in this case. We have some authority on this—Wigmore on Evidence and Corpus Juris Secundum, both of which hold declarations against interest is a proper exception to the hearsay rule, and as to that, I do not feel that your Honor's ruling was correct in the Badovinatz instance.

The Court: Let me ask you this question—declaration against whose interest?

Mr. Gillen: Against the interest of Mr. Jeffress.

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The Court: Do the authorities go that far?

Mr. Gillen: Well, it can only be declaration against interest of the defendant, your Honor, in one form or the other.

The Court: Could there be a question of whether or not the interest against whom the declaration is made or was made, would be confined to the interest of a party to the action?

Mr. Gillen: No, it wasn't in the Badovinatz matter.

The Court: No, I realize that.

Mr. Gillen: Mr. Badovinatz was no party to the action. Mr. Badovinatz made declaration against interest which indicated he had an obligation against the defendant in this case which he paid within the period of time that we are interested in here. It is declaration against interest of the declarant who is now either dead or beyond the control of the Court. Your Honor recognizes there are many declarations against interest. A common one is in an automobile traffic violation, a man says, "My brakes didn't hold," or "I didn't see" or "I was going too fast" or "I ran through the red light by mistake." In effect he is saying, it is my fault, I am obligated to you under the circumstances. In regard to owing money, there are declarations against interest—a man can say, "I owe John Jones so much," that is declaration against his interest, or he can say, "John Jones owed me so much but now he paid it." That is declaration against his interest because he is admitting that there is no longer due to him an obligation, that it has been paid and the slate

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is clean. He is declaring against interest because he is burning his bridges behind him to make any claim against that obligation. Mind you, we have here, at the starting point of this whole transaction, the preparation by Mr. Maundrell of the promissory note which is in evidence, we have the passing of the money, some bank records to show how the money went thru the conduit to Mr. Remmer's interest, namely, the Cal-Neva account, and reflecting the withdrawal of that amount from the bank on account of Mr. Jeffress in San Francisco, and we are now attempting to present to the jury declaration of interest by Mr. Jeffress to the effect, "I will give back the promissory note because the obligation has been paid." In other words, "I no longer have a claim for the $50,000."

The Court: What is it you expect to prove, Mr. Gillen, in this record?

Mr. Gillen: I expect to prove by Mr. Thatcher in this regard that while Mr. Thatcher was working on this income tax problem in 1949 and 1950—and I might state to your Honor there are some other aspects—a petition for readjustment of the tax claims in connection with the Jeffress assessment that was levied against Mr. Remmer's assets—Mr. Thatcher was working on that and it came to his attention an obligation of $50,000 which Mr. Remmer owed to Mr. Jeffress had been paid, but the evidence of the payment of that obligation was not completed, in that Mr. Jeffress still had the note, and Mr. Thatcher communicated with Mr. Jeffress, asked Mr. Jeffress if the obligation had

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been paid and if so would Mr. Jeffress return the note, so Mr. Thatcher might have it in his hands, or the hands of the accountant who was working on the matter. We will prove Mr. Jeffress (1) admitted the obligation was paid, and (2) Mr. Jeffress returned the note. That is the whole sum and substance.

The Court: Have you concluded now?

Mr. Gillen: Yes, and I would like to have your Honor hear the testimony out of the presence of the jury, as you did in the instance of Mrs. Badovinatz, and I think your Honor will then rule consistently as you did in the Badovinatz matter, that this is a recognized exception of the hearsay rule.

Mr. Campbell: I think the last suggestion should be followed in connection with the offer of proof, in the event your Honor is inclined, from the general statement, to admit the evidence. However, my understanding of the rule of these matters does not coincide entirely with that of Mr. Gillen's. My understanding of the rule is this, that as an exception to the hearsay rule, a statement made by a decedent against his pecuniary interest at the time that he makes the statement—and by against his pecuniary interest I mean his referring to an obligation which he admits owing at the time he makes the statement—is admissible, but a statement of past events does not come within that exception to the hearsay rule. I was going to say the situation of the Badovinatz evidence is entirely distinguishable from this proffered evidence. There

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Mrs. Badovinatz was testifying as to admission by her husband that on the date he made that statement he owed Remmer the sum of money that was involved—I forget what it was—five thousand dollars—which was against his then personal pecuniary interest. Now, the general rule as set forth here in Corpus Juris Secundum—I am reading from Vol. 31 at page 963—"To be admissible as a declaration * * *." Then as to pecuniary interest it states: "Where the declarant had adequate knowledge of the facts stated * * *," which presents another facet of the matter and that is, if the statement were against his then existing pecuniary interest, then it is admissible. It must also appear that primary evidence, rather than this hearsay evidence, is not available to the proponent of the evidence. Here—and I say this without the presence of the jury—primary evidence is available to the defendant as to the circumstances, the making and the circumstances of the obligation referred to, at any given period of time.

I submit, your Honor, that under the circumstances that the proffered evidence is not admissible as it does not fall within the exception to the hearsay rule and is in no way inconsistent with your Honor's ruling on the Badovinatz matter.

The Court: Your point is at the time the declaration was made and the declaration that was admitted in evidence, would show that at a prior time the declaration was made to Mr. Thatcher the loan had been paid?

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Mr. Campbell: That is the statement made by counsel.

The Court: And for that reason at the time the declaration was made there was no interest against which the declaration was spoken?

Mr. Campbell: That is correct.

The Court: Then the other point.

Mr. Campbell: That there is no showing that primary evidence is not available.

The Court: Such exceptions to the hearsay rule as to declarations against interest cannot be utilized if primary evidence of the transaction is available and you say that this is the situation here?

Mr. Campbell: That is the situation. I would like to make one observation.

The Court: Read that authority again, what you denominated primary evidence.

Mr. Campbell (Reads): "Where declarant had adequate knowledge of the facts stated and primary evidence cannot be procured, the declaration is admissible if made against his pecuniary interest." Now, in this instance we say that one of the conditions—that is, the absence of primary evidence or showing that primary evidence cannot be obtained—cannot be complied with.

Mr. Gillen: I would like to know what he means, primary evidence that is available.

Mr. Campbell: Well, would be evidence of one party to the transaction itself. Of course, that is the primary evidence. May I make this further statement, if the Court please. I think it is apparent the reason for this rule, and why it is an excep-

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tion to the hearsay rule, and I believe all the authors, including Wigmore, refer to this—why it must relate to a statement against the then present pecuniary interest, is the belief and the logic that a man would not ordinarily lie about owing somebody something or not having ownership of something because it is an admission on his part of a then existing debt and that is the reasoning behind that exception to the hearsay rule.

The Court: That same reasoning is here. When a man makes a statement that he is not indebted, in the face of an apparent liability and note for $50,000, when he said, "I am not indebted," why that is and the effect would amount under such circumstances to the same thing you have just stated here. He would be inclined, if he was not honest, he would be inclined to deny that he was paid. When he said it was paid, why it is certainly some evidence of the truth of his statement.

Mr. Campbell: I suggest that we hear the proposed evidence outside of the presence of the jury before the Court rules, in order that we can see the legal scope of the offer.

The Court: I think that might be a good idea.

Mr. Gillen: I suggested that, your Honor. It is entirely agreeable.

The Court: Very well.

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MR. JOHN P. THATCHER

took the witness stand, and having been sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Thatcher, so you may be enlightened upon the proceeding, the Court has determined to hear evidence on a phase of this matter out of the presence of the jury, in order to enable it to rule upon the offer. Is that a correct statement, your Honor?

The Court: Yes, sir.

Q. Mr. Thatcher, in the years 1948, 1949, and 1950 you were engaged as an attorney doing some work upon the income tax problems of Mr. Remmer? A. That is right.

Q. And had there been a jeopardy assessment levied upon Mr. Remmer's assets on a civil complaint for income taxes?

A. There had in March, 1949.

Q. In connection with the jeopardy assessment, did you prepare some sort of a petition which was filed with the Internal Revenue Bureau?

Mr. Campbell: I don't understand this was the matter of the subject——

The Court: I don't either. I don't see where this would be material.

Mr. Gillen: I was giving your Honor a little background of the work he was doing at that time and the reason for the talk with Mr. Jeffress, that's all. I can go right to the point.

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(Testimony of John P. Thatcher.)

Q. In 1949 or 1950 did you have a conversation with Mr. Jeffress regarding transaction between himself and Mr. Remmer which had taken place in 1946? A. I did.

Q. And was that with regard to a promissory note that Mr. Jeffress was holding against Mr. Remmer? A. It was.

Q. And do you know what the amount of that note was? A. I believe it was $50,000.

Mr. Campbell: I presume in the presence of the jury he is going to be asked the conversation. That is a leading question. I am not making objections here because the jury is not present.

The Court: No, that is right. In the presence of the jury we ought to avoid leading questions.

Q. Now, Mr. Thatcher, will you relate to the Court what conversation you had with Mr. Jeffress at that time regarding the $50,000 obligation, $50,000 note?

A. I got in touch with Mr. Jeffress immediately following the filing of the petition and asked him to bring to me or Mr. Semenza the note for the $50,000 which he had in his possession, which he did. He gave it to Mr. Semenza.

Q. Did you have any conversation with him at that time as to whether or not the obligation had been paid?

A. I don't recall whether or not I did. I don't know whether it was paid or not at that time.

Q. But Mr. Jeffress did relinquish or surrender the promissory note?

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(Testimony of John P. Thatcher.)

A. Yes, he turned it over to Mr. Semenza.

The Court: Well, that ends that discussion; it certainly couldn't be a declaration against interest under the circumstances of this conversation.

Mr. Campbell: I submit this line of testimony is immaterial.

The Court: Yes.

Mr. Gillen: If a man relinquishes anything of evidence, let us hear what he had to say, whether the note should be given back to him, whether it was paid, or whether he surrendered it or not. I want Mr. Thatcher to see the note.

Q. I show you here defendant's Exhibit A-1 and ask you whether or not you recognize that as the note that was surrendered to you by Mr. Jeffress?

Mr. Campbell: He says it wasn't surrendered to him.

The Court: I wish you could avoid leading questions.

Mr. Gillen: Of course, I am not asking the witness in the presence of the jury.

The Court: You still have the possibility of that effect of leading questions.

Mr. Gillen: I think your Honor can separate the wheat from the chaff.

The Court: Very well, but I do not want leading questions.

Q. Are you acquainted with the note, ever seen it before? A. Yes.

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(Testimony of John P. Thatcher.)

Q. Do you know whether or not that was the note Mr. Jeffress surrendered to either you or Mr. Semenza?

A. I know Mr. Semenza had this note in his possession.

Q. When you talked to Mr. Jeffress about surrendering the note, did Mr. Jeffress in anywise protest or ask that the note be returned to him or ask how long it would be kept or anything of that sort?

Mr. Campbell: Same objection.

The Court: Objection sustained.

Q. Let me ask you this: Do you have any recollection of anything Mr. Jeffress said about surrendering the note for $50,000 to either you or Mr. Semenza?

A. Mr. Jeffress recalled the indebtedness and I asked if he knew there was a note in existence and he said there was and he would look it up and bring it in.

Q. Do you recall, Mr. Thatcher, when you talked to Mr. Jeffress whether or not Mr. Semenza was present? A. No, he was not.

Q. Did Mr. Jeffress say anything about having the note returned to him, or anything of that nature? A. No, he didn't mention that.

Q. Did you tell Mr. Jeffress what you wanted the note for?

A. I told him we wanted it as proof of this loan which had been made by him to Mr. Remmer.

Q. Did you say anything concerning any further matter relating to the loan?

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(Testimony of John P. Thatcher.)

A. I told him that up to that time we had no knowledge—rather. I told him that we had been informed of the circumstances of the loan but had no evidence of it and wanted to verify the existence of the loan.

Q. Did you say anything to him about whether or not the loan had been repaid?

Mr. Campbell: Objected to——

The Court: Objection sustained. Now, that is the third time you have suggested answers to the witness.

Mr. Gillen: I was directing the witness' attention to a——

The Court (Interceding): Objection is sustained. I think we ought to find, and believe we have already from this witness, the entire substance of this conversation. If there is anything else in his conversation, I would like to know about it. Is there any further substance to this conversation?

A. I do not believe there is, your Honor.

Q. When you were speaking to Mr. Jeffress on that occasion about returning the note to you or Mr. Semenza, did you know at that time whether or not that obligation had been liquidated or paid?

Mr. Campbell: Objected to as calling for conclusion.

The Court: Objection sustained.

Mr. Gillen: Whether or not he had any knowledge?

The Court: The objection is sustained.

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(Testimony of John P. Thatcher.)

Mr. Gillen: I didn't get the grounds of the objection.

The Court: The one ground I have in mind, it savors of attempt to evade the rulings of the Court.

Mr. Gillen: I don't think so. The man can say whether he did or not.

The Court: I am not going to argue. That is the ruling.

Mr. Gillen: I think a man can answer whether he did or not.

The Court: I am not going to argue. Any further questions?

Mr. Gillen: Your Honor seems to forget that we are advocates here.

The Court: The objection to the question will be sustained.

Mr. Gillen: Your Honor's ruling is a man can't say yes or no?

The Court: You heard my ruling and you understand.

Mr. Gillen: No, I don't understand, that is why I am asking. I want to keep out of trouble with the Court. I want to know what your Honor's policy is, whether a man can answer yes or no.

The Court: The objection is sustained on the grounds set forth in the objection. So we will call in the jury.

Mr. Gillen: What is the ruling on the matter, your Honor?

The Court: Objection is sustained.

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.) [2625]

MR. THATCHER

resumes the witness stand.

Mr. Gillen: In view of the Court's ruling, no further questions of Mr. Thatcher.

Cross-Examination

By Mr. Campbell:

Q. Now, Mr. Thatcher, returning to your testimony regarding a meeting in your office of April 8, 1948, which you place in the afternoon of that day. I believe you stated the government agents arrived about two o'clock?

A. I believe the appointment was set for that time, yes.

Q. Now the appointment had previously been made, had it? A. Yes, it had.

Q. By you?

A. No, it had been made with me.

Q. And by whom had it been made with you?

A. My recollection is that it was made by telephone call from San Francisco.

Q. And with whom did you have that conversation? A. I think it was probably Mr. Kyne.

Q. That is Willie Kyne? A. Yes.

Q. Now it is a fact, is it not, that the purpose

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(Testimony of John P. Thatcher.)

of that meeting was the request of the government agents to interview Mr. Remmer, is that correct?

A. That is correct.

Q. Now you say that Mr. Remmer was present in your suite of [2626] offices on that day?

A. Yes, sir.

Q. When did you arrange, or when was the appointment made with Mr. Remmer for his presence?

A. Well, that had been arranged about the latter part of March.

Q. That he was to be in your office on that occasion? A. That's right.

Q. And was that pursuant to the request of the revenue agents to interview him? A. It was.

Q. So that the original purpose of the meeting was for the interview of Mr. Remmer, is that correct? A. That's correct.

Q. Now was the first time that you met with the agents regarding request to interview Mr. Remmer on April 8th? A. Yes, it was.

Q. You had no previous meeting with them?

A. No.

Q. Now you say the discussion lasted about 20 minutes? A. Somewhere around there.

Q. And I believe you stated that in addition to Mr. Weaver, Mr. Harkness and Mr. Morgan, there was also present a typist or stenographer?

A. Yes. [2627]

Q. And was that a typist or stenographer that those gentlemen brought with them? A. Yes.

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(Testimony of John P. Thatcher.)

Q. And was she present throughout the discussion? A. Not to my recollection, no.

Q. Do you recall whether or not anything was said at that time by you to the effect that a stenographer could not be present? A. No.

Q. Do you have any distinct recollection of her having left that meeting? A. Yes, I do.

Q. How soon after the meeting commenced did she leave?

A. Oh, I would say about 10 minutes.

Q. Do you recall the occasion for her leaving at that time?

A. Well, it became pretty obvious when she left.

Q. What was said?

A. Well, I say I don't recall what was said, but it became obvious Mr. Remmer was not available for questioning.

Q. Now you are positive, are you, Mr. Thatcher, that Mr. Remmer did not enter the room where you and the agents were at any time?

A. I am quite positive.

Q. Now do you remember, Mr. Thatcher, that in the course of that conversation that one of the agents, Mr. Weaver, stated to you that the only grounds upon which Mr. Remmer could [2628] refuse to be questioned was on constitutional grounds of his right against self-incrimination, and that that was a personal right which he himself had to claim. Do you recall that statement?

A. I do not recall that exact language, something to that effect.

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(Testimony of John P. Thatcher.)

Q. You recall that in substance, is that correct?

A. No, I do not recall that in substance. Something to that effect might have been said.

Q. Do you have a recollection any such statement was made, either in words or in substance?

A. No, I do not.

Q. Now you say that on this occasion you handed the agents this written statement, Defendant's G-1, is that correct? A. That is correct.

Q. Did you have a stenographer present during this meeting? A. No.

Q. Did any stenographer come into the room during this meeting? A. No.

Q. This was a statement which you had written up prior to that meeting with the agents on that occasion? A. It was.

Q. And you say you had never met any of these agents prior to that time? [2629] A. No.

Q. When did you actually dictate this statement to your stenographer?

A. On the morning it took place.

Q. And your appointment was for two or 2:30 that afternoon? A. Two o'clock.

Q. So that the statement was prepared and ready at the time the agents arrived? A. It was.

Q. Now isn't it a fact, Mr. Thatcher, that this statement was handed to the agents in the presence of Mr. Remmer? A. It is not.

Q. Your testimony is that, although having Mr. Remmer present, you kept him in another room at all times? A. That is right.

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(Testimony of John P. Thatcher.)

Q. Was that in an adjoining room to that where you had your meeting?

A. First Mr. Woodburn's, which adjoins to the east of mine, and then he left Mr. Woodburn's room and went to the library, which is across the hall and one door to the west.

Q. Where was he, if you know, during the 20 minutes that you were with the agents?

A. Well, I believe he was part of the time in Mr. Woodburn's office and the latter portion of the time in the library. He was in the library when the agents left. [2630]

Q. Did you consult with Mr. Remmer at any time during that 20 minutes? A. No.

Q. Or did you see or observe Mr. Remmer in his movements during that period of time?

A. No.

Q. You are satisfied, are you, Mr. Thatcher, that you are not mistaken when you state that Mr. Remmer was not present at any time with the agents on that occasion? A. I am not mistaken.

Q. Were the agents in the library at any time?

A. No.

Q. Were you there when they came into the anteroom of your office? A. I was in my office.

Q. Do you know when they first arrived at your suite of offices on that date?

A. Probably just shortly before.

Q. Do you know that or do you simply assume that? A. I simply assume that.

Q. Do you know whether or not on that occasion

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(Testimony of John P. Thatcher.)

that they had to wait a while before seeing you and were sent to the library of your office?

A. No, they would not be sent to the library.

Q. Isn't it customary in the offices which you maintain, where [2631] a number of people were waiting to occasionally have some of them waiting in the library?

A. It is the custom once in a while.

Q. And do you know, of your own knowledge, whether or not that occurred on that occasion?

A. I do not know.

Q. So that a moment ago, when you said they were not, you were simply assuming?

A. They were not what?

Q. That they did not go into the library?

A. Well, as I recall, there was no reason for them to go into the library at that time. They would be in the reception room.

Q. But you have no knowledge of it?

A. No, I haven't.

Q. Did you, or have you at any time, met Mr. Weaver and the other agents in the presence of Mr. Remmer? A. No.

Q. Never on any occasion? A. No.

Q. Do you still represent Mr. Remmer?

A. I do not.

Q. Over what period of time did you represent him as his attorney?

A. The early part of 1948, and then I think the following [2632] first of March, 1949, up to July 1, 1950.

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(Testimony of John P. Thatcher.)

Mr. Campbell: I think that is all.

Redirect Examination

By Mr. Gillen:

Q. Mr. Thatcher, you left the firm and became disassociated with the firm of Thatcher, Woodburn and Forman when?

A. On the 30th of June, 1950.

Q. Now, Mr. Thatcher, with regard to the interview that you had with Mr. Remmer in Mr. Woodburn's office prior to the arrival of the agents, am I correct in assuming that your testimony is that when you left Mr. Remmer on that occasion to go to your own office and receive the agents, that Mr. Remmer was in Mr. Woodburn's office?

A. He was.

Q. And then am I correct in assuming from your testimony that you did not see him again until after the agents left? A. I did not.

Q. And when you saw him again he was in the library?

A. After the agents left I opened the door of the library and found him.

Q. Do you know whether or not the agents came directly from the reception room into your office?

A. Well, I know only there was no waiting period between the time they were announced by the receptionist and the time they came to my office.

Q. And during the period of time that you talked with the [2633] agents, is it true or not true that

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(Testimony of John P. Thatcher.)

any of the agents left the room and went into the library or any other part of the suite of your offices?

A. None of the agents left the room during that time.

Q. In other words, they came into your private office immediately after announced by the receptionist and remained with you throughout the period of 15 or 20 minutes, whatever time it took, and then left your offices? A. That is true.

Q. Now with regard to Defendant's Exhibit G-1 in evidence, the statement that you prepared, you stated that you prepared that on the morning of April 8th, is that correct? A. That is right.

Q. Was it within your knowledge prior to the making of this appointment at your office by the agent that Mr. Remmer's income tax affairs were being investigated by the Internal Revenue Department? A. It was.

Q. And it is your recollection that Mr. Kyne made the appointment for the agents with you?

A. That is the best of my recollection, yes.

Q. On a phone call from San Francisco?

A. Yes, I think so.

Q. You fixed the time and hour that you would receive them? A. Yes. [2634]

Q. Now what was your purpose in preparing the statement in advance of the arrival of the agents?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

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Mr. Gillen: I think that is all.

Mr. Campbell: Nothing further.

(Witness excused.)

WILLIAM GRAHAM

a witness for the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Mr. Graham—I may be hazy on this, you may have answered this question at the previous examination—were you acquainted during his lifetime with a man by the name of J. B. Scarlett, also known as Jack Sullivan? A. Very well.

Q. As a matter of fact, Mr. Scarlett, also known as Sullivan, was associated with you in business enterprises? A. For many years.

Q. In Reno. Now during the year 1946, I believe you have already testified that negotiations were undertaken, whereby you and another business associate of yours, Mr. James B. McKay, were selling your stock in Cal-Neva Lodge corporation to the defendant in this case, Mr. Remmer, is that correct?

A. Yes.

Q. And by whom was that transaction being handled? [2635]

A. By George Thatcher, the attorney.

Q. By the way, Mr. Graham, is Mr. J. B. Scarlett, also known as Jack Sullivan, still living?

A. No, he is dead.

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(Testimony of William Graham.)

Q. When did he die, if you recall?

A. Last year.

Q. Here in Reno? A. Yes.

Q. Now in the course of the negotiations for the sale of that stock belonging to you and Mr. McKay to Mr. Remmer, I believe I am correct in my recollection that you previously testified that there were some personal accounts owing from all three of you to the Cal-Neva corporation that had to be cleaned up and paid? A. That is correct.

Q. And that was also being handled through Mr. Thatcher's office? A. Mr. Thatcher, yes.

Q. And directing your attention to about that time which, if my recollection serves me, was in May or June of 1946, I will ask you whether or not you had a conversation with Mr. Scarlett, also known as Sullivan, regarding a loan to Mr. Remmer?

Mr. Campbell: Objected to; calling for hearsay, if the Court please. [2636]

The Court: Objection will be sustained.

Q. Well, did you have a conversation with Mr. Scarlett at or about that time when the Cal-Neva transaction was being conducted in 1946, May or June?

The Court: You may answer that yes or no.

A. Yes.

Q. I wanted to add something to the question.

The Court: Pardon me.

Q. This is a specific conversation I am seeking to identify, a conversation regarding Mr. Remmer?

A. Yes.

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(Testimony of William Graham.)

Mr. Campbell: Objected to as calling for hearsay.

The Court: The answer may stand.

Mr. Gillen: Now, may it please the Court, at this point I think I should seek your Honor's direction as to your Honor's policy. We are about to encounter a situation similar to a matter discussed earlier this morning and I want to know what is your Honor's policy.

The Court: Do you want to take it up in the absence of the jury?

Mr. Gillen: If your Honor thinks that is advisable.

The Court: Yes, I think it is.

(Jury and alternate jurors admonished and excused at 11:30 until 1:45 p.m.) [2637]

Afternoon Session—February 7, 1952—1:45 P.M.

(In the absence of the jury.)

RE: OFFER OF PROOF LOAN TO SCARLETT

(Feb. 7, 1952—Notebook No. 341—P.P. 26-48.)

Mr. Gillen: Would it be your Honor's pleasure that I present this matter in the form of offer of proof first?

The Court: I hardly know what you have in mind.

Mr. Gillen: We have in mind regarding the same type of transaction Mr. Thatcher was testifying to this morning. We desire to offer evidence of

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admission against interest on the part of J. B. Scarlett, also known as Jack Sullivan, with regard to a $25,000 loan made by him to Mr. Remmer and the repayment of that loan, and with regard to his expressed and committed intention to make that loan taking place on two separate occasions.

Now we offer to prove, may it please the Court, through Mr. Graham that at the time in 1946, May or June, that the sale of the Graham and McKay interests to Remmer was under negotiations, that each of the three persons involved in the transaction were required to liquidate, or pay up, certain obligations that they personally owed, or were chargeable to them personally by the Cal-Neva corporation. I think your Honor will recall there is some testimony already in the record that Mr. Graham at that time owed the corporation some four thousand dollars, Mr. McKay owed the corporation three thousand odd dollars and Mr. Remmer owed the corporation some seventy odd thousand dollars, and that that money had to be paid into the corporation before the transfer of stock and so on and the account cleared off.

We offer to prove that at that time that Mr. Scarlett communicated personally with Mr. Graham and stated to Mr. Graham, "I have just promised Bones Remmer that I would loan him $25,000. He says he needs it to clean up his account with Cal-Neva, is that true?" That Mr. Graham stated to him yes, it was true, that they were all cleaning up their accounts with Cal-Neva. That Mr. Scarlett then said to Mr. Graham, "Well, is it all right to

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give it to him? Will I get my money back?" and Mr. Graham said to Mr. Scarlett, "You will get some money back; when he makes money or sells the place, you will get the balance of it, that is how we are going to get our money, that is how we are going to get our money back," and Mr. Scarlett said to Mr. Graham, "All right, then, I promised him I will loan it to him and I will."

We offer to prove that on a number of occasions between 1946, May or June, and 1949, March, that Mr. Scarlett spoke to Mr. Graham and asked Mr. Graham when and if Mr. Remmer had sold or planned to sell or had arranged to sell Cal-Neva, because he wanted to get his 1946 loan back, his money back, and that Mr. Graham on those occasions told him that Mr. Remmer was looking for a buyer for Cal-Neva.

We offer to prove that Mr. Scarlett told Mr. Graham that he had asked Mr. Woodburn, the lawyer, to protect him on the return of the $25,000 loan in 1946.

We offer to prove, may it please the Court, that in October, if I recollect correctly the month, of 1948, the sale of Cal-Neva by Remmer to the Adler interests was in the process of negotiations and that there was to be an escrow at the First National Bank of Nevada and on that occasion Mr. Scarlett spoke to Mr. Graham and asked him concerning the getting back of his money and that Mr. Graham said, "When the money comes through, you will get your money."

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We offer to prove further that although the sale was consummated, if I remember correctly, in October or November of 1948, the escrow was not perfected and the money was not payable until March of 1949, and that on March 2, 1949, Mr. Graham was paid, as was his associate, Mr. McKay, a large sum of the money out of the first money that was paid by Adler to Remmer in escrow at the First National Bank of Nevada, and upon receiving his money, that Mr. Graham communicated with Mr. Scarlett, or talked in person with Mr. Scarlett, also known as Sullivan, and said to Mr. Scarlett, "The money is ready. They are paying it out of the escrow. I got mine; you had better get your loan for 1946 note now. Go over to Woodburn's office," and that Mr. Scarlett said to Mr. Graham—It is disturbing to have counsel laughing when I am trying to talk. There has been a lot of snickering going on in this case and I have noticed it.

The Court: I haven't seen any of it getting to the jury and I don't know what took place.

Mr. Campbell: I don't know to what counsel is referring.

The Court: I hadn't noticed any matter of that kind. If I had and it occurred to me it was derisive, I would ask counsel to desist. I can not believe counsel would do that.

Mr. Gillen: I believe my eyes and I believe the eyes of my associates, who have seen the same thing.

Mr. Avakian: I might say to your Honor on about two occasions——

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The Court: There are a lot of things I don't like.

Mr. Gillen: I hope you are not speaking to us.

The Court: I notice when the jury is out that counsel go back and forth to speak and converse with jurors. I do not say they are conversing with them about the case, but I do not believe it is the proper thing to do.

Mr. Gillen: I do not think you have found any reason to find fault with me, your Honor. I have religiously avoided——

The Court: I think we ought not to fraternize.

Mr. Gillen: I do not think the defense has. If they pleasantly, it is just common courtesy.

The Court: I just want to mention things that happen, as long as you are mentioning a few things. I do not think counsel would knowingly offer any derision. I have not noticed any such disposition on the part of counsel on either side, so I hope you are wrong in your assumption, Mr. Gillen.

Mr. Gillen: I hope I am, too. I hope they are thinking up a joke they heard a week ago.

The Court: Yes, I hope so.

Mr. Gillen: Mr. Scarlett said to Mr. Graham at that time: "Well, I got my money. Woodburn took care of it for me."

Now, may it please the Court, this testimony is connected up with the three documents which were offered in evidence yesterday, which were in for identification, and now let me ask you, Mr. Graham:

Q. Would you so testify? You have heard what I offer—would you so testify?

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A. I would so testify, the same as you said.

Mr. Gillen: That connects up with that order or assignment to the escrow holder, I think it is D-1, E and F, the escrow order, the cashier's check from the Nevada National Bank, and the receipt signed by Mr. Scarlett, which was handled in Mr. Woodburn's office.

The Court: I understand you are through now. Before you proceed I would like to have you read a little of the first part of this over.

(Record read.)

Mr. Campbell: My objection is that this is calling for hearsay and the testimony is hearsay and further, primary evidence is available, whether or not the loan was made and over what period of time it existed. The primary evidence, of course, would be evidence of the parties to the loan. It is true the evidence would show that Mr. Sullivan is deceased. However, the evidence of the other party to the loan is available to the defense. Under the circumstances, I believe that this hearsay testimony should not be admitted, and I make my objection upon that ground.

Mr. Gillen: I might say Mr. Campbell has already committed himself in previous argument to this very situation. In Corpus Juris Secundum, your Honor, Vol. 31, found at page 217, we find this language under the "Evidence" Chapter: (Reads.) Now it is the best available or primary evidence. The statement counsel made regarding best available or primary evidence means best obtainable or

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primary evidence of the declarant's declaration, not of the transaction.

The Court: Let me ask you a question. I had a purpose in having that read back to refresh my memory as to what this offer involves. First, it seems to involve, or to be concerned with, a conversation occurring in 1946.

Mr. Gillen: That is right.

The Court: In which Mr. Scarlett advised with Mr. Graham as to the feasibility of making a loan which he promised to Mr. Remmer.

Mr. Gillen: Yes, he had promised it, he had committed himself.

The Court: All right. Then the next conversation in July of 1946, or some time around there, "When is the sale going to be made so I can get my money back?"

Mr. Gillen: That was intervening.

The Court: Yes, that happened some time in 1947, 1948, or 1949, in regard to an escrow proposition. Where is there any declaration here against interest? How could a man say that when he inquired of John Doe, "Shall I loan money to Bill Smith," that is a declaration against interest?

Mr. Gillen: No, it is a little different than that, may it please the Court.

The Court: That is the only basis on which you ask to have evidence admitted as his declaration against interest.

Mr. Gillen: But it is a little different than that. When a man commits himself, makes an agreement to do something, he is making a declaration against

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his interest. If I agree to wash your Honor's car, I am making a declaration against my interest. I am obligating myself. Now his conversation with Mr. Graham was a declaration against his interest that he had already made a promise to Mr. Remmer that he had loaned money and was doing was merely conferring with Mr. Graham, as the language would indicate, whether or not the representations that had been made to him by Mr. Remmer—he was committed to the promise to loan Mr. Remmer $25,000—were true or untrue, in that Mr. Remmer stated he needed money to square up his account with Cal-Neva corporation, and he asked Mr. Graham if they were true or untrue and then in addition, in the same conversation, he asked Mr. Graham about how he would get the money back and Mr. Graham told him what he was doing, he would have to wait until Mr. Remmer either made money or sold the place, Mr. Graham saying, "That is the way we are going to get our money." Now the intervening conversation merely does show the existence of the obligation, the life of the obligation, still being alive. Now may I say very frankly to your Honor that as to the intervening conversation, in the occasions intervening between the first conversation in 1946, May or June, and the ultimate conversation in which he says the obligation has been cleared, I think is properly to be excluded as hearsay, because it is merely a matter of inquiry, "Where am I going to get my money?", no declaration of interest, so I believe that would properly be excluded. However, ultimately we find the situation

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where Mr. Scarlett then being advised the money is now available and of the debts being paid out of the escrow—"I got mine. Go over to Woodburn's and get yours"—and this is all referring to the 1946 loan—and at that point Mr. Scarlett makes the declaration against interest, to wit, "I have already been paid." In other words, Mr. Remmer is no longer obligated to me, I have my money.

The Court: When was that conversation had, that he said he got his money?

Mr. Gillen: That was had in 1949, on March 2nd, when Mr. Graham and Mr. McKay collected their money.

The Court: Well, that was way after the time stated in the indictment.

Mr. Gillen: Well, that wouldn't make any difference. We have lots of things in this record after the time stated in the indictment but inclusion of matters that occurred during the indictment period.

The Court: I can't see where a conversation which began in 1946, was declaration against interest.

Mr. Gillen: May I point to another point in the same volume I just read to your Honor, Corpus Juris Secundum, Vol. 31 on Evidence. It says: "Thus the declaration is admissible * * *"

The Court: This conversation only had to do with solicitation of advice of Mr. Graham whether he should make this loan.

Mr. Gillen: The 1949 conversation.

The Court: 1946. Let me get that 1949 conversation again.

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Mr. Gillen: May I straighten out your Honor on 1946. If I said to your Honor, "I have just signed a contract, or entered into a contract, to build three houses" and at some later time, when I was incapable to go ahead, for whatever reason, and you were called upon to determine whether or not I had ever made a declaration against my interest, that I had obligated myself by contract or otherwise to do a certain thing, that would be a perfectly proper instance of a declaration against my interest. Now as to 1949, may it please the Court, the reverse is true. The man then says, "I am obligated to do something for some one," but the reverse is true in 1949—he says, "I no longer have an obligation against Mr. Remmer. I got my money. I am paid."

The Court: You said a little while ago that that was obviously hearsay, that later conversation?

Mr. Gillen: No, it is the exception. Now, your Honor, in regard to the 1949 conversation, your Honor will remember that Mrs. Badovinatz testified to something that occurred in February in 1947.

The Court: Yes.

Mr. Gillen: You remember she said in February, 1947, her husband said to her, "I am going to the bank to get a cashier's check to pay Bones Remmer back some money I owe him." She may have mentioned $5,000, I don't recall. That was supplemented by records of the bank, showing on February 7, 1947, he did in fact purchase a cashier's check made payable to Mr. Remmer, which, of course, your Honor's ruling was perfectly proper, with the exception, and we still take the exception, that it does

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not show whether the obligation was incurred during——

The Court (Interceding): We will postpone this argument now. I have three or four matters at one o'clock. We will be in recess in this case until quarter to two.

1:45 P.M.

(Defendant present. Jury absent.)

Mr. Gillen: Shall I proceed, your Honor?

The Court: Yes.

Mr. Gillen: May it please your Honor, to summarize the rule that covers the situation that confronts us here, may I respectfully invite your Honor's attention to Corpus Juris Secundum, Vol. 31, on the subject of "Evidence," the language found at page 959, Section 217. Under the heading of "Requirements for Admission of Declarations," we find the following language, based on summarization of what appears to be the universal rule. The language reads as follows (Reads.) Now, of course, we have that situation here. The declarant, it has been established, is deceased, therefore unavailable as a witness before this court. (Reads (2).) And we have that situation here. We have these three conversations, yes, more than three conversations, but we have the conversation of 1946, May, between Mr. Scarlett and Mr. Graham, Mr. Scarlett being the deceased declarant, in which Mr. Scarlett makes a declaration against his interest, to the effect that he has committed himself to make a loan, and then further conversation relates to the verification of

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the representations that were made to him when the proposal of the loan was made and when his commitment to make the loan was obtained. Then there were intervening, as I pointed out to your Honor this morning, conversations that we referred to in the course of the next ensuing two years, which I said to your Honor quite frankly were not declarations against interest and should properly not be admissible conversations, wherein Mr. Scarlett asked Mr. Graham whether or not any money was available or whether Cal-Neva was going to be sold and when he could expect to get his money. Those were merely inquiries and I do not believe properly declarations against interest. And then finally we have the March, 1949, conversation, wherein Mr. Graham advised Mr. Scarlett that the money is now being paid out of the escrow and Mr. Graham has received his money and Mr. Scarlett should go and receive his, a declaration of Mr. Scarlett against his interest that he has already been paid the 1946 loan by Mr. Woodburn and that Mr. Remmer is no longer obligated to him. (Reads (3) from CJS.) Certainly Mr. Scarlett, having discussed these things, was cognizant of the facts relating thereto. (Reads (4).) The same general philosophy that is noted in denying declarations.

Now if I may invite your Honor's attention again to the second declaration, to the second ground—and I will read it again to your Honor: (Reads (2).) Now at page 963 we find a clarification of that second necessary ground and that clarification

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is found in the following language: (Reads.) And that is the situation that we have here. In fact, we have both situations. The first situation, the conversation of 1946, Mr. Scarlett makes an acknowledgment or declaration of an indebtedness to another. In other words, by the commitment of agreeing to make the loan, he had obligated himself to fulfill his promise to Mr. Remmer to make the loan, and then in 1949, we have the reverse of the situation, where he acknowledges that the obligation has been paid, liquidated and paid and that the man to whom he made the loan was no longer obligated to him, that he had nothing coming on that account.

Now in regard, may it please the Court, to the sanctity of such things, as indicated in the fourth ground I mentioned to your Honor, we find this language which appears to amplify that rule, under the heading of "Statements Against Interest, Wigmore, Vol. 5, Section 1465," and I quote: (Reads.) In other words, boiling it down to ordinary straight language, it appears that the man at the time had no reason to tell any fibs, had no reason to lie about his own interest and his declaration, therefore, is true, would have the sanctity of being accurate and truthful, because there was no reason for it to be otherwise.

Now that is our situation, your Honor, and your Honor did mention this morning that the 1949 conversation a declaration of interest took place after the end bracket of the time period involved in the indictment, and I say to your Honor that that makes

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no difference, for this reason—if the obligation was incurred within the time period of the indictment and was repaid, it would be practically a washed transaction; in other words, it would have no effect on net worth. A man has $100 by borrowing within the time period and pays back $100, it is a washed transaction because at the end of the year it hasn't changed his situation. It makes no difference. But it is where a situation arises where payment is made on an earlier obligation at a later date—and I again refer to the situation of Mrs. Badovinatz, where the statement was made regarding the conversation that was held between her husband and herself in 1947, in February, some two months after the close of the indictment period December 31, 1946, and her husband said, "I am going to the bank to get a cashier's check—whether she mentioned the amount or not, I do not recall—to pay the money I owe to Bones Remmer," and I believe that he did in fact go and get a cashier's check and it was in fact made payable to the defendant in this case. So I say to your Honor that we have fully met the four requirements laid down by the universal rule.

Counsel has said something about another party to the transaction being present and this is not the best available evidence. It is not only the best available evidence, but it is the only evidence of the declaration. We are concerned here not with the facts so much as the declaration against interest. That is the concern of your Honor in your Honor's contemplated ruling. Now I know what counsel is talking about. He is talking about the possibility

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that Mr. Remmer, having been present, that he could take the witness stand and testify whether he owed money or not. That is not the situation we are confronted with here. As a matter of fact, the witness could take the witness stand and say things that the other party to the transaction could deny, but here we have the other party to the transaction admitting, and admitting what? That he had agreed to and did lend money to the defendant and admitting that at a later time that he had been repaid the money and there was no further obligation. Now to whom did he make this declaration against his interest? To Mr. Remmer? No, to Mr. Graham, and Mr. Graham is not only the best available evidence, but the only available evidence as to those two conversations, because they were made directly with Mr. Graham by the deceased declarant, and we submit, your Honor, having met all requirements and being so closely related, except in a stronger position that that in the case of Mrs. Badovinatz, that both conversations should be admitted from the Witness Graham.

Mr. Campbell: May I be heard very briefly, your Honor?

The Court: Yes, sir.

Mr. Campbell: It seems to me that we may be losing sight of the ultimate fact which counsel apparently is attempting to prove here.

I understand from counsel's statement that he is attempting to prove that a loan was made by Mr. Scarlett, or Mr. Sullivan as he was known in a business sense, to Mr. Remmer in 1946, which loan was

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subsequently repaid in 1948, or 1949—1949. Now in support of that contention he is offering these declarations purportedly made by Mr. Scarlett to Mr. Graham.

What do those declarations amount to? In the first place, the first conversation, the one occurred in 1946, according to the offer of proof, is Mr. Scarlett says to Mr. Graham: "I am thinking about, or considering, making a loan."

Mr. Gillen: He said, "I promised to make a loan."

Mr. Campbell: That is not my understanding.

Mr. Gillen: Well, let us read the record.

Mr. Campbell: Well, whatever it is, at any rate he was contemplating a loan which had not been made at that time and he was inquiring, according to the offer, as to the repayment——

Mr. Gillen: I think counsel is misquoting the offer, and if counsel is going to do that, it is going to be confusing and we ought to have the offer of proof read.

The Court: I take it the offer of proof is that Mr. Scarlett stated he had promised to loan the money.

Mr. Gillen: Yes, your Honor.

The Court: I understand that.

Mr. Campbell: Supposing the testimony would be that Mr. Scarlett told Mr. Graham, "I have promised Mr. Remmer that I am going to loan him some money," now is that a statement against pecuniary interest? It is not a statement which in and of itself would bind legally Mr. Scarlett to loan

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money. It might be corroborative of evidence, if it were available, that such a promise had been made to Mr. Remmer, but that is not what this evidence is. He says: "I promised to loan him this money. What are my chances to get it back?" Then at a later date he tells Mr. Graham, "I got my money back. Mr. Remmer doesn't owe me any longer." He can testify to the ultimate facts, but to prove the loan and the date upon which it was made, none of this is in the offer of proof through Mr. Graham. From that conversation it does not follow that the loan was made or that it was contemplated in that conversation, nor that the loan was made in 1946.

Now I think this is true—take, for example, a conversation as between the two individuals—the primary evidence of what took place in that conversation must be obtained from the participants themselves.

Mr. Gillen: That is in contradiction to the rule.

Mr. Campbell: May I finish my argument, Mr. Gillen.

Now as to whether or not a loan was made and when it was made and whether or not the documents which have been marked for identification here would show the assignment of some $25,000 in 1949, to Mr. Scarlett relates to a loan, the primary evidence of that loan, the terms under which it was made, the conditions surrounding it, is necessarily the testimony and evidence of the parties to the transaction. Now it is true that one party to that transaction is deceased. His testimony is not available. The conversation he had with Mr. Graham

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does not supply the ultimate fact sought to be proved here, as to whether or not, after that conversation, a loan was consummated and was consummated in 1946. However, if such loan were made, as I stated before, the direct evidence of the making of the loan and when it was made and the conditions surrounding it is available to the defendant, so that it is not necessary to resort to hearsay evidence in the first place, and in the second place, it does not render hearsay evidence admissible, and in the third place, the evidence relative to the conversation in 1946, does not meet the requirements as set forth in law as read by Mr. Gillen.

Now a statement—for example, let us take it a step farther and say that Mr. Scarlett said in 1946, that "Remmer owes me $25,000," or Remmer owes me $50,000 or $100,000. That is not a statement against pecuniary interest of Mr. Scarlett. That is a statement in favor of his pecuniary interest, which is the ultimate fact that counsel is attempting to prove, that Mr. Remmer did owe Mr. Scarlett $25,000.

Now as to the conversation in 1949, if that is admissible—that is to say, the conversation in which Mr. Scarlett stated, "I have now received my money"—if that is admissible under the provisions of the exception to the hearsay rule, nevertheless it, standing alone, would be immaterial, unless it were shown that the conversation related to a loan which had been made in 1946, and which was an outstanding indebtedness as of December 31, 1946, none of which matters this conversation purports to supply;

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and I, therefore, renew the objection to the proffered evidence upon the grounds that it calls for hearsay and is not within any exception to the hearsay rule, and secondly, that the proffered testimony is immaterial to the issues before this Court.

Mr. Gillen: May I be heard in reply to counsel.

May it please the Court, what counsel is trying to say, is trying to enforce upon your Honor, is something that is at cross-purposes with the problem that confronts your Honor at this time. In other words, he says if there is a party to the transaction living and available, then you can never use a declaration against interest, which is not the fact. What he is trying to say, the defendant is here, so the defendant, if he wants to prove that, has to take the stand and prove it himself. Now, as a matter of fact, the jury might not believe the defendant, the jury might not be as willing to accept the defendant's testimony concerning the fact that he had borrowed $25,000 at a time when it was very important for him to acquire $25,000, or any amount of money, they might be less willing to receive and believe such testimony coming from the defendant than to believe testimony of a disinterested witness who comes here and says that the party to the transaction on two different occasions when there was no rhyme or reason for him to make these declarations against his interest to him concerning his obligations to or obligations from the defendant in this case. The problem that concerns your Honor here is whether or not declarations against interest have been made and meet requirements that have been

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summarized here as the universal rule, not the fact whether the transaction took place or how many parties may be living to the transaction or whether or not we have presented here, in the person of Mr. Graham, the best available witness and evidence as declaration against interest made by a declarant who is now beyond the reach of the court by reason of his demise.

Counsel says another thing. Counsel says there is no evidence of when the obligation was incurred. Well, in the Badovinatz matter, there was no evidence when the obligation was incurred, either. That does not make any difference, but as a matter of fact, we have offered here by declaration against interest, we offer these two conversations in which reference is made to when the obligation was incurred, to wit, in 1946, and that attaches itself to a specific milestone in this chain of events, that milestone being the occasion when Mr. Graham and Mr. McKay were selling their interests to Mr. Remmer and when it became necessary for all of them to raise some money to pay their outstanding accounts to the corporation, so there was the milestone in connection and the reason why Mr. Remmer borrowed $25,000. He probably borrowed money from other people to meet the $70,000 obligation to the corporation.

Now counsel also mentioned that this 1949—I don't quite follow—conversation standing alone meant nothing. Well, I disagree with him that it means nothing. It is a declaration against interest

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by a deceased person, related by a disinterested person not a party to the transaction——

The Court (Interceding): You must keep in mind Mr. Scarlett did not tell Mr. Graham about a loan. He told him he contemplated a loan.

Mr. Gillen: That is correct.

The Court: There is nothing in any conversation of Mr. Scarlett's that would indicate whether or not he ever did loan money.

Mr. Gillen: In 1949, there was, your Honor.

The Court: He said he got some money, but nothing in the conversation of Mr. Scarlett's that would show that in 1946, he loaned any money to Mr. Remmer.

Mr. Gillen: In 1946, it is true he did say, "I loaned," he said, "I have agreed, or promised, to loan money, $25,000." He further inquired as to the truthfulness as to the representations, he said, "He said he needs it for Cal-Neva, is that true?" Mr. Graham assured him the money was needed for Cal-Neva by the three stockholders, then he said something to the effect about when he would get the money back and Mr. Graham said, "When he makes money or Cal-Neva is sold."

There were intervening conversations, concededly not declarations against interest, merely inquiries, but the next conversation in 1949, that the money is made available in escrow, ready to be paid, Mr. Graham gets his money, Mr. Graham goes to Mr. Scarlett and says to him, "I just got my money. If you want to get your money on the loan you made in 1946, go over to the lawyer's office and get it,"

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and Mr. Scarlett didn't say, "I didn't loan any money in 1946," or anything of the sort. Mr. Scarlett said, "I have already been taken care of. Mr. Woodburn has already given me my money," or "I have already got my money from Woodburn. It has been paid." Supplementing that we have the transaction in Mr. Woodburn's office, the same amount, we have the assignment out of the proceeds of the escrow in the Adler transaction, prepared by Mr. Woodburn in his office, wherein Mr. Remmer directs the escrow trust department of the bank to pay out of the first money that comes in from Adler to Mr. Scarlett the sum of $25,000. We have the check that was paid, bearing the same date as Mr. Graham got his money, March 2, 1949, for the same amount, $25,000, and Mr. Scarlett's receipt and release to the escrow or trust department that he had received that money, his endorsement on the check, check made payable to him, endorsed by him, and the check obviously has been cancelled, paid off. And I say, your Honor, that we have met every single requirement under the rule and that both of these declarations against interest should go before the jury, and we say the position we are in here is much stronger than the position in which we concede your Honor was right in allowing the declaration in the Badovinatz matter.

The Court: Objection will be sustained. Call in the jury.

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2:20 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. GRAHAM

resumed the witness stand on further

Direct Examination

By Mr. Gillen:

Mr. Gillen: In view of the Court's ruling, I take it I can not pursue the subject that left at the recess taken by the Court this morning.

The Court: No.

Q. Now, Mr. Graham, you previously testified, it is my recollection, that you, in the year 1946, loaned to Mr. Remmer the sum of ten thousand dollars in the form of a check, which loan was paid back in either 1947, or 1948, do you recollect that?

A. Correct.

Q. Do you have the check that you issued to Mr. Remmer with you? A. Yes, sir.

Mr. Gillen: May I see it, please? May I have this marked for identification?

Q. Mr. Graham, you handed me your check that you issued in favor of Elmer Remmer on February 2, 1946, for the sum of ten thousand dollars?

A. Yes, that is the check.

Mr. Gillen: I offer this check, may it please the Court, [2638] as defendant's exhibit next in evidence.

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(Testimony of William Graham.)

Mr. Campbell: No objection.

The Court: It may be admitted, H-1.

Mr. Gillen: The exhibit is now known as Defendant's Exhibit H-1. With the Court's permission, I shall read it to the jury.

The Court: Yes, sir.

Mr. Gillen: (Reads Exhibit H-1.)

Q. Now, Mr. Graham, were you acquainted, during his lifetime, with a man by the name of Robert Jeffers? A. Yes.

Q. Mr. Graham, directing your attention to the month of July, 1947, do you have a recollection of having telephoned long distance to Elmer Remmer concerning Mr. Robert Jeffers? A. Yes.

Q. And what was the occasion of your calling Mr. Remmer concerning Robert Jeffers at that time? A. He owed the Bank Club.

Q. How much money did he owe the Bank Club?

A. Twenty some thousand dollars.

Q. Who was it that owed the Bank Club twenty some thousand dollars? A. Bob Jeffers.

Q. Let me ask you, does it refresh your recollection that it was twenty-three thousand? [2639]

A. Twenty some thousand, I don't know.

Q. What was your conversation with Mr. Remmer on that occasion concerning the twenty some thousand dollars that Mr. Jeffers owed the Bank Club?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

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(Testimony of William Graham.)

Mr. Gillen: I do not think it is incompetent, your Honor. It is further evidence supporting the matter that is already before the jury, that was brought out from the prosecution's witness, namely a Mr. Perkins, who was the bookkeeper or accountant for the Bank Club. Your Honor will recall Mr. Perkins testified concerning——

The Court (Interceding): We had better have our arguments in the absence of the jury.

Mr. Gillen: This is not an argument, just calling your Honor's attention to some testimony that has gone before the jury.

The Court: The ruling will stand. If you want to argue, I will give you an opportunity.

Mr. Gillen: I am sorry to discommode the jury, but it is important.

(Jury and alternate jurors admonished and excused at 2:25 p.m.) [2640]

(In the absence of the jury.)

RE: CHECK FROM BANK CLUB

(Febr. 7, 1952—Notebook 341—P.P. 50-57.)

Mr. Gillen: May it please the Court, as your Honor knows, the introduction of evidence on the subject matter or topic is not like the one-horse shay, it can not all be done at once; I mean, it must be presented as points are presented.

I will remind your Honor there appears—and that is what I said in argument before the jury only making reference to testimony already in the

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record and heard by the jury—your Honor will recall that the prosecution called to the witness stand Mr. Perkins, who was accountant at the Bank Club, and Mr. Perkins gave testimony concerning the issuance of a Bank Club check to Elmer Remmer in the sum of $29,979, which money was to pay for certain Burton & Gallagher whiskey. Your Honor will recall that he testified that that check was required to be and was endorsed and cashed at the Bank Club by Mr. Remmer and that there was retained by the Bank Club out of that 29 thousand dollar check the sum of 23 thousand dollars to cover an obligation by Mr. Jeffress to the Bank Club for 23 thousand dollars which Mr. Remmer had previously agreed to underwrite.

Now, the testimony that I am seeking from Mr. Graham now is merely rounding out the picture of that particular transaction, wherein Mr. Jeffress, it will appear, had been gambling at the Bank Club and desired to put in a marker for some money and he wanted to put in markers to the extent of 23 thousand dollars and he stated to Mr. Graham, who was called up to OK whether this should be done or not, that Mr. Remmer owed him in excess of 23 thousand dollars. This grows out of the 50 thousand dollar loan. That evidence is before the Court, the promissory note for $50,000 that was testified to here and introduced, that Mr. Graham, to substantiate the representation, telephoned long-distance to Mr. Remmer and stated to Mr. Remmer, "Bob Jeffress is here. He says you owe him more than 23 thousand dollars. He wants to put in markers. Will

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you stand good for it?" and Mr. Remmer acknowledged his indebtedness to Mr. Jeffress in excess of 23 thousand dollars and agreed to stand good for it and that thereafter—this telephone conversation was had in July of 1947, obviously prior to July 30, 1947, because the check that we have in evidence under designation of plaintiff's 147A, bears the date of July 30, 1947, and then we have the testimony, as I have stated, of Mr. Perkins that that check was presented to Mr. Remmer for his endorsement, was cashed, 23 thousand dollars retained out of it to cover Mr. Remmer's underwriting of the Jeffress obligation, and that Mr. Remmer was given the difference on that check. Now, it is competent, relevant, and material and in verification of the entire transaction.

The Court: What do you expect to receive in the way of answer to this question? What do you intend to prove?

Mr. Gillen: I intend to prove, may it please the Court, in further substantiation of the fact that Mr. Remmer had borrowed $50,000 from Mr. Jeffress and that was the $50,000 needed for the Cal-Neva account, that $50,000 was still outstanding, or outstanding at least to the extent of $23,000, in July of 1947, and, of course, that would affect the net worth as of the end of December, 1946; and that Mr. Graham will testify that he in effect said, "Jeffress says you are obligated to him for more than 23 thousand, he owes us 23 thousand, or wants to become obligated to us—will you stand good for it," and Mr. Remmer said, "Yes, I owe him more than

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23 thousand and I will stand good for it. Give it to him and I will pay it," and that he did in fact pay.

The Court: I would suggest you propound this question to this witness and see what his answer is in the absence of the jury.

Mr. Gillen: All right.

Q. (By Mr. Gillen): Mr. Graham, in the month of July, 1947, did you have a long-distance telephone conversation with Mr. Remmer concerning Mr. Robert Jeffress? A. Yes.

Q. Will you just relate to the Court what the telephone conversation was with Mr. Remmer, what you said to him and he said to you?

A. I asked him—I said, "Bob Jeffress is in heavy, in some 20 thousand dollars, and I spoke to Mr. Jeffress and he says 'Bones owes me more than that,'" so I said, "Do you owe him?" He said, "Yes, I owe more than that to him; I will stand good for it."

Q. Did you mention the amount?

A. Twenty thousand, because I tried to stop Bob at ten thousand and tried to stop him at 15 thousand and he wouldn't stand for me stopping him.

Q. And Mr. Remmer said he owed Jeffress money and he would stand good for it?

A. Yes.

The Court: That conversation was with Mr. Remmer?

Mr. Gillen: Yes, your Honor.

The Court: What is your objection to that?

Mr. Campbell: My objection is that it is incompetent, if the Court please.

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The Court: Just what do you mean? On what grounds?

Mr. Campbell: And further it is immaterial. This conversation is certainly, in the first place, not the best evidence of an obligation or the fact an obligation did exist or that if an obligation existed, that it existed as of December 31, 1946. That is the basis for my objection. I think further it is a self-serving declaration under the circumstances.

The Court: Fix the time of that conversation.

Mr. Gillen: I fixed it as of July, 1947, prior to July 30, 1947, which is the date Mr. Remmer made good the obligation of 23 thousand dollars out of this check, prosecution's Exhibit 147A.

Would your Honor care to hear on the other factors? Counsel stated a couple of things I think are misleading. In the first place, he said this was no evidence of indebtedness. As a matter of fact, your Honor, we have before your Honor evidence of the indebtedness in the form of Mr. Remmer's promissory note, dated in September of 1946, for the sum of $50,000 to Mr. Jeffress. Then we have—and counsel said it would be irrelevant—of course your Honor can readily see the relevancy—if the entire obligation was paid before December 31, 1946, as I mentioned in the other offer, it would then be a washed transaction, the money would have been obtained during the year and paid back during the year and leave nothing, it would be balanced off, evened up, but the obligation still existed at December 31, 1946, the closing date of this indictment, and it is very evident that the obligation still existed at

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that time because Mr. Jeffress tells Mr. Graham that Mr. Remmer owes him that amount of money, and Mr. Campbell then says it is a self-serving statement, and he mentioned that as an afterthought, on Mr. Remmer's part. Well, may it please the Court, it is certainly not self-serving statement at the time it was made. It may prove to be self-serving in character now but at the time it was made it was not certainly self-serving, when Mr. Remmer said, "Sure, give him 23 thousand and I will stand good for it." That was admission of an obligation to a man in the sum of 23 thousand dollars. That was a statement against interest at that time.

The Court: I am going to permit you to ask this question.

Mr. Campbell: May I make one observation?

The Court: Yes.

Mr. Campbell: I wish to point out to the Court that in this instance, for example—and I presume it may occur in subsequent instances—it is an attempt, or it would be if allowed, the testimony of a witness to be entered without that witness taking the stand. Now, if this is used to establish the obligation, there is no manner in which cross-examination can be had——

The Court (Interceding): I think so. There would be no opportunity to cross-examine the witness who is in effect testify. Mr. Remmer is testifying through Mr. Graham.

Mr. Gillen: Not at all, your Honor. There is Mr. Remmer's note here before the Court. There is a testimony from a prosecution witness——

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The Court (Interceding): We are getting something in this record, to the effect Mr. Remmer's statement in this record that he owed 23 thousand dollars to this particular individual, without having Mr. Remmer on the stand or an opportunity to cross-examine.

Mr. Gillen: No, there is more than that. May I respectfully say this to your Honor. It is my recollection——

The Court (Interceding): I think it is hearsay testimony.

Mr. Gillen: No. May I show your Honor the transcript of Mr. Perkins' testimony. Your Honor, if I am not very badly mistaken, Mr. Perkins testified as to the reason for withholding of that 23 thousand dollars from the $29,000 Burton & Gallagher check; namely, that Mr. Remmer had gone good for an obligation of Mr. Jeffress, and this is merely filling that out, the circumstances under which he did that.

Another thing, your Honor—I think we lose sight of, and I think I can demonstrate to your Honor the foolishness of Mr. Campbell's last remark—Mr. Remmer may not go on this witness stand in this trial and testify that he told Mr. Graham that he was obliged to Mr. Jeffress in excess of 23 thousand dollars and that he would go good for him. That would certainly be counsel's example of self-serving statement for Mr. Remmer to take the witness stand and say——

The Court (Interceding): Suppose Mr. Remmer did testify he borrowed 50 thousand dollars,

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wouldn't he also be allowed to testify as to whether he paid him back and if he paid it, or any portion of it, wouldn't he be able to explain how he paid him back?

Mr. Gillen: I suppose he would, yes, but we have here evidence from a disinterested witness, interested only to the extent of getting that money, regarding this matter and this situation was introduced not by us, but by the prosecution, that there had been issued to Mr. Remmer a 29 thousand dollar check, and then their own witness explained 23 thousand was withheld because Mr. Remmer had gone good on an obligation for Mr. Jeffress. Now, Mr. Graham is here to testify from first-hand knowledge——

The Court: I would like to look at Corpus Juris on the question of self-serving declarations. We will take a recess until three o'clock. Recess taken at 2:40.

2:55 P.M.

(Defendant present.)

(Jury absent.)

The Court: The objection is sustained. If the Court ruled otherwise, it would be permitting Mr. Remmer to testify without sanctity of a note or subjecting himself to cross-examination.

Mr. Gillen: I think we found some testimony, your Honor, where there was reference made——

The Court: Yes, but I have my mind made up about this matter. I am not going to allow Mr. Remmer to testify from the mouth of another witness.

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Mr. Gillen: No, the testimony of Mr. Perkins—testified to the obligation. Would your Honor listen to it? It is very short.

The Court: Yes, but it wouldn't make any difference as to the admissibility of this question, would it?

Mr. Gillen: Mr. Perkins testified that he withdrew this—well——

The Court: The ruling will stand. Call in the jury.

3:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. GRAHAM

resumes the witness stand.

Mr. Gillen: In view of the Court's ruling, no further questions of Mr. Graham.

Cross-Examination

By Mr. Campbell:

Q. Mr. Graham, referring to the check which you produced here, relative to the ten thousand dollar loan which you made in 1946 to Mr. Remmer, and concerning which you also testified when you appeared here before, is that correct?

A. Yes.

Q. At that time I do not believe you had the check with you, is that right?

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(Testimony of William Graham.)

A. Yes, I had the check with me. You told me to bring everything I had in the case.

Q. Now, calling your attention to the check and to the notations appearing on the back, the signature Elmer Remmer and the memorandum here C-CK 75107378, and particularly calling your attention to that last notation, was that on there when you received the check back from your bank?

A. I didn't notice that. I never paid any attention to that. I don't know whether that was on there; I don't know anything about it.

Q. That wasn't a number which you placed on there? [2641] A. No.

Mr. Campbell: This CK usually refers to cashier's check.

Mr. Gillen: CK refers to cashier check, I don't think so.

The Court: I think we have a lot of matters in there we are not interested in.

Mr. Gillen: I do not think counsel can characterize what it means. It is some kind of notation.

Mr. Campbell: Well, I withdraw the statement.

Q. Now, Mr. Graham, when was this loan paid back to you?

A. Well, paid back in '48, some of it paid back and some cash and some paid back I owed.

Q. That you owed?

A. A friend of mine rang me up from San Francisco and wanted me to loan him five thousand dollars. He said, "I am selling some bonds and will send it in a few weeks" and then—it was during

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(Testimony of William Graham.)

the racing season—I said, "You go over to Mason Street and see Bones and I will ring him up and tell him to give you five thousand," it was Bill Hervey, and he went over to Mason Street and Bones gave him the five thousand.

Q. When was that?

A. That was in '48 during the racing. In the meantime, I rang up and told Bones to bet some horses for me, around three thousand dollars, and then when I went to San Francisco he gave me the difference to make up ten thousand dollars, in cash, so [2642] that is how I was paid back.

Q. In other words, you gave him credit that he paid out for you around eight thousand?

A. Yes, sir.

Q. And the balance you got in cash?

A. I think $1,750 in cash; I am not quite sure. That is how I got it.

Q. That repayment all took place in 1948, is that right? A. Yes.

Mr. Campbell: That's all.

Mr. Gillen: No further questions.

(Witness excused.)

Mr. Gillen: We might facilitate another matter. In view of the Court's rulings, it will be impossible for us to further examine Mr. Woodburn and unless Mr. Campbell would desire to cross-examine Mr. Woodburn insofar as he testified yesterday, there is no necessity of discommoding him and bringing him back.

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Mr. Campbell: I have no cross-examination.

The Court: I understand Mr. Woodburn may be excused, is that satisfactory? A. Yes.

The Court: He may be excused.

Mr. Gillen: In relation to Mr. Vacchina, the trust officer who appeared here yesterday and identified certain [2643] records and photostatic copies in for identification, we are unable, in view of the Court's rulings, to proceed further with him and are willing he be excused, unless Mr. Campbell desires to cross-examine him.

Mr. Campbell: I did not understand the first part of counsel's statement. If counsel is withdrawing——

Mr. Gillen: We are not withdrawing, we are unable to proceed with further examination.

The Court: I think the effect of it, in view of the rulings he says there is nothing to be gained by calling him.

Mr. Gillen: That is right.

Mr. Campbell: I have no cross-examination.

The Court: Then Mr. Vacchina may be excused.

VERN WALDO

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name, please?

A. Vern Waldo.

Q. Where do you reside?

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(Testimony of Vern Waldo.)

A. In Reno, 46 Raymond Drive.

Q. Will you state what is your business?

A. Assistant cashier First National Bank of Reno, Reno, Nevada.

Q. Have you been with that bank for some period of time? [2644]

A. I have been with them three years.

Q. And as assistant cashier of that bank, are the commercial accounts under your direct supervision? A. That is correct.

Q. And you have access to them in the ordinary course of your business as assistant cashier, is that correct? A. That is correct.

Q. Were you subpoenaed to appear here to bring with you certain records of the commercial account of Cal-Neva Lodge?

A. That's right.

Q. Will you produce the originals of those records, please?

Mr. Campbell: Did you say Cal-Neva Lodge or Cal-Neva, Inc.?

Mr. Gillen: I think it is Cal-Neva Lodge on the account.

Q. May I ask if you have photostatic copies of these original documents? A. Yes, I have.

Mr. Campbell: I have no objection to using photostats.

Mr. Gillen: I wonder if I may inquire through the Court of counsel if there is any objection, they having examined them, to offer photostats in lieu of the original of these bank statements?

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(Testimony of Vern Waldo.)

Mr. Campbell: No, no objection.

Mr. Gillen: I will offer then as an exhibit or exhibits, however it serves the convenience of the Court, six [2645] sheets of photostats and will have them marked in whatever manner that may be convenient. When I say six sheets, may it please the Court, one of those sheets is made to represent the reverse side of the ledger sheet, so really five sheets if that is called one sheet together.

The Clerk: Exhibit I-1.

Mr. Gillen: We offer them in evidence.

Mr. Campbell: No objection.

The Court: Admitted in evidence, I-1.

Mr. Gillen: It might be advisable, your Honor, before counsel cross-examines, so the jury will follow the evidence, that I read them to the jury, with the Court's permission.

The Court: Yes, certainly.

Mr. Gillen: (Reads first sheet of exhibit.)

Q. I take it, Mr. Waldo, that that document is a telegraphic order written in code, is that correct?

A. That is correct.

Mr. Campbell: I will stipulate there is a document giving the full translation of that document.

Mr. Gillen: The next document of the exhibit is entitled "Translation of telegram received from Bank of America National Trust and Savings Division, Day and Night Branch, San Francisco, California." (Reads document.)

Q. That means it was transmitted by teletype, is that correct? A. Correct. [2646]

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(Testimony of Vern Waldo.)

Mr. Gillen: The message reads as follows: (Reads from exhibit.)

Q. "Col. Dept.," that means Collection Department, does it not? A. That is right.

Mr. Gillen: (Continues reading exhibit.)

Q. Now that means, does it not, that your bank received from the Bank of America, Day and Night Branch, an order to put into the account of Cal-Neva account, as per instructions of Elmer F. Remmer, the sum of 50 thousand dollars?

A. That is correct.

Q. That is what you call in banking terms a telegraphic transfer of funds? A. Yes.

Q. In other words, the Bank of America in San Francisco stood good for that order that you followed, is that correct? A. That is correct.

Mr. Gillen: Now the next document in this exhibit reads: "Main Office Branch No. ——" (Reads.)

Q. "TT," I take it, Mr. Waldo, would mean telegraphic transfer? A. That is correct.

Mr. Gillen: (Continues reading from exhibit.) And there are numerous transactions reflected, which I will not take the time of the jury or the Court to read, but there appears at the top of the sheet, on the face of the sheet, under date [2647] September 28, 1946, a deposit of 50 thousand dollars, and I take it, Mr. Waldo, that would be a reflection of the telegraphic transfer and transaction referred to before? A. That is correct.

Mr. Gillen: I think that is all.

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(Testimony of Vern Waldo.)

Cross-Examination

By Mr. Campbell:

Q. Mr. Waldo, do you by any chance have the signature card of this account with you?

A. Yes.

Q. And that is the card which you have produced, which you just handed me, the signature card referring to the account, the ledger sheet of which is in evidence as Defendant's Exhibit I-1?

A. Yes.

Q. Do you have a photostatic copy of this?

A. No, sir.

Q. Can you supply a photostatic copy of this, Mr. Waldo? A. I can.

Mr. Gillen: No objection to its being put in evidence.

Mr. Campbell: I am going to offer this in evidence with the request that it be withdrawn and returned to this witness if he will send down a photostatic copy of the document, and we will leave the original here.

Mr. Gillen: We will be agreeable and will be glad to bring it over from Reno, if that will facilitate matters when [2648] Mr. Waldo photostats it.

The Court: Is that marked in evidence?

Mr. Gillen: We have no objection to the exhibit being withheld until the photostat arrives.

The Court: We will give it a number, Exhibit 185. The photostat will be admitted when it is produced.

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(Testimony of Vern Waldo.)

Mr. Gillen: Yes, your Honor, no objection.

Mr. Campbell: Reading from this exhibit, shows the account as having been opened on 9-29-46; there are signatures appearing thereon, being that of Elmer Remmer, James B. Jeffers and Harold H. Maundrell.

Q. Now referring to the ledger sheet, which is a portion of Defendant's Exhibit I-1, I call your attention to the fact that the name of Harold Maundrell, Crystal Bay, Nevada, has been scratched out and in pen and ink written 541 Elko Avenue, Reno. Do you know when that change took place in that account? A. I can't answer that.

Q. Do you know whose writing that is?

A. No, I do not.

Q. Do you recognize it as the writing of any of the bank boys? A. No.

Q. Do you have anything in your file that you have with you indicating the time at which that change was made? A. No, sir.

Q. Now your attention has been directed to the deposit as [2649] shown by the deposit book on the ledger sheet of 50 thousand dollars by telegraphic transfer on September 28, 1946. That is the 50 thousand dollar item I believe you identified under the heading of "Deposits" on September 28, 1946, is that correct? A. That is correct.

Q. And at that time the balance in the account, with that 50 thousand dollars, amounted to $50,-994.35, is that correct? A. That is correct.

Q. Now I direct your attention, under date of

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(Testimony of Vern Waldo.)

October 1, 1946, there is shown a withdrawal of 50 thousand dollars as one of the items withdrawn on that date, is that correct? A. That is correct.

Q. And that resulted in an overdraft, that together with another item drawn on that date of $3,379, resulted in an overdraft of $5,320.71, as of the close of business October 1, 1946, is that correct?

A. That is correct.

Q. This ledger sheet further shows, does it not, that overdraft continued until October 26th, at which time a deposit was made in the account of some $47,300, is that right, sir?

A. That is correct.

Q. When I say "overdraft," I mean to say an overdraft continued in the account, did it not, because other items were also charged against the account? [2650] A. That is correct.

Q. Now I draw your attention to that deposit of $47,300 on October 26, 1946, and also to the next deposit on December 7, 1946, of $78,634.29. I will ask you if you have with you the deposit slips relating to those two deposits?

A. I do not, Mr. Campbell.

Q. Would it be possible for you, Mr. Waldo, to secure those slips, have photostats of them made at the same time you have the photostat made of the signature card? A. We can do that.

Q. Will you do that? A. Yes, sir.

Mr. Campbell: That is all.

(Witness excused.)

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MARYCE CHANEY MARTIN

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name, please?

A. My full name is Maryce Chaney Martin.

Q. Where do you reside, Mrs. Martin?

A. I live in Beverley Hills, California.

Q. Can you give us the address?

A. 311 North Alpine Drive.

Q. With whom do you live?

A. My husband and two small children. [2651]

Q. What is your husband's name, please?

A. Hershey Martin.

Q. What is your husband's business?

A. He is a theatrical booking agent, for the William Morris Agency.

Q. That is a national theatrical booking agency?

A. Yes.

Q. And he is a member of the Act Department for that agency in this area?

A. Yes, that is correct.

Q. His activities in that capacity take place not only in California, but Nevada?

A. Yes, and up north, Washington, all of the West Coast.

Q. Prior to the time that you began devoting your time to your home and two small children, did you have a profession or business calling of your

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(Testimony of Maryce Chaney Martin.)

own? A. Yes, I was a professional dancer.

Q. Did you do any other type of work than professional dancing yourself?

A. Yes, I produced my dancing girls.

Q. Did you also engage in some other business enterprise with your husband in connection with the theatrical business?

Mr. Campbell: Objected to as immaterial.

The Court: You may answer.

A. My husband had a theatrical booking agency of his own at [2652] one time in San Francisco and I assisted him.

Q. Now, Mrs. Martin, are you acquainted with the defendant in this case, Elmer F. Remmer?

A. Yes, I have known Mr. Remmer for about 13 or 14 years. He has been a very tried and true friend to me.

Mr. Campbell: I ask the last be stricken as not responsive.

The Court: It may go out.

Q. Under what circumstances did you first meet Mr. Remmer?

A. I worked at Cal-Neva Lodge. I believe I started in December of 1938, but I am not sure of the exact date.

Q. And did you in the ensuing years produce the shows at Cal-Neva Lodge?

A. I helped to do that, yes.

Q. Now in the years 1943, and 1944, did you ever borrow any money from Mr. Remmer?

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(Testimony of Maryce Chaney Martin.)

A. Yes, I did.

Q. Can you tell us when in 1943, you borrowed money from Mr. Remmer and when in 1944?

A. Well, I believe it was around September or October of 1943, and again in 1944, about the same time. I am not sure of the exact dates.

Q. And you were married when?

A. I was married in August, 1943; August 17, 1943.

Q. What was the amount that you borrowed, as you fix it, in [2653] September or October of 1943?

A. I borrowed $2,500.

Q. What was the amount that you borrowed, as you fix it, approximately the same time in 1944?

A. $2,500.

Q. Now do you recall in what form that money was given to you?

A. Well, I believe once it was given to me in the form of a check, once in cash, but I can't tell which time it was given in cash and which time in the form of a check, I am not sure.

Mr. Gillen: Now I have a cancelled check I would like marked for identification.

The Clerk: J-1.

Q. I am going to ask you, Mrs. Martin, under what name were you known at the time you worked as a professional dancer and also in the course of time you worked at Cal-Neva Lodge?

A. I was known as Maryce Chaney.

Mr. Thompson: I have no objection to this check.

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(Testimony of Maryce Chaney Martin.)

Q. Let me ask you this, Mrs. Martin, I will show you here Defendant's Exhibit J-1. I will ask you to look at this and tell me whether or not this refreshes your recollection as to which occasion of the two occasions mentioned of the $2,500 that you borrowed from Mr. Remmer that you received the loan in the form of a check?

A. Well, yes, I received the cash in 1943, and the check in '44.

Mr. Gillen: There being no objection from counsel, I [2654] offer the check in evidence as next in order.

The Court: Admitted in evidence, J-1.

Mr. Gillen: With the Court's permission, I would like to read the check.

Q. Mrs. Martin, I take it, that the reason you say your memory is refreshed looking at this check, that the check bears the date of August 30, 1944?

A. That is right.

Q. And you identify then that is the occasion on which you received the $2,500 loan by check?

A. That is correct.

Mr. Gillen: I might say to your Honor, so there may be clarification concerning this particular exhibit, this was withdrawn from the box that was brought into court at the Court's direction and removed from the Cal-Neva papers from the box in custody of the clerk of the Court. * * * I misidentified these—these were corporate records of Cal-Neva brought in voluntarily. This check reads as follows: (Reads exhibit.)

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(Testimony of Maryce Chaney Martin.)

Q. Now, Mrs. Martin, the $2,500 which you borrowed in, I believe you said September or October of 1943, and the $2,500 that you borrowed August 30, 1944, did you repay those amounts to Mr. Remmer? A. Oh, yes.

Q. When, do you recall, did you pay the 1943 loan, or if you [2655] did not pay it all at once, when did you start to pay the 1943 loan?

A. Well, I believe, to the best of my knowledge, that I started in 1944, I started paying that probably in 1944. I am not sure of the date.

Q. Did you pay that first $2,500 loan all at once?

A. No.

Q. What is your best recollection now as to in what manner you paid that loan?

A. Well, my husband paid it off gradually. We tried to pay so much—sometimes it may have been $200 or sometimes more or a little less and at that time there may have been larger sums, but I am not sure, I can't remember.

Q. Then on August 30, 1944, you borrowed another $2,500? A. That is true.

Q. What is your best recollection now as to whether or not you had completed your payments of the indebtedness of the first $2,500 before you borrowed the second $2,500?

A. I do not think it was completed. I do not think we completed; as best I can remember, the entire amount by January, 1946, and the reason I remember that is that I had a baby in January,

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(Testimony of Maryce Chaney Martin.)

1946, and we planned on getting our debts straightened out by that time.

Mr. Gillen: I think that is all. [2656]

Cross-Examination

By Mr. Campbell:

Q. Now as I understood your testimony, Mrs. Martin, you were employed at Cal-Neva Lodge in 1943, and 1944?

A. No, I wasn't; prior to that.

Q. Prior to that?

A. Yes, from about—I don't know what year I started, perhaps from the Cal-Neva records you could find out, but I think '38, and I believe I worked there in summers until about '41, but I won't be sure of the dates.

Q. Now in connection with either your professional performances or in connection with your shows which you were assisting producing, did you have any dealings with Cal-Neva Lodge in the years 1943, and 1944?

A. No, none with Cal-Neva Lodge, other than the fact that we visited there, but we had no business dealings.

Q. The first loan you said you secured in 1943, and you first stated you believed it was September of 1943, and the second loan in September of 1944, and then later——

Mr. Gillen: She said about the same time.

Q. (Continuing): ——and after refreshing your

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(Testimony of Maryce Chaney Martin.)

recollection from this check, placed the date of the 1944 loan as August 30, 1944, is that correct?

A. That is correct.

Q. Now does that also refresh your recollection as to when the 1943 loan was obtained? [2657]

A. Well, I was married on August 17, 1943, and I believe it was a few weeks after I was married because we wished to buy a piece of property at that time and I am not sure what date, but somewhere in there, I don't know the exact date.

Q. Now you negotiated these loans with Mr. Remmer personally, is that correct? A. Yes.

Q. Where was it that you negotiated them, in San Francisco or Cal-Neva?

A. No, I was in Cal-Neva for my honeymoon and it was during that time.

Q. That was in 1943? A. Yes.

Q. And you say you received the money in cash at that time? A. Yes, I received it in cash.

Q. And did you sign a note or any other evidence?

A. No, he didn't ask me to sign any note.

Q. It was given to you in cash, is that correct?

A. Yes, gave it to me in cash.

Q. And in connection with the second loan there of August 30, 1944, you were also at Cal-Neva when that loan was negotiated?

A. I don't remember. I don't believe I was, but I don't remember.

Q. Did you on that occasion meet Mr. Maundrell, who signed that check? [2658]

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(Testimony of Maryce Chaney Martin.)

A. Yes, I know Mr. Maundrell. I might have seen him in San Francisco or in Cal-Neva, but I am not sure.

Q. I take it you had known Mr. Maundrell from the time you had appeared at Cal-Neva?

A. That is correct.

Q. Now, Mrs. Martin, at the time you negotiated those loans, or obtained that money, did you know whether or not the funds which were being lent to you were the funds of Cal-Neva, Inc.?

A. No, I didn't. I just asked Mr. Remmer if he could help me. I didn't know where the funds came from.

Q. So that you have no knowledge whatsoever on that subject?

A. No, other than the check just shown to you.

Q. That, of course, is drawn on Cal-Neva?

A. Yes, but I don't know whether he just asked them to give me a check or how he managed it.

Q. You talked with Mr. Remmer and you received the money? A. That's right.

Q. Now when you repaid it, did you repay by check?

A. No, I paid it in cash usually. I may have given him a check at times, but I don't remember, I am not sure.

Q. Where were those payments made?

A. Usually in San Francisco, because I was living there at the time.

Q. You stated you and your husband were conducting an agency there? [2659] A. In 1944.

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(Testimony of Maryce Chaney Martin.)

Q. Now did you maintain, or did your husband maintain, any record with relation to the repayment of these loans?

A. No, we didn't. We more or less kept track of it ourselves.

Q. Mentally?

A. Yes; I didn't keep any records of it. I didn't think it was necessary and it never dawned on me to keep any records.

Q. But do you now have any recollection as to the balance that you owed on these loans as of December 31st—that is the year end—of any of the years 1943, 1944, 1945, or 1946?

Mr. Gillen: As to 1946, that is assuming something not in evidence because the witness has stated that the entire loans had been fully paid by January of 1946.

Mr. Campbell: If that is her testimony, I think the objection is good as to the last date.

Mr. Gillen: Another observation should be made. Mr. Avakian calls to my attention, counsel mentions 1943. She said she started paying in 1944, the first loan.

Mr. Campbell: Well, I am cross-examining.

The Court: Well, you may proceed.

Q. Do you have my question in mind?

A. Yes, I do. I don't really have any recollection.

Q. As I understand your direct testimony, you do have definite recollection that you did not commence making any payments until 1944? [2660]

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(Testimony of Maryce Chaney Martin.)

A. I don't believe we did. I believe we started in 1944, but that is quite a while ago and I don't want to say I remember the exact dates, because I don't.

Q. And you were quite definite that by January of 1946, you had paid off all the obligations?

A. Yes, and my reason for knowing that is that we tried to clear up our debts before our baby came.

Q. And your child was born in January?

A. January 24, 1947.

Q. Since then, of course, that event so definitely in mind, can you place when it was with relation to that event that you paid off the last of the money that you owed on these loans?

A. No, I really don't know.

Q. Could you state it was before or after the end of the year 1945?

A. I think probably at the end of the year.

Q. By the end of the year?

A. I believe so, but I can't really be sure. I don't want to say finally because I don't know.

Mr. Campbell: I think that is all.

Redirect Examination

By Mr. Gillen:

Q. By the way, Mrs. Martin, you mentioned that on the occasion of the first loan that you obtained from Mr. Remmer in 1943, following your marriage, I believe you placed it at September or October, you said the reason for that loan was that you [2661]

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(Testimony of Maryce Chaney Martin.)

were desirous of buying a piece of property, is that correct? A. That is correct.

Q. Did you in fact at that time buy a piece of property? A. Yes, we did.

Q. Can you tell us where that property was located?

Mr. Campbell: I think that is immaterial.

The Court: Why is that material?

Mr. Gillen: It substantiates the statement that she was making this loan for a specific purpose.

The Court: Well, she said she bought property, so I don't think it makes much difference where it is located.

Mr. Gillen: That is all.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.) [2662]

Friday—February 8, 1952
10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Campbell: There has been produced here by agreement a portion of the original records of the automobile agency of Remmer & Jordon, which was referred to in the testimony of Mr. William Remmer day before yesterday, and at this time, by stipulation, I wish to offer these records in evidence as

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government's next in order and will ask that they may be withdrawn at the end of today's session, in order that photostats may be substituted.

Mr. Gillen: That is agreeable, your Honor.

The Court: The exhibit will be admitted, No. 186.

Mr. Campbell: They consist of three cards, appearing to be ledger cards. If I may, at this time I will read into the record from these records.

Mr. Gillen: No objection.

Mr. Campbell: (Reads exhibits.)

Mr. Gillen: Shall we proceed then, your Honor? The defense will call Mrs. Robert Jeffress.

MRS. ROBERT JEFFRESS

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your full name? [2663]

A. Mrs. Edna Elliott Jeffress.

Q. I take it that Elliott is your maiden name, is that correct? A. Yes.

Q. Will you state where you live?

A. In San Francisco, 672 - 11th Ave.

Q. What type of building is that?

A. It is two flats.

Q. With whom you do reside there?

A. With my two sisters.

Q. Will you state their names, please?

A. Clare Elliott and Helen Elliott.

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(Testimony of Mrs. Robert Jeffress.)

Q. Mrs. Jeffress, how long have you lived in that building of flats? A. Eighteen years.

Q. And when you originally went to live there, did you live there with your two sisters?

A. My two sisters and one brother. Since then my brother passed away.

Q. At the time you went to live there, who was the owner of the building?

A. Mr. and Mrs. Robert L. Jeffress.

Q. Did you become very well acquainted with Mr. and Mrs. Robert Jeffress?

A. Yes, very well. [2664]

Q. Now Mrs. Robert Jeffress, did she pass away at some time in the intervening years?

A. She passed away in August, 1940.

Q. Did Mr. and Mrs. Jeffress have any family?

A. Yes, a son and daughter.

Q. Do you recall the names of those two children?

A. James Jeffress and Carolyn Jeffress.

Q. Now when you first went to live in that building, what flat did you and your sisters and brother occupy? A. The lower flat.

Q. And at that time, I take it, Mr. and Mrs. Jeffress and their family lived in the upper flat?

A. Yes.

Q. And at any time in the intervening years did you move from one flat to another?

A. Yes, I moved after I married Mr. Jeffress, moved upstairs.

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(Testimony of Mrs. Robert Jeffress.)

Q. When did you marry Mr. Jeffress?

A. In August, 1947.

Q. So we may have your testimony in mind, it is my understanding then that the first Mrs. Jeffress passed away in 1940? A. Yes.

Q. And seven years later, in August, 1947, you married Mr. Jeffress? A. Yes.

Q. During the intervening time between the date of the death [2665] of the first Mrs. Jeffress and the date that you married Mr. Jeffress in 1947, seven years later, where did Mr. Jeffress live and where did you live?

A. I lived in the lower flat and Mr. Jeffress lived in the upper flat.

Q. And after the passing of his wife, with whom did Mr. Jeffress make his home in his upper flat?

A. Well, he made his home with his daughter and his son.

Q. Now young Mr. Jim Jeffress, did he remain at home up until the time you and Mr. Jeffress married?

A. No, he didn't. He went into the army, I think the beginning of 1941, early part of 1941, Jim Jeffress.

Q. Do you know how long he was in the service?

A. I think it was the end of '45, or '46.

Q. Now Miss Carolyn Jeffress, how long did she remain with her father?

A. She remained until she was married. I think she was married in March of '46.

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(Testimony of Mrs. Robert Jeffress.)

Q. And then Mr. Jeffress occupied the flat alone?

A. Yes.

Q. And you and your two sisters still lived downstairs? A. Yes.

Q. Your brother in the interim had passed away? A. Yes.

Q. After you and Mr. Jeffress married in August, 1947, did [2666] you move any place in that building? A. I moved upstairs.

Q. Did your two sisters continue to live downstairs?

A. They remained downstairs I think about a year and then Mr. Jeffress came up to the Lake and they moved upstairs with me.

Q. Do I understand some time following your marriage Mr. Jeffress came up to live at the Lake?

A. Yes.

Q. With whom did he make his home?

A. Well, part time with his son and daughter.

Q. And where about at the Lake?

A. That was near Brockaway, Lake Tahoe.

Q. Can you tell us about the time he went to live at the Lake and how long he remained there after your marriage?

A. I think he came up the beginning of '48, and he lived up here until June of 1950.

Q. Did you frequently come up here on visits and live?

A. Yes, and then I moved up in August of 1949, to Mt. Rose.

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(Testimony of Mrs. Robert Jeffress.)

Q. Now, Mrs. Jeffress, is Mr. Robert Jeffress still living or has he since passed away?

A. No, he passed away in November, 1950.

Q. Now, Mrs. Jeffress, calling your attention to the month of January of 1947, I will ask you whether or not you recall the opening of a safety deposit box in a San Francisco bank by [2667] either of your sisters and yourself?

A. Yes, I do, my sister, Helen, and I opened a box at the Anglo Bank in January, 1947.

Mr. Campbell: I don't understand—do you mean rented a box or entered a box?

Mr. Gillen: Rented a box. I will clear that up.

Q. Is it your testimony that your sister, Helen Elliott, and you rented a box with the Anglo California Bank? A. Yes.

Q. In January of 1947, is that correct?

A. Yes.

Q. And did she hold that box or rent that box jointly with any one else?

A. Yes, with myself.

Q. By the way, is your sister employed?

A. Yes, she is.

Q. Where?

A. She is employed with the Internal Revenue in San Francisco.

Q. Did you and your sister maintain that box for any period of time jointly?

A. We still have the box jointly.

Q. Directing your attention to the year 1947, at some time between January of 1947, when you and

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(Testimony of Mrs. Robert Jeffress.)

your sister jointly acquired this safety deposit box, and the month of August, 1947, when you became the wife of Mr. Jeffress, do you have any [2668] recollection of an incident wherein Mr. Jeffress gave you or your sister a document to put in your safe deposit box for safe keeping for him?

A. Yes, I remember that Mr. Jeffress gave my sister a note to keep for him. He gave her a note and said, "This is a note for money that Bones Remmer"——

Mr. Campbell: Just a minute—I object to conversation.

The Court: That part of the answer may be stricken.

Mr. Gillen: The part that would be responsive is that Mr. Jeffress gave her sister a note to keep for him.

The Court: As I understand.

Q. Now can you fix the approximate time or the occasion that that occurred?

A. Well, it was an evening in the early part of 1947, that my sister and I were having dinner upstairs in his home and he was looking for a paper or something, going through his dresser drawer and I was helping him find the paper and at the time he came across this paper and he took it out and then is when he handed it to my sister and he asked her——

Mr. Campbell: Just a minute.

Mr. Gillen: Don't tell what he said.

Q. Did you see the paper? A. Yes, I did.

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(Testimony of Mrs. Robert Jeffress.)

Q. Did you read the paper?

A. No, I did not. [2669]

Q. Did your sister read the paper in your presence? A. No, she did not.

Q. Was the paper open or folded up?

A. It was folded.

Q. Can you describe how it was folded?

A. Well, I would say it was folded as an ordinary letter would be folded.

Q. I will show you here, Mrs. Jeffress, Defendant's Exhibit A-1 in evidence, which I will identify for the record as the 50 thousand dollar note from Elmer Remmer to Robert L. Jeffress. I will ask you to look at this document, fold it in any manner you wish, if you wish to, and tell us whether or not that appears to be the type or kind of paper that Mr. Jeffress on that occasion handed to your sister to keep for him?

A. Yes, it could very well be the same paper.

Q. Now you have folded it up and let me ask you whether or not the paper that was handed to your sister, to the best of your recollection, was folded in that manner or was folded in any other manner?

A. Well, when he handed it to her it was folded like this.

Mr. Campbell: May the record show that the exhibit indicates at this time two additional folds?

Mr. Gillen: The record may show, as described by Mrs. Jeffress, the document was folded over once and a second time.

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(Testimony of Mrs. Robert Jeffress.)

Mr. Campbell: But there are also on the paper two [2670] additional folds.

Mr. Gillen: Stipulated there are two additional folds and stipulated they all appear to be old creases.

Mr. Campbell: They were on the exhibit before that came into evidence evidently.

A. Well, Mr. Jeffress gave——

The Court: Just a moment, please.

Q. Now, Mrs. Jeffress, directing your attention to the month of July of 1947, that would be the month before you married Mr. Jeffress, do you have in mind an occasion when Mr. Jeffress went to Nevada from San Francisco?

A. Yes, I do, Mr. Jeffress went to Nevada the week of the 4th of July, 1947.

Q. Now on that occasion at that same time did you leave San Francisco for any visit to any friends?

A. Yes, I did, I went to Los Angeles.

Q. For what purpose?

A. To visit my niece.

Q. What is your niece's name?

A. Janet Elliott.

Q. What was the date of your marriage in August, if you recall? A. 23rd.

Q. Now when did you return to San Francisco from your visit with your niece for the 4th of July holiday in July of 1947? [2671]

A. I think we stayed four days.

Q. When you say "we"?

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(Testimony of Mrs. Robert Jeffress.)

A. Well, my two sisters accompanied me.

Q. Your three sisters went to visit your niece?

A. Yes.

Q. And you think you stayed four days?

A. I think we stayed four days.

Q. You returned then to your home in San Francisco? A. Yes.

Q. You have stated in your testimony that in the early 40s, I think you said 1941, Mr. Jeffress, Jr., left his father's home to go in the service and in 1946, his daughter, Carolyne, left her father's home at the time of her marriage. In the intervening time, between 1946, and the time you married Mr. Jeffress in August of 1947, did Mr. Jeffress live alone in the flat? A. Yes, he did.

Q. Now on your return with your sisters from Los Angeles in July, 1947, was Mr. Jeffress at home when you arrived?

A. No, he was not, he was still in Nevada.

Q. Do you recall how long it was after you returned that Mr. Jeffress returned to the flat on 11th Avenue?

A. Well, it could have been a week, it could have been ten days or it could have been two weeks. It was a short time.

Q. It was some days after your return? [2672]

Q. When did it come to your attention that Mr. Jeffress had returned home from Nevada?

A. Well, I was away from home and when I returned there was a note under my front door, asking me to come up and see him.

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(Testimony of Mrs. Robert Jeffress.)

Q. At that time, in July of 1947, had you and Mr. Jeffress already perfected plans to be married?

A. Yes, we had.

Q. Had you set August as the time for your marriage? A. Yes.

Q. Did you, on returning to your flat and finding the note from Mr. Jeffress, go upstairs to see him? A. Yes, I did.

Q. Was he alone at the time? A. Yes.

Q. Did you have any conversation with him at that time?

Mr. Campbell: May that be answered yes or not if the Court please?

The Court: Yes, answer yes or no.

A. Yes.

Q. When you went to see Mr. Jeffress, what was he doing?

A. He was figuring, putting figures on paper.

Q. Was that conversation that you had with Mr. Jeffress pertaining to any financial loss on the part of Mr. Jeffress?

Mr. Campbell: Objected to as leading and suggestive.

The Court: Objection sustained. [2673]

Mr. Gillen: Then, may it please the Court, we have arrived at a point in this direct examination where I must take up with your Honor the purpose of these questions.

The Court: Very well, then we will excuse the jury.

(Jury and alternate jurors admonished and excused at 10:30 a.m.)

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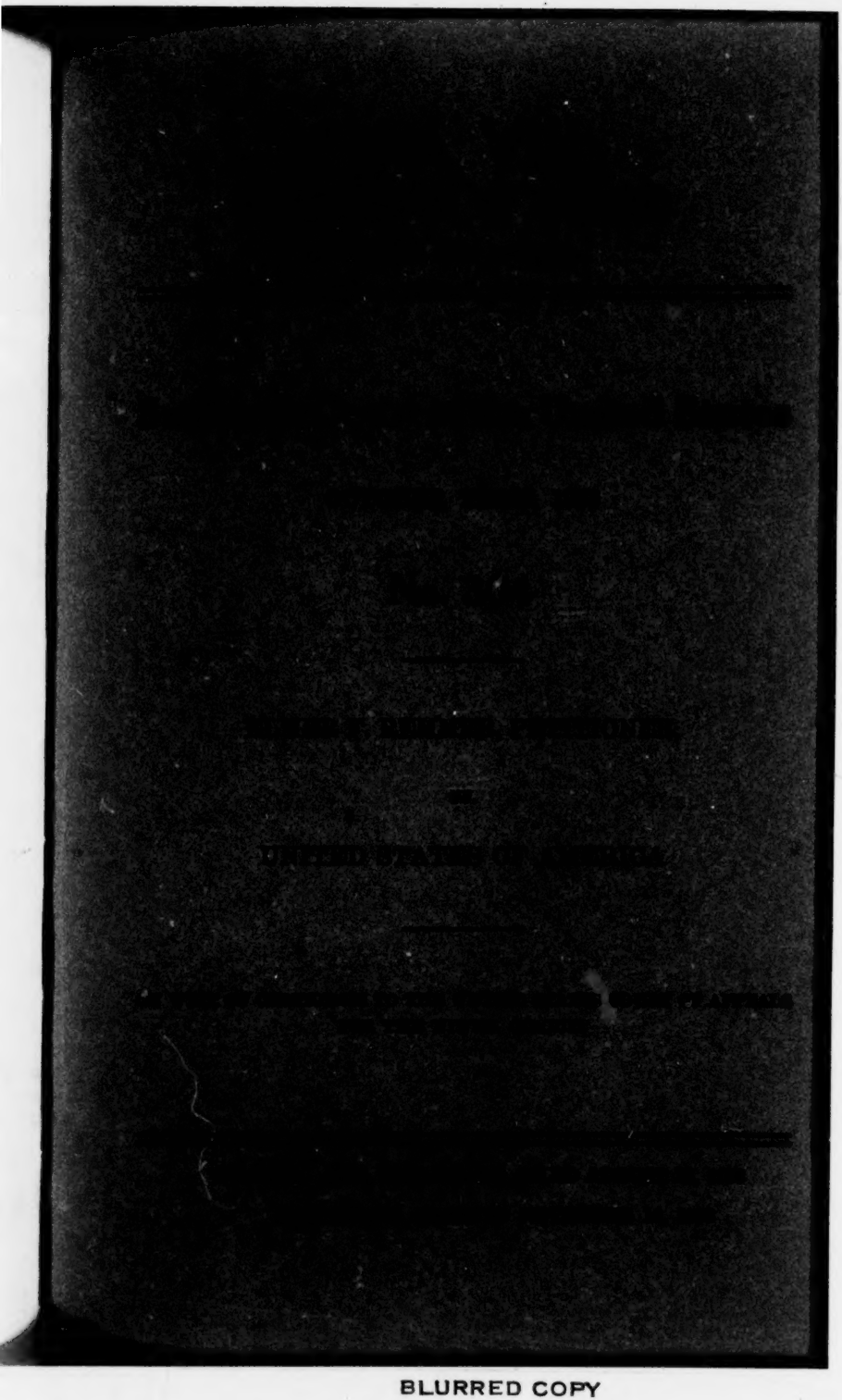

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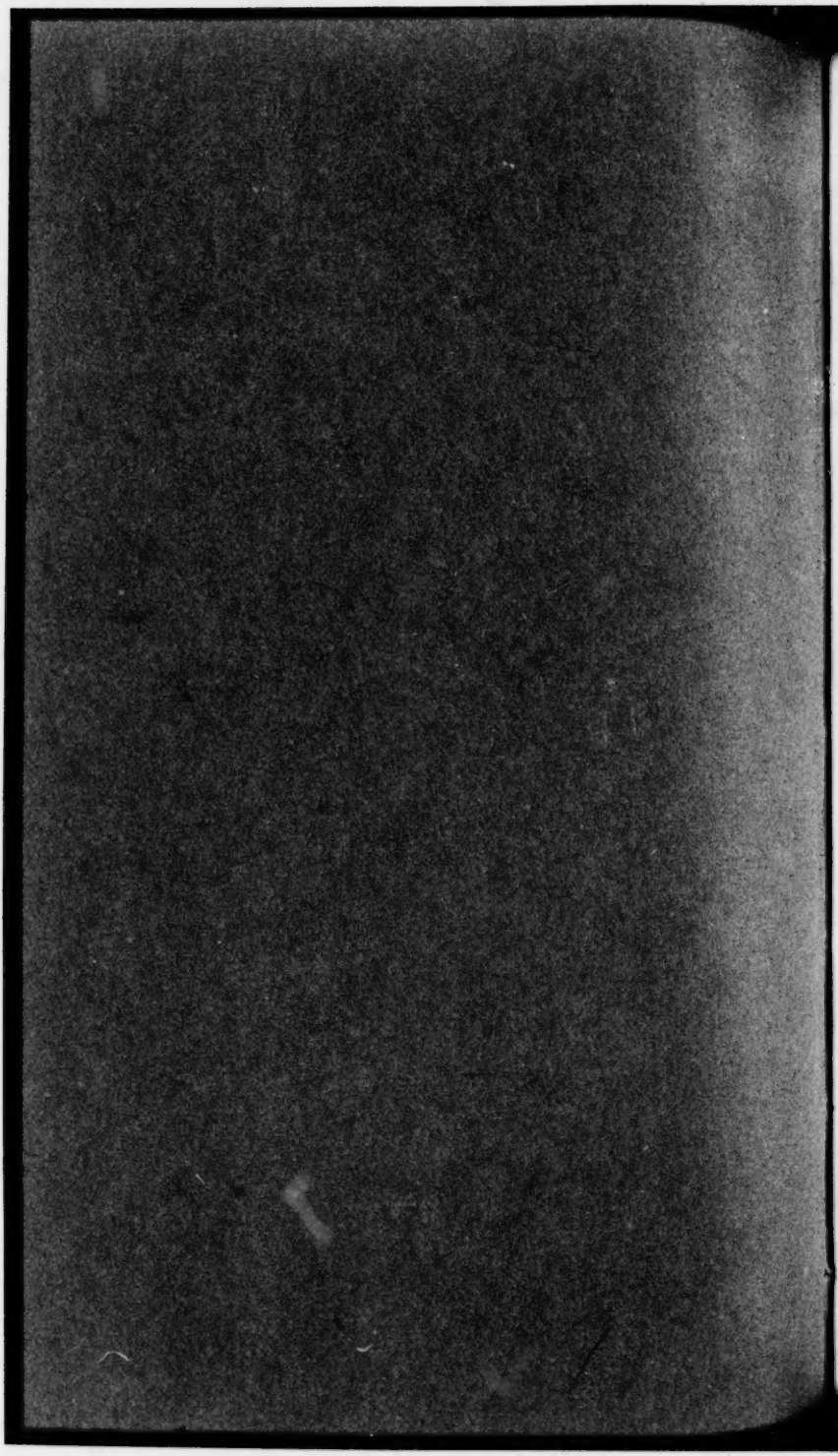

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes

Volume VIII
(Pages 3139 to 3518)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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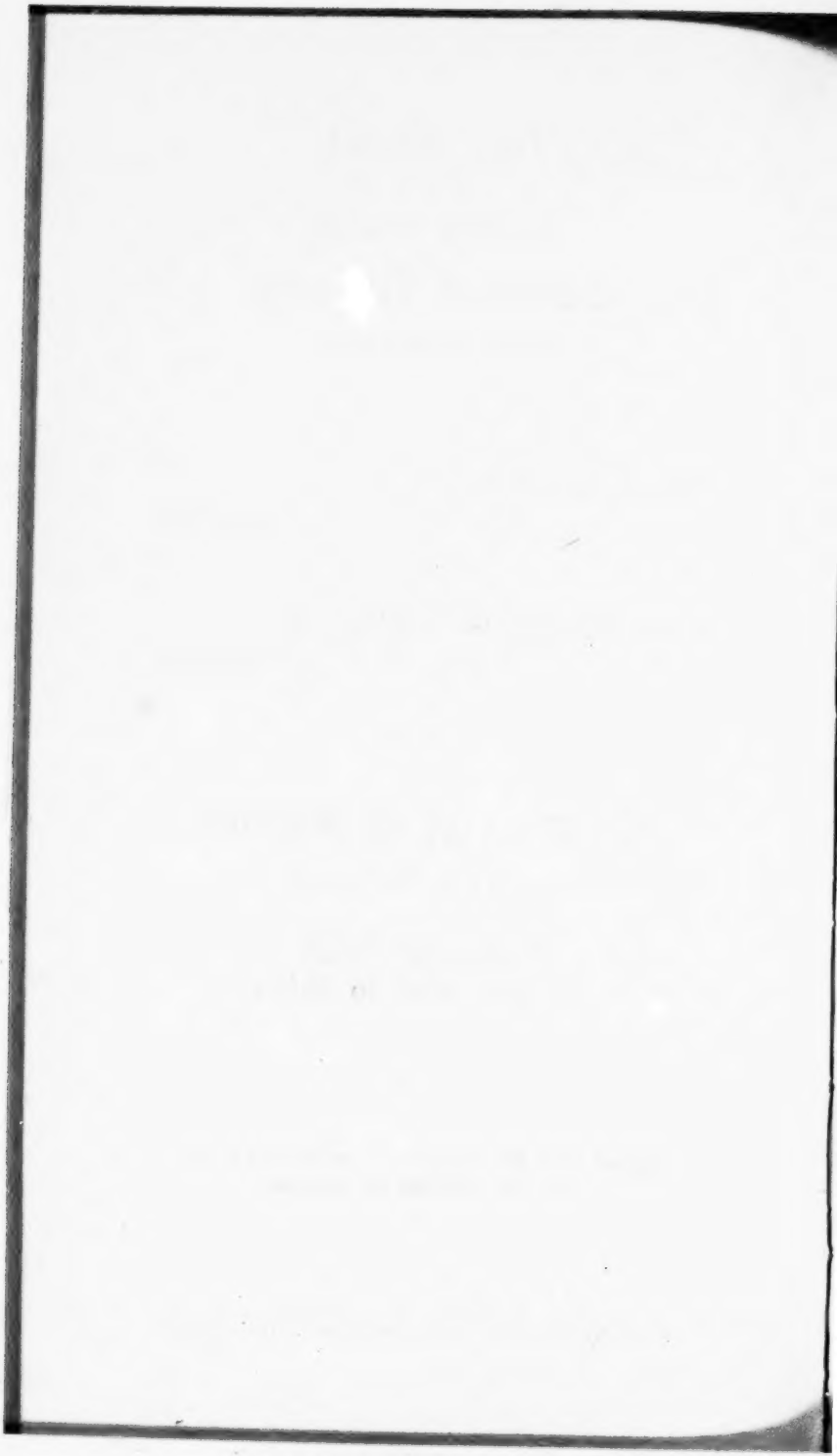

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(In the absence of the jury.)

RE: CONVERSATION WITH MRS. JEFFRESS REGARDING NOTE

(Feb. 8, 1952. Notebook 341—P.P. 86-90. Notebook 342—P.P. 1-29.)

Mr. Thompson: I would like to suggest at the outset we have Mrs. Jeffress testify to the conversation. It may assist.

The Court: Very well.

Q. (By Mr. Gillen): I would like to have you state to the Court, if you will, what was the conversation that you had with Mr. Robert Jeffress on the occasion in July, 1947, when, in response to the note he left under your door you went upstairs and found him in his flat working at some figures on a piece of paper?

A. (Mrs. Jeffress): Well, when I went up he said to me that, "I have been foolish; I have been gambling in Reno and lost," "almost went broke" were the words he used. So in his conversation he was figuring and he said to me that "Part of the loss was taken care of by Mr. Bones Remmer from $50,000 that he owes me."

Mr. Gillen: Now, may it please the Court, we submit that conversation as a declaration against interest by Mr. Robert Jeffress in 1948, showing an outstanding obligation as of the end of 1946, as to repayment by Mr. Remmer as to a part, if not all, of that obligation in 1947. Of course, your Honor will have in mind that this is supported by the

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$29,000 check and the testimony of Mr. Perkins, that Mr. Jeffress had become obligated in the sum of $23,000 to the Bank Club and that Mr. Remmer had underwritten that obligation and that Mr. Remmer, upon receipt of the $29,000 check, growing out of the whiskey transaction, had endorsed the check and had refunded, or there had been retained by the Bank Club, to cover Mr. Jeffress' obligation, the sum of $23,000 out of the $29,000 check. Now, your Honor, I think we had quite a comprehensive discussion yesterday of the universal rule expressed in Corpus Juris that declarations against interest could either be a declaration with regard to the declarant owing some money or in regard to the declarant acknowledging that an obligation due him had been repaid. Each of them is declaration of interest in one reverse or the other.

Mr. Thompson: If the Court please, we object to the conversation upon the ground it is hearsay and incompetent, does not come within any exception to the hearsay rule. If your Honor please, the conversation as testified to by Mrs. Jeffress, it is not an acknowledgement or statement by Mr. Jeffress that he owed anybody anything which would be a declaration against his interest. It is a statement to the effect that he had lost some money gambling, but did not owe that money, that that money had been paid, and it is also a statement to the effect that Mr. Remmer owed him some money. Taken together they are two statements in favor of his interest; first, that he had paid an obligation which he incurred at the Bank Club by reason of his

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gambling, and, second, that Mr. Remmer owed him $50,000. Both of those declarations are in favor of, rather than against, his interest.

Mr. Gillen: Your Honor, I would like to respond to that and first, if I may, so both your Honor and myself will follow the thought, I would like the reporter to read to your Honor the answer by Mrs. Jeffress.

The Court: Yes, read the answer.

(Answer read.)

Mr. Gillen: Now, here we have this foundation for the admission of this declaration against interest and exception to the hearsay rule from the evidence, your Honor: First of all, we find that Mr. Jeffress, the declarant, died in November of 1950; that in July of 1947, along the holiday, 4th of July holiday, that Mr. Jeffress went to Nevada; that he returned during the month of July from Nevada; that he had a conversation with the woman who is on the witness stand, whom he had already had arrangements to marry the following month—the arrangements had already been made—and he at that time declared—first of all, we might say we have, if your Honor will recall, the summarization of the indispensable elements of this matter—we might read the preamble to refresh our minds on it: "Requirements for Admission of Declarations" (Reads from CJS). Now, we have to establish in the record he passed away or was unable at this time as a witness. (2) We have a statement regarding his finances and regarding an obligation that

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was incurred by him as the result of a gambling spree and losses that had been incurred by him. (3) Now, this means only that the declarant must be acquainted with the facts and circumstances in the matter, which certainly he was. I mean, he knew he lost money and he knew out of the obligation owed him by Mr. Remmer, that Mr. Remmer had taken care of part of the loss. (4) Now, once again if we may refresh our memories on the type of cases that must be involved here, we find—I am reading from Corpus Juris Secundum Vol. 31 on "Evidence," we find in Section 219 on page 963 this language: (Reads.) Now, we have both here. We have the statement that he had become obligated to the club where he had been gambling, and we have here an obligation due him had been paid in payment of his obligation to another, so we have a round-robin. We have met all four requirements, and then, of course, your Honor has in mind the statement of Wigmore, the philosophy of making this an exception to the hearsay rule, so I submit, your Honor——

The Court (Interceding): What did we hear yesterday about one of these prerequisites, something about primary evidence being available?

Mr. Gillen: Well, the primary evidence means the primary evidence as to declaration made by the declarant, not as to testimony, but as to declaration made by the declarant and Mr. Wigmore says in his work: (Reads Vol. 5, Sec. 1465 Wigmore.)

The Court: Well, we have the situation—just assume the facts as they are introduced here—as-

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sume that there was an obligation of $50,000 due to Mr. Jeffress from Mr. Remmer——

Mr. Gillen: There is evidence of that in the record already.

The Court: Say prior to the conversation, or prior to the incident recited in the conversation, the gambling loss, Mr. Remmer was indebted to Mr. Jeffress in the sum of $50,000. The effect of the evidence we have heard and the effect of the conversation, would amount to this, that just prior to this conversation, or shortly prior to it, Mr. Remmer had paid something on account——

Mr. Gillen: That is correct and that is declaration against the account.

The Court: ——something on account, therefore decreasing to that extent the total of that indebtedness, $50,000.

Mr. Gillen: That is correct.

The Court: Now, we have here in the language of Corpus Juris Secundum: (Reads) "On the other hand, the declaration against * * *." Well, if an individual owed a sum of money to me and by some arrangement had settled a part of it and paid part of it and I made a statement to that effect, I think that is a declaration against interest.

Mr. Campbell: But isn't it true the other part of the objection, that primary evidence is here available——

The Court: That is something I would like to have some authority on now.

Mr. Campbell: As I read Corpus Juris Secundum——

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The Court: That is the one point I am in doubt about.

Mr. Gillen: I might straighten your Honor and Mr. Campbell out on this. In this same volume is found the situation that some jurisdictions have held the admission of this type of evidence to a supreme court role and that the supreme court rule in some jurisdictions is this—they say, we will not accept declarations against interest merely because the declarant is not available to the court unless he is dead.

The Court: Yes, I read that.

Mr. Gillen: Now, the general and more liberal and universal rule is if he is beyond the jurisdiction of the court for any reason, so we have here complied with the strictest limitation of the rule.

The Court: I think we can safely say that the acknowledgment of a part payment of a debt certainly would be declaration against an interest.

Mr. Gillen: No question about it, your Honor.

Mr. Campbell: I wish to refer to page 942, paragraph 204, Corpus Juris Secundum Vol. 31 (Reads.)

Mr. Gillen: Before we lost our thought on the one point your Honor has in mind, that we are not entirely bereft of supporting evidence. There is included here some writing that will support this declaration; there is a note; there is a check; there is testimony by the prosecution's witness that part of the check, to wit, 23 thousand dollars, was retained for certain purpose, to wit, to pay an obligation of Mr. Jeffress, from Mr. Remmer.

The Court: Just the other way.

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Mr. Gillen: Was retained by the bank to pay an obligation of Mr. Jeffress from Mr. Remmer; that is, Mr. Remmer paid an obligation for Mr. Jeffress—I put it awkwardly, I am sorry.

The Court: I see what you mean.

Mr. Campbell: It seems to me it goes back to the initial proposition. Here supposedly is a conversation of two people, one of whom is available and the other is not available. If evidence is to be put in in this fashion, through hearsay declarations, the government is bereft of an opportunity of questioning as to the true nature of the transaction, testing out the accuracy of the statements made by the decedent. Also I referred yesterday to page 943 as to the admissibility of a declaration and the elements. It says: (Reads) "Where declarant had adequate knowledge of the facts stated * * *."

The Court: Well if we can find a definition of primary evidence. It might be so simple that we ought to know it without any research, but it might be a good idea just to find out what it means.

Mr. Campbell: May I suggest the morning recess at this time.

(Recess taken at 10:55 a.m.)

11:15 A.M.

(Defendant present.)

The Court: I think, if you permit me to, I would like to give you some thoughts I have here now and then you can direct your arguments for or against the ideas that I might express here.

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First I would like to start off with this citation of authority you have on primary evidence. (Corpus Juris Secundum, Vol. 31, 942-943.) Well, this, of course, is hearsay evidence and proposed to admit it as an exception to the hearsay rule and in CJS we find this statement, on page 942, Section 204: (Reads.) So if we start out with the thought that before evidence of the kind offered here is admissible, there must be a possibility of obtaining what is called primary evidence—now note the original edition, Vol. 22, CJ 973, Section 1219: (Reads.) So I would take it that the best evidence and primary evidence meant one and the same thing. Reading on the same section: (Reads.) "The best evidence * * *." Now, on page 974 the best evidence rule: "The rule of evidence commonly known * * *." Now, in the next section there are limitations of that rule recited, page 975: (Reads.) Now, I think those are the rules of evidence and they apply no doubt to both criminal and civil cases, but in the article on Criminal Law, 16 C. J., original Corpus Juris, on page 611: (Reads.) Then in Section 1219 of the same volume on page 616, we find an article headed as follows: "Grounds for Demurrers to the Admission of Secondary Evidence." (Reads.) So my present thought is I will sustain the objection, in view of the principles which I find here.

Mr. Gillen: Then I have the answer to that, I am sure, your Honor. May I see Vol. 31 again. May it please the Court, I think I can state, without fear of being challenged by any one, that the best evi-

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dence of the fact that once Remmer owed Jeffress $50,000 and that Remmer had paid Jeffress back part or all of that $50,000, would be Mr. Jeffress himself taking the witness stand and saying, "Yes, Remmer owed me $50,000 but he has paid me back $50,000 and he paid it at a certain time," or he might even say "he paid me under certain circumstances." That would be by far primary and best evidence. Of course, I think, your Honor, the best evidence rule applies primarily, if not exclusively, to writings; in other words, secondary evidence as to what is in the writing, who prepared it or wrote it and was it destroyed and not available for any of numerous reasons we can think of, secondary evidence is now allowed by some one who had knowledge of that writing.

The Court: I notice that statement but I can't agree with that, that that applies to writing.

Mr. Gillen: I do not think it is going to confuse us, your Honor, in any event. Now, if I owed a man some money and I paid him back, I say again that the best evidence would be my creditor making the statement on the witness stand, "Yes, Gillen owed me some money but he has paid me back," because there the man is hurting himself, he is making declaration against his interest. That would be much stronger than if I would take the witness stand and say, "Yes, I owed John Jones some money but I paid him back" and you have nothing other than my word for that. You are far more liable to believe and it is far more convincing, to have the creditor say, "He now doesn't owe me any

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money because he paid it back." The debtor's testimony would be in the nature of self-serving statement.

The Court: That might be better evidence than the creditor's.

Mr. Gillen: Then what?

The Court: Than the other party's statement to the same transaction.

Mr. Gillen: Yes, your Honor, I think my statement as to the debtor would be self-serving statement, while the statement of the creditor would be declaration against his interest and would be far more convincing and have far more force by the triers of the facts.

Now, I think what is bothering us here could be cleared up in a word. What are we seeking the best evidence of here? We are seeking here the best evidence of what declaration was made by the declarant against interest. We are seeking the best evidence from one source, and I would like to read your Honor from the very page that Mr. Campbell read to your Honor. It is Section 204, Vol. 31, Corpus Juris Secundum, under "Evidence," at page 942, and under the general heading of "Impossibility of Obtaining Other Evidence," we find on that page a footnote and the footnote reads as follows and refers to a case which I will be happy to read to your Honor. The footnote reads as follows: (Reads.) Now, is that clear to your Honor? In other words, a fact is in dispute and this footnote says that the necessity that arises as an exception to the hearsay rule is not because there is no

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other source from which the same information concerning the fact may be obtained, but because there is no other authenticated way of obtaining it from the same source, the same source being the declarant who made this statement of declaration against his interest. Let me read that again, your Honor. (Reads.) The same source being Mr. Jeffress in this case.

Now, that footnote cites the case of In re Roders Estate, 193 Pac. (2), 631, and in that case, which was a case concerning intention, although there was evidence to the effect in writing, because it evolved around a will, a change in will, the point that we were concerned with was the intention and declaration against his interest that was made by the taxpayer in the case. The court says, in reviewing the matter, at page 634 of the decision, paragraph 2 of the decision: (Reads.) In other words, there may have been other sources of what apparently was the intent of the testator, but there was no other source but the testator's or somebody who had heard his declaration against interest, the same source as to his intentions. Now it says: (Reads.) "It is under this principle * * *" and it cites Wigmore on Evidence, page 155, Section 1421.

So now we are concerned with this, your Honor. What is the best available evidence at this point in the case of learning what Mr. Jeffress had to acknowledge concerning an obligation that was outstanding to him from another person. The best available evidence would be, of course, regardless of anybody else concerned in the transaction, would

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be Mr. Robert Jeffress himself taking the witness stand and saying, "Yes, this obligation was outstanding but on a certain date it was paid, therefore, the obligation is no longer due me," or part of the obligation, whatever the case might be—it is immaterial. Mr. Jeffress would then be making a declaration against his interest. It would be the most forceful and strongest evidence of the transaction that we could obtain. Now, Mr. Jeffress is unavailable to this court by reason of the phraseology that is within the limits of the very strictest rule, strictest interpretation of this exception to the hearsay rule, which as your Honor recalls, some jurisdicions say merely because he is not available is not enough, he has to be dead, while some jurisdictions say other circumstances of inavailability other than actual death are good enough. Now, in the absence of Mr. Jeffress, by reason of his death, what is the next best and most authentic evidence that we can obtain from that same source, regardless of the fact that there may be other sources who can throw some light on the subject, what is the best evidence that we can now obtain, in the face of Mr. Jeffress' death, from that same source, to wit, Mr. Jeffress, concerning a declaration against his own interest, and that source is a person who heard Mr. Jeffress make the declaration against his own interest.

Now, to me, your Honor, it is very clear, and let us just once more look at that language. The language says: (Reads.) And the language again here on the next page, 634: (Reads.) And of course the same source is the declarant, the man who declares

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against his own interest and if he is not here, then the next best evidence you can obtain from the same source, from the same man, from the declarant——

The Court (Interceding): Do you care if I ask a question or two?

Mr. Gillen: No.

The Court: What was the declaration which was offered in that will case, 193 Pacific (2)? What jurisdiction was that?

Mr. Gillen: That is New Mexico.

The Court: Now, tell me what was the declaration and question to be proved in the case? What was the main issue of the case?

Mr. Gillen: The question to be proved in the case by this, may it please the Court, the decedent, the testator had made a will. He had subsequently changed his will, changing thereby the interests of certain heirs, but in changing his will he had not executed the codicil, so the changed portion of the will was not in strict adherence to the probate rules and therefore the will was attacked for being not properly executed in form, and then the question arose—the probate court, as your Honor is well aware, trying to obtain the true intent of the testator—then the question arose as to the testator's intent in the premises and under the circumstances and his declarations of his desires were the circumstances there served as declaration against his interest and also enlightened the probate court as to what his true intent was, although the manner in which he did it did not live up to the strict letter

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of the law about the manner of executing a codicil to a will or making a change.

The Court: Wouldn't a reading of that case disclose that no evidence could be offered, no proof was available, of the decedent's intent except that declaration?

Mr. Gillen: No, there was a writing connected with it, but this is the writing which was objectionable.

The Court: That would prove the thing had not been legal, construction of the instrument, but other than the legal construction of the evidence, there was no evidence available except declarations of his intent?

Mr. Gillen: From that source?

The Court: No, other sources.

Mr. Gillen: No, the Court said there was evidence from other sources——

The Court (Interceding): A thought occurred to me now. Just suppose that the rule is advanced as the true rule that any declaration could be admitted that was a declaration against interest in any case where the declarant was dead?

Mr. Gillen: That is the exception to the hearsay rule.

The Court: Whether or not the best evidence?

Mr. Gillen: The court here indicated that although the question was raised, there were other ways that these declarations were objectionable, in that the court in this case stated this was not strictly declaration against interest because the man was giving away his property anyway. It was more

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declaration of his intentions but the court said, regardless of the objection raised, this was hearsay and not a true exception of the hearsay rule and there were other ways of getting at this same evidence. The court says: "Necessity we understand * * * from the same source."

The Court: Well, from the same source.

Mr. Gillen: From the same source. Now, here we have——

The Court (Interceding): I can't go along with that, Mr. Gillen. I am going to sustain the objection.

Mr. Gillen: May we have a few moments after the recess?

(Noon recess taken at 11:45 a.m.)

2:00 P.M.

(Defendant present.)

Mr. Gillen: Shall I proceed, your Honor?

The Court: Yes, sir.

Mr. Gillen: May it please the Court, your Honor made an inquiry of me this forenoon which I misunderstood and it was called to my attention by Mr. Golden. I miscomprehended what your Honor said and that was the question your Honor asked me if it were my contention that the declaration against interest of a dead or unavailable person could be used in all cases. I said yes, because I had in mind your Honor was relating to this same type of circumstances. The answer to that is no, but before I answer your Honor's question, there is another

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point that I think perhaps should be cleared up, and it is a matter that was raised by Mr. Campbell and if I may dispose of that first, your Honor, then I would like to take up the question that your Honor posed.

Mr. Campbell made one observation or contention to this effect—he said if this declaration is permitted, the prosecution is then deprived of the opportunity to cross-examine. Now, our contention is this, your Honor—the question to be probed into by the prosecution is whether or not the decedent or declarant, who is now dead or unavailable, whether he made a declaration against his interest. Now, as said by the witness on the stand, this decedent "made this declaration against his interest to me." That person is available for cross-examination to determine whether or not such a declaration was in fact made by the declarant now deceased, so he is not deprived of his opportunity to cross-examine.

Now, as to the declaration itself, the authorities and the rules have shown us that as to the truth of the declaration, or the declaration as to the truth of its contents, is authenticated by itself, because it is a declaration against interest and because, as the rule points out, one does not make a declaration against his own interest unless it is true. In other words, one does not deprive himself of pecuniary rights or gain or proprietory rights unless true, so the fact of the declaration against interest, the truth of it, is authenticated by the fact it is made against the interest of the person making it. Now,

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as to the proposition of whether he made it or not, of course, that is a matter that can be probed into by cross-examination of the person who contends that the declaration was made. So much for that.

Now, your Honor asked me this morning, and as I say, I miscomprehended because I thought your Honor was referring to this set of circumstances, where the circumstances were the same, whether or not declaration could be used in any case, and the answer is no. The declaration against interest of a deceased or unavailable person can be used when no higher or better evidence from the same source, or actually created by the same declarant, can be obtained or is available. In other words, the evidence that is created comes from a source. That source, of course, is the declarant. When no better evidence than the declarant's declaration against his interest can be obtained, or when no better evidence than that created by the declarant now unavailable can be obtained, then the declaration against interest, as an exception to the hearsay rule, can always be used.

Now, as to the matter of something better, some higher type of evidence created from the same source, let us take as an example when Mrs. Jeffress took the stand and stated: "My husband"—at such a time, at a time and place—"wrote me a letter and in that letter he stated * * *" thus and so, concerning either his declaration against his interest, as owing somebody some money, or as the obligation owed to him having been paid. Now, there the prosecution could readily object that better than

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her relating a declaration against that had been made to her, that the letter itself would be the best evidence, the letter in his handwriting, in which he made the declaration against his interest. Now, that not only is an illustration of declaration against interest, merely testifying, when there are available better evidence in writing by him, but it also is another example of the best evidence rule, limiting the use of secondary evidence; and in that regard, may it please the Court, may I invite your Honor's attention on that very subject to 5 Wigmore, third edition, at page 260, and it is Section 1456. The section is called the "Necessity Principle" and it says as follows: (Reads).

Now, you see why we should repeatedly come up with reference to this rule, your Honor. The rule does not say whether evidence on the same subject matter was available or whether evidence concerning the same transaction, it says the availability of other or better evidence from the same source. Now, what is the same source? The same source refers to the declarant, the person who has made a declaration against his interest. Let us read that again, your Honor, that subject of necessity of excepting to the hearsay rule. (Reads.) Of course, that is the most certain reason for the unavailability of the witness.

Now, if the unavailability of any other person to the same transaction were the rule, then, of course, you could never use the declaration against interest of one of the parties of the transaction. I do not know whether I am making myself clear to your

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Honor, but it is clear to me that the rule is that it is not whether or not you can obtain other evidence as to the same transaction, same topic, same subject matter, same incident, whatever it may be, that is not the test. The test is, is there any way of getting better or other evidence from the same source and when they use "source" they mean declarant, and when they say "declarant," they mean declarant unavailable by reason of being beyond the reach of the court, and better still and universally accepted, the fact the declarant is dead and certainly cannot be reached by the court, and then the only next better evidence that we can obtain of that declarant's or that source's information or declaration against his interest is a witness to whom he made that declaration during his lifetime and in this instance, of course, he made his declaration to his intended wife. He told her about his predicament, that he had been foolish, that he lost a considerable amount of money, became indebted and a man who was obligated to him had picked up some of his debt, and to me, your Honor, I do not think you can find, in the light of the wording of the rule, which is the universally accepted rule, you can find a stronger example for declaration against Mr. Jeffress' interest. I submit it.

Mr. Campbell: I would like to add one or two observations if I may. I disagree, of course, with Mr. Gillen's statement and implication of the law. Might I point out if his situation, or if his last contention, were true that by the same token it would be possible then for the government in this

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case, in instances of certain witnesses who were unavailable on account of health or on account of not being able to locate them by process, to put in evidence of statements, either in written form or in oral form, say he had made to the agents, which, of course, we know is not the law and cannot be done in that manner that the evidence must be produced here.

Now, our contention is simply this—in the first place, we do not concede that the statement made by Mr. Jeffress to the now Mrs. Jeffress was a statement against interest, and in the second place, assuming that it was, we do not believe that it is admissible in this case, in the absence of a showing that primary evidence, or the best evidence, is not available. Now, in criminal cases the usual instances of admissions against interest are admissions offered by the prosecution, admissions which have been made by the defendant outside of the court room and at various times, either before or after the occurrence of the offense and they are admissible because they were made against the defendant's interest and the defendant himself is not available to the government to call on the stand to attempt to produce the same admissions.

Now, in this instance the ultimate fact, I take it, which is sought to be proven, is the circumstance of a loan made from Mr. Jeffress allegedly to Mr. Remmer, which loan was outstanding, at least a portion thereof was outstanding, as of December 31, 1946. The note itself, as counsel pointed out, is here in evidence. Mr. Maundrell, on cross-examination,

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identified the note as having been made by him under the direction of Mr. Remmer, that he saw some money there, he did not count it, he did not know how much there was—a bundle of currency that was brought in—that he did not know when the money had been paid back, the loan, if, in fact, the loan had been consummated. So much is in the record. There is also some evidence in the record by Mr. Perkins that in July of 1947 that 23 thousand and some odd dollars of an obligation which the Bank Club owed to Mr. Remmer was, with Mr. Remmer's consent, applied on an indebtedness which Mr. Jeffress owed at that time to the Bank Club. I think that is essentially all that the record now contains as to that matter.

Now, the best evidence of a transaction or of an event is necessarily the evidence of the participants and of the eye witnesses. In this instance the best evidence of the existence of the loan, of course, as of the time the loan was made, would be the note itself, but as to the circumstances under which the document was drawn, the time which that loan continued, is a matter peculiarly within the knowledge of the principles. Now, I submit—I believe counsel alluded to this this morning—the evidence of Mr. Jeffress, if he was here and available, as to the payment of that note might be entitled to a little more weight than the testimony of the defendant here, because the defendant, of course, is an interested party to these proceedings. However, the testimony of both of them, or of either of them, is the best or primary evidence of what was done. Sup-

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pose there was a lawsuit which involved that note—now the evidence of either of them or of both of them would be admissible and each of them would be and would qualify to be the best and primary evidence of the events themselves. Now, it would be possible to carry this one step farther, for some one to take the stand and give any type of a story as to what some irresponsible, but now deceased, person—I do not wish to be understood as referring to Mr. Jeffress as an irresponsible person—I am using a hypothetical case—but what some irresponsible man said prior to death, such as saying, "Mr. Remmer owed me a million dollars and paid it back yesterday"—clearly that would not be admissible and would have no probative value. There would be no manner in which the government could test the truth of the statement. It would be possible, and this type of testimony would make it possible, for a defendant in a case to testify without subjecting himself to cross-examination and the test which the law requires.

Now, referring for a moment to the case cited by counsel this morning, the New Mexico case. In that case, which was a will contest—and I think the Court is thoroughly aware that special rules apply to the declarations made by a decedent at the time that he signs his will and has the witnesses attest to it—in most jurisdictions he makes a statement to the attesting witness that "I declare this to be my last will and testament" and they so certify—that is a declaration generally recognized and in proving the attesting witnesses come in and say, "We were

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both present and in the presence of each other he signed and acknowledged it to be his last will and testament." In this particular New Mexico case there had been presented a document for probate, the front page of which document contained certain changes. In the contest there was produced a will, as I recall, in which, as in the first document—both documents consisted of three pages—the second and third pages of both purported wills were exactly alike, all three pages in each case were stapled together, but the first page of the contested document and the first page of the document which was offered in evidence were different and the contestants of the will sought to show that the document offered for probate, as I recall—I am stating here facts from memory, I may be a little wrong, but I do not believe so—sought to show that after the execution of the will properly executed and in the presence of witnesses, as required by the New Mexico laws, which requires, as most other States do, the presence of two witnesses and attesting clause and declaration by the maker of the will—they were attempting to show that at some subsequent date the decedent had decided to make certain changes and that he apparently had made those changes and substituted them as the first page in one of the duplicate originals, without meeting the requirements of the law for a codicil, and in proving that these changes and that alteration had been made at a date subsequent to the attestation clause of the will, they were attempting to, and were permitted to, introduce these declarations of the decedent as to what changes he

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was going to make, and that was for the purpose of showing that the will, which had been admitted to probate, so far as the first page was concerned was not a valid document, because it had not met the requirements of the New Mexico probate law.

Now, I submit that this is an entirely different situation than is presented here. Here we are offered evidence of a conversation. Now, I take it the only material part of the conversation, and the part which counsel would indicate was an admission against interest, is the reference by him where Mrs. Jeffress says that Mr. Jeffress said, "I got myself into trouble gambling. I lost a large sum of money which was paid for me by Mr. Remmer on account of money"—I believe she used the sum $50,000—"on account of $50,000 which I loaned to him back in 1946."

Mr. Gillen: Which he owes me.

Mr. Campbell: Well, which he owes me since 1946.

Mr. Gillen: I do not think she mentioned the date.

Mr. Campbell: My recollection is she referred to the year 1946. Well, I don't think that makes any difference.

Now, as to money owed him by Mr. Remmer, I submit that this is not a statement against interest. That is a statement in favor of the pecuniary interest and on that grounds that statement, or that portion of the statement, would clearly not be admissible, even if proof were in the record here

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showing that primary or best evidence was not available.

Now, what is primary or best evidence? I am going to refer to some of the authorities set forth in "Words and Phrases," Vol. 33, the permanent edition, published in 1940 and which, of course, carries cumulative back parts, which volume I have in my hand, carrying back part through 1951. There is quoted here the case of Cavelle vs.———, 77 Pac. 55, a Montana case:

"Primary evidence is that kind of evidence which under every possible circumstance affords the courts certainty of the fact in question. Thus a written instrument is itself the best possible evidence of its existence and content."

Another authority quoted here, Best vs. Equitable Life Insurance Company, 299 S. W., 118, referring to page 120, and the note on that decision says:

"Best evidence or primary evidence is the particular means of proof which is the most natural and satisfactory of which the case admits and includes the best evidence which is available to a party and procurable under the existing situation, and all evidence falling short of such a standard and which in its nature suggests there is better evidence of the same fact, is secondary evidence."

Which, of course, is directly in line with the portion of Corpus Juris to which your Honor referred this morning.

Another case referred to, a recent case, is that of Pettit vs. Campbell, a Texas case, reported in 149 SW(2), 633 at page 635:

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"Primary evidence or best evidence is the kind of proof which affords greatest certainty of fact in question under any of its circumstances."

Now, the position of the government is first, that the proffered statement of Mr. Jeffress is not, upon analysis, a statement against interest, and, secondly, that even if it were, it is not the primary or best evidence of the facts which are sought to be proved through the proffered testimony.

Mr. Gillen: May it please the Court, I think I can answer those points very rapidly.

Counsel is reading your Honor rules with which we have no quarrel. We have no quarrel with the best evidence rule as stated, and he has read rules and set forth what is recognized in law as primary evidence or the best evidence to prove a fact, but he is talking at cross purposes with the problem that confronts your Honor. He is quoting a general rule and he is shutting his eyes and ears and turning his back to and completely ignoring the necessity principle that has been related here in connection with the exception to the hearsay rule in the matter of exception of declaration against interest, because he is ignoring what the rule has to say and what is universally held in the words "from the same source."

Now, he has to admit himself that if the defendant in this case were to take the witness stand and testify that "I have paid an obligation that I owed to a Mr. Jeffress," or a part of it or paid all of it, that that wouldn't be as effective as the creditor himself taking the witness stand and saying, "The

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man is no longer obligated to me," because in the case of the debtor testifying, "I paid him," that is a self-serving statement and in the case of the creditor testifying that he paid, that is a declaration against interest.

Now, the question is not what is the best evidence as to the fact. These two people, the creditor and the debtor, were in different businesses altogether and on different planes. The question that we are concerned here with is what is the best evidence from this same source. The source means Mr. Jeffress, the creditor. The source means the declarant who made the declaration against interest. What is the best evidence available? Now, if there was a writing existing from Mr. Jeffress to the effect that he had been paid, I will concede readily that that would be better evidence from that same source than the testimony orally of Mrs. Jeffress that he told her that in person and vocally. But we have no evidence here of any written acknowledgment or any writing declaring against his interest that there was a note or an obligation to him.

Now, counsel said something that makes me think he hasn't been listening while we have been discussing things here. He says Mr. Jeffress' declaration, if we break down the testimony and analyze it, that it wasn't declaration against interest at all, because when a man says a certain party owes me money, that is declaration in his interest and not against interest. Conceded; but when a man says a certain party owes me money and he has paid part or all, the portion referring to the amount he de-

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clares the obligation has been paid, is a declaration against his interest, because he is directly depriving himself of claim for the money or property or whatever is involved.

The Court: I think I will go along on that branch of the argument.

Mr. Gillen: Thank you. In 20 Corpus Juris on Evidence, Section 557, to which counsel referred a moment ago, on page 469 we find this: (Reads): "A declaration against interest is admissible notwithstanding the declarant * * *." In other words, if there is conversation related, a declaration of a deceased person related, part of which is collateral to the declaration or part of a declaration against interest, the entire conversation that was had is admitted, if it is connected up with the ultimate declaration against his interest, so if a man says, "Jack Jones owes me"—or owed me or owes me—"a thousand dollars, but he paid $500 of it," it can not be knocked out because he says he owes $500, which is a declaration in his interest, and thereby defeat a declaration against his interest by adding to that sentence, in the same conversation, "but he has paid me back $500." That is exactly what happened here. Mr. Jeffress said to his intended wife, he said, "I have lost this money, I practically broke myself," and whatever else he said, and then he said, "Remmer paid my obligation from the $50,000 that he owed me." I don't have the exact words, but your Honor heard and remembered. There a man is saying a man was obligated to him but had liqui-

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dated, at least some of his obligation, and that part is declaration against interest.

Now, counsel has said another funny thing I don't quite follow. If your Honor lets this declaration against interest to go in, he says then in cases where witnesses, whom the government would like to have and did not arrive, because they were ill or for some other reason, and if they make statements to the agents, they could simply bring in these statements and put before the court. Well now, a statement that is taken by an agent of the Internal Revenue Department in an investigation matter of the person, is not a declaration against interest of the man who makes it. That would categorically be simply relating some facts within knowledge or answering some questions concerning facts by another person altogether and he would certainly have to show it was definite declaration against interest before he could introduce it. However, he did that very thing in the case of Mrs. Badovinatz and that very thing was this—Mr. Badovinatz told his wife in February of 1947, "I am going down to the bank to purchase a cashier's check to pay Remmer $5,000 that I owe him" and they introduced that evidence and that was, of course, undoubtedly a declaration against the interest of Mr. Badovinatz. Mr. Badovinatz was dead, he was not available, so they bring in the person to whom he made the declaration against his interest.

The Court: They couldn't offer any one else to prove that fact.

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Mr. Gillen: They could offer exactly the same person they are contending we could offer here.

The Court: They couldn't offer Mr. Remmer.

Mr. Gillen: As a defendant, no. But could they offer anybody better to bring to your Honor's attention a declaration against interest from the same source? Those are the words that stick and those are the words counsel steps over and sidesteps from time to time, but they certainly mean something. From the same source in plain, ordinary language, means from the same place or same person. If you get a supply of groceries from the same source, that means you get it from the same store. If you get information from the same source, it means you get it from the same person; that is what the law means. What is the best evidence? It is the fellow who created it but is unavailable by reason of his death; then what is the next best place to get evidence he created by declaration against his interest? It is the person to whom he made the declaration.

The Court: I cannot reconcile that idea in my mind. I would like to hear a statement——

Mr. Gillen: What do you think the authorities mean by "from the same source"?

The Court: They are qualifying something that admits of no qualification because there can only be one class, the evidence from this lady here, this statement. It is the best and it is the worst that could be gathered from that source. It seems meaningless to me.

Mr. Gillen: What do they mean—I ask respect-

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fully—when they say, "It doesn't mean that other evidence can be gathered from other sources, but from the same source." That same source would be other parties to a transaction.

The Court: Let us apply that phrase. I am trying to do a little thinking out loud. The best evidence from the same source, you mean from the same declaration. It admits of no qualification or anything of the kind. It is neither the best nor the worst. It is all you have.

Mr. Gillen: I do not think it means that at all.

The Court: What do you mean by best evidence from this declaration? If you can define that, tell me what would be the worst or something other than the best?

Mr. Gillen: I think the worst would be another party's statement which might be self-serving. I think the best would be——

The Court (Interceding): Let us take the situation we have here now. You know it was all right; if it wasn't, the lady wouldn't have mentioned it. That is all we have, is the statement of Mrs. Jeffress. How could you apply this or divide it into degrees or qualify it in any way?

Mr. Gillen: Because the rule says there may be other sources that you can get evidence concerning the same transaction from, but that is not the test. It is the test whether you can get it from the same source. May I read this note again to your Honor and read the distinction which is made in the New Mexico case. Here is what Corpus Juris Secundum, Vol. 31, that we read from this morning, Section

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204, page 942, says. It speaks of necessity for pursuing the hearsay rule and admitting declarations against interest: (Reads.)

Now, your Honor, I have in mind in criminal cases we have other exceptions, the primary being the case of the dying declarant, the man found in a dying condition, and believing he is about to die, makes a statement which, because of the sublimity of the moment, the law says we can——

The Court (Interceding): I do not know whether necessity applies to res gestae or not. We are not concerned with the res gestae.

Mr. Gillen: Corpus Juris Secundum says: "Necessity should be based * * *" That is what is bothering your Honor. Your Honor seems to feel if there is no other evidence, then what are we going to do, but if there is other evidence, shouldn't we resort to that other evidence? This rule says no. This rule says: (Reads—"It is not necessary * * *") What is the point in question? Did or did not Mr. Jeffress receive some of an obligation due him from the defendant in this case? That is the point in question. (Reads.) Now, the same source is what? He said "He owed it to me but he paid it to me." That is the same source, and in the Roder case, which is cited in this note in Corpus Juris Secundum, we find the same situation stated with a little greater detail on page 634: (Reads—"Necessity as we understood * * *")

Now, what is being contended here is one of the parties to this transaction is dead, but there is another party to the transaction who still lives and

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so, therefore, there is available another source; whether it be a more reliable source or less reliable source, there is another source from which we can obtain some enlightenment as to the transaction; namely, whether or not any part of this obligation was paid back. Now, the same source is the declarant, the man who made the declaration against his interest—"He owed it to me but he paid it, therefore, he doesn't owe it to me any more." The decision goes on to say (Reads): "It is under this principle we have * * *." In other words, the rule says, admit it, don't lose it, and then if somebody wants to criticize and say it bears no great weight, let them do it, but admit it is better than to do it than to lose the information the declarant gave out.

As I say to your Honor, I do not want to appear smug or smart, but it is very clear to me what we are concerned with here is not, is there an opportunity for somebody else to give us some information about the transaction as to whether a man paid any part of the debt or not. There are probably fifty other people who can say something about it. The court and the rule says that is not it. The test is, is there any other way of getting better information from this fellow who says, "My obligation has been cleared," who says, "Here is my declaration against interest." I will concede if there was a letter in existence that this man wrote, or a receipt in existence, or his endorsement on a check, or some memorandum or notation, that would be the best evidence, if we could identify Mr. Jeffress' handwriting, better than his wife giving testimony he

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told her something, but the fact of the matter is there is no other evidence, there exists no such better evidence than her statement there was a declaration of interest.

What did Mrs. Badonavitz have? All we had in the Badonavitz case was this—a man says to his wife, "I am going down to the bank to buy a cashier's check to pay back Remmer five thousand dollars I owe him," and in support of that there appears here a banker who produced what? At approximately the same time a cashier's check that was purchased by Mr. Badonavitz and made in favor of Mr. Remmer for the amount of money involved.

Now here, may it please the Court, we have in support of this declaration against interest that a man makes to his wife what? We have a check that was paid to Remmer by a cashier or bookkeeper, accountant, who testified here the Bank Club owed Mr. Remmer 29 thousand dollars—"We made him a check for that amount but he underwrote another man's obligation, so we retained 23 thousand of that 29 thousand," and that other man was Mr. Jeffress, and that is supporting evidence over which we had no control, a check that had gone through the bank and records that showed the turnover of these things, supporting, corroborating evidence, over which we had no control.

I submit, your Honor, it is most detrimental to the defense in this case if we are shut out in the face of the showing we have made here and in the face of the universal recognition of this rule, it is

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most detrimental to the defense if we are not given our right under this rule, if your Honor does not admit this evidence. I submit it.

The Court: I would like to see that volume of Corpus Juris Secundum, Vol. 31. The objection is sustained. I just won't accept that statement of the rule. "From the same source," I would go along with that. Bring in the jury.

Afternoon Session
February 8, 1952—3:10 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MRS. JEFFRESS

resumes the witness stand on further

Direct Examination

By Mr. Gillen:

Mr. Gillen: May the record show that your Honor has sustained the objection of the prosecution to the question asked of Mrs. Jeffress this morning, concerning a conversation she had with her intended, later, husband, Mr. Robert Jeffress, on the occasion mentioned in 1947?

The Court: The record will so show.

Q. Mrs. Jeffress, this morning you described an incident of your husband, prior to your marriage, I believe in the month of January, 1947, prior to the time that you became the wife of Mr. Robert Jeffress, in your presence and with your assistance

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(Testimony of Mrs. Robert Jeffress.)

looking through his papers for some letter, running across a [2674] piece of paper which was folded over in letter fashion, which he gave to your sister for safekeeping for him, and do you know whether or not your sister placed that piece of paper in your safety deposit box? A. She did.

Q. Which you identified as having rented with your sister in the Anglo California Bank in January of 1949? A. Yes, she did.

Q. Now, when was the next time that you saw that piece of paper after it had been handed to your sister and taken away?

A. When Mr. Jeffress asked me to have my sister bring it in up to Mt. Rose.

Q. Can you fix the time that was?

A. Well, I am not too positive. It was between August, 1949, and June of 1950.

Q. Some time between August of 1949 and June of 1950?

A. Yes. I think it was in the winter of 1949 but I am not sure of that. I am not positive.

Q. You were living at Mt. Rose at that time with Mr. Jeffress? A. Yes.

Q. And of course you had then been married some two years? A. Yes.

Q. And did you communicate with your sister?

A. Yes.

Q. And in what manner did you communicate with your sister? [2675]

A. By telephone.

Q. You asked her to bring the note up?

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(Testimony of Mrs. Robert Jeffress.)

A. The next time——

Mr. Campbell: Objected to as leading and suggestive.

The Court: Objection sustained. The answer may go out.

Q. Well, what did you say to your sister on the telephone?

Mr. Campbell: Objected to as hearsay.

The Court: Objection sustained.

Mr. Gillen: Withdraw that.

Q. This telephone conversation you had with your sister was from where to where?

A. It was from the Christmas Tree on Mt. Rose to my home in San Francisco.

Q. That is the 11th Avenue flat which you occupied with Mr. Jeffress? A. Yes.

Q. Following that conversation did your sister arrive at Mt. Rose?

A. Yes, some time later.

Q. And when your sister arrived, did she have with her the piece of paper that had been entrusted to her by your husband? A. Yes.

Q. And that is the piece of paper that you identified this morning as looking similar to defendant's Exhibit A-1, the Remmer note to Robert Jeffress? [2676] A. Yes.

Q. When your sister arrived with that same piece of paper, did you unfold it and read it at that time? A. No.

Q. What did you do with the piece of paper?

A. I put it in the dresser drawer.

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(Testimony of Mrs. Robert Jeffress.)

Q. Did you call your husband's attention to the fact that this piece of paper had arrived?

A. No, not at that time.

Q. Did you at any later time call to your husband's attention the fact that the piece of paper had arrived? A. Yes.

Q. Did you ever turn that piece of paper over to your husband? A. Yes.

Q. Can you tell us approximately when that was, how much later?

A. It was either, as I said, in the winter of 1949 or the early part of 1950. I think it was the winter of '49.

Q. Now, can you fix it this way—approximately how long after your sister brought the paper to you and gave it to you that you turned it over to your husband? A. I would say a few weeks.

Q. Under what circumstances did you turn it over to your husband, voluntarily or by reason of request from him? A. He asked me——

Mr. Campbell: Objected to as immaterial. [2677]

The Court: The answer may stand.

Q. He asked you. Now do you know what he did with that piece of paper when you turned it over to him? A. He said he was taking——

Mr. Campbell: Just a minute.

Q. Do you know what he did with that piece of paper when you turned it over to him?

A. I presume he gave——

Mr. Campbell: Objected to—may she be instructed to answer of her own knowledge?

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(Testimony of Mrs. Robert Jeffress.)

Mr. Gillen: I don't think counsel should be so severe.

Mr. Campbell: I do not mean to be severe on the witness but I want her to understand the situation.

(Question read.)

The Court: If you know, say yes; if you don't know, say no.

A. Yes.

Q. Did you see what he did with that note?

A. Yes.

Q. Did he take it in his hand? A. Yes.

Q. Did you see what he did with it?

A. Yes.

Q. What did he do with it?

A. He put it in his coat pocket. [2678]

Q. Do you know what he did with it after that?

A. Took it into Reno.

Q. Do you know what he did with it in Reno?

A. No, I do not.

Q. Did you accompany him into Reno on that occasion? A. No.

Q. Do you know whether or not he had the piece of paper when he returned from Reno?

A. No.

Q. Did you ever see that piece of paper again?

A. No.

Q. You did see a piece of paper, however, that you saw this morning that you say looked like the same piece of paper, is that correct? A. Yes.

Q. And I refer now to defendant's A-1?

A. Yes; a photostatic copy.

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(Testimony of Mrs. Robert Jeffress.)

Q. The folded piece of paper I showed you you never saw the original again excepting this morning you saw this piece of paper which you say looked like the one that was in your possession?

A. Yes.

Q. Now, Mrs. Jeffress, I understand from your testimony that you never personally read this note in its original form, is that correct? [2679]

A. Yes.

Q. You were recently, however, shown a photostatic copy of the note, is that correct, of Elmer Remmer to Robert Jeffress in amount of 50 thousand dollars, dated September 27, 1946?

A. Yes.

Q. Now, Mr. Jeffress, in the year 1943 Mr. Jeffress was a widower at that time, residing with his daughter, is that correct, upstairs from the flat where you were residing with your sisters as a tenant? A. Yes.

Q. And you had developed, as I understand, a friendship with Mr. Jeffress and with his first wife and other members of his family over the years?

A. Yes.

Q. Were you acquainted with the fact that Mr. Jeffress had entered into a business enterprise in the year 1943? A. Yes.

Q. And do you recall what that business enterprise was? A. Yes.

Q. What was it?

A. Ambassador Bar in San Francisco.

Q. Were you acquainted with the fact whether

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(Testimony of Mrs. Robert Jeffress.)

or not he ever sold his interest in that Ambassador Bar in San Francisco after acquiring an interest in 1943? A. Yes. [2680]

Q. Do you remember when that was?

A. Either in 1945 or 1946, I don't remember which.

Q. Either in 1945 or 1946? A. Yes.

Q. If the record should show that the bar was sold in January of 1946, would you say that that would refresh your memory? A. Yes.

Q. Now, you stated that in 1948 your husband went to the Lake from San Francisco and made his home for some time with his son, James, is that correct? A. Yes.

Q. What were the circumstances of his going to the Lake, do you know?

Mr. Campbell: Objected to as calling for hearsay.

Mr. Gillen: I am calling for her knowledge as to why he went to the Lake.

The Court: She may answer the question.

A. He bought an interest into the Christmas Tree at Mt. Rose.

Q. Who bought the interest, Mr. Robert Jeffress or Mr. James Jeffress?

Mr. Campbell: Objected to as calling for conclusion.

The Court: She may answer if she knows.

A. James Jeffress.

Q. And did Mr. Robert Jeffress, your husband, go to work there at the Christmas Tree? [2681]

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(Testimony of Mrs. Robert Jeffress.)

A. Yes.

Q. For his son? A. Yes.

Q. And that occasioned his moving up and living with his son and remaining in Nevada?

A. Yes.

Q. Did you at times come up and visit here for extended visits? A. Yes.

Q. Did you finally move up here? A. Yes.

Q. And when was that?

A. That would be August of 1949.

Q. How long did you remain a resident here?

A. Until June of 1950.

Q. And then did you and Mr. Jeffress return to San Francisco? A. Yes.

Q. Was it 1950 or 1951 Mr. Jeffress passed away? A. 1950.

Q. So at the end of that year Mr. Jeffress passed away? A. Yes.

Q. Now, Mrs. Jeffress, were you at any time interviewed by any representatives or agents of the Internal Revenue Department? A. Yes.

Q. Who was the first person who interviewed you and about what time was it, if you can fix it? [2682]

Mr. Campbell: Objected to as incompetent and immaterial, if the Court please.

The Court: Objection sustained.

Q. Let me ask you this—were you at any time interviewed by any representative or agent of the Internal Revenue Department concerning the in-

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(Testimony of Mrs. Robert Jeffress.)

come tax case of Elmer Remmer, the defendant in this case?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Gillen: I would like to be heard on that, if the Court please.

The Court: We will excuse the jury until Monday morning.

Mr. Gillen: I do not like to do that. I think I can say as to my reason without in any wise prejudicing the jury. There has been some evidence here, may it please the Court, offered by the prosecution as to the rather exhaustiveness of the investigation that had been conducted in the matter of the Remmer tax problem. These questions are for the purpose of refuting, in some degree, that very contention and specifically I want to establish—and I can do so by a written statement that is in the hands of the government—dispute the contention of the exhaustiveness of their investigation, that this lady was never asked when the 50 thousand dollar obligation was paid. She was never asked that question, which is a vital [2683] point in connection with the prosecution of this case and the establishing of the net worth.

Mr. Campbell: I submit, without conceding the statement made by counsel, what the witnesses were asked or were not asked, if we are going into those collateral matters we could be here until doomsday.

Mr. Gillen: We have only been going a couple of days.

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(Testimony of Mrs. Robert Jeffress.)

The Court: Objection sustained.

Mr. Gillen: I will ask counsel for the prosecution, through your Honor, to produce the written statement that was taken from Mrs. Jeffress concerning this matter, so I may examine it and possibly offer it in evidence.

Mr. Campbell: I object to that. The witness is here on the stand. Has been produced to answer questions.

Mr. Gillen: I am trying to ask her the questions, counsel is objecting and I ask for the production of the written statement that was signed, the statement given about this matter by Mrs. Jeffress, so I may examine it and offer it to your Honor as a possible bit of evidence.

The Court: I think if there is any signed statement, it should be given to counsel.

Mr. Campbell: I have no objection if that is the Court's position.

The Court: Yes, if it relates to this present case.

Mr. Gillen: Oh, yes; it is concerned with this matter. [2684]

Mr. Campbell: This document, consisting of six handwritten pages, may be marked for identification.

The Clerk: 187 for identification.

Mr. Campbell: May I preliminarily identify it through the witness?

Mr. Gillen: I wish I could examine it. I asked that it be produced, your Honor, and I think it would be proper that I be permitted to examine it.

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(Testimony of Mrs. Robert Jeffress.)

The Court: Very well.

Q. Now, Mrs. Jeffress, I am going to show you a sheath of yellow pages produced here by the prosecution under the Court's order, consisting of six pages, and on the last two pages there appears a purported signature, "Edna Jeffres," the entire six pages being written in handwriting. I ask you to look at those last two pages and tell me whether or not you recognize either or both of those signatures, "Edna Jeffress"? A. Yes.

Q. Do you recognize both of those signatures?

A. Yes.

Q. Whose signatures are they? A. Mine.

Q. Now, the rest of the handwriting on these six sheets, will you glance over them. Can you tell us, if you know, who wrote those six pages other than the two signatures in your own [2685] handwriting?

A. No, I don't recognize it.

Q. Did you see those six pages written in your presence? Did you see anybody write those pages?

A. No.

Q. I do not think you understand my question. When you were interviewed and gave the information which you signed in these six pages, two different signatures, who interviewed you?

A. The one with my signature was done in Mr. Campbell's office. I called at Mr. Campbell's office.

Q. Do you see the man here who interviewed you? A. Yes, that gentleman.

Mr. Campbell: Mr. Shelton.

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(Testimony of Mrs. Robert Jeffress.)

Q. When Mr. Shelton interviewed you did he write down what you said to him? A. Yes.

Q. Did he write it down on yellow sheets of paper? A. Yes.

Q. Would you just read through those yellow sheets, fully or sketchilly, as you desire, and see if you recognize what is written down there as being generally what Mr. Shelton interviewed you about? Possibly Mr. Campbell would stipulate Mr. Shelton conducted the interview and that is his handwriting on those pieces of paper?

Mr. Campbell: Oh, yes. [2686]

Mr. Gillen: Then we do not have to bother.

Q. Now, the date of the first sheet there is what?

A. November 21, 1951.

Q. Do you recall that as the date that you were interviewed by Mr. Shelton? A. Yes.

Q. Did you know at that time that you were talking to Mr. Shelton?

A. I thought I was talking to Mr. Shelton—no, I thought I was talking to Mr. Campbell.

Q. Why do you think that?

A. Because I was called to Mr. Campbell's office.

Q. You thought Mr. Shelton was Mr. Campbell. All right.

Mr. Gillen: I will offer this, may it please the Court, as defendant's exhibit next in evidence.

Mr. Campbell: We have no objection.

The Court: It may be admitted in evidence. 187 will be admitted as K-1.

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(Testimony of Mrs. Robert Jeffress.)

Mr. Gillen: With the Court's permission, I will read this exhibit to the jury. I am going to read, may it please the Court, the original with the assistance of a typewritten copy. The reason I am reading the original is that there are certain corrections which have been made as the matter progressed. Partly in pencil and partly in ink, the statement reads as follows: (Reads "* * * Helen Elliott * * *".) May I interrupt [2687] and ask at this point to whom did you refer when you stated to Mr. Shelton in this statement that you told Mr. Golden that Mr. Jeffress gave the note to an attorney in Reno?

A. I beg your pardon?

Q. To whom did you refer when you mentioned the name Mr. Golden? Did you refer to Mr. Golden, the lawyer here? A. Yes, I did.

Q. You had had a telephone conversation with Mr. Golden prior to that time?

Mr. Campbell: Objected to as leading and suggestive.

Mr. Gillen: I will withdraw that.

Q. When did you tell Mr. Golden that Mr. Jeffress had given the note to an attorney in Reno?

Mr. Campbell: Objected to as immaterial.

The Court: Objection sustained.

Mr. Gillen: (Continues reading exhibit).

Q. Now, Mrs. Jeffress, on the occasion that you say that you place as early in 1947 that your husband told you that he was going to the bank to get

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(Testimony of Mrs. Robert Jeffress.)

some money to lend Mr. Remmer, are you positive that that was the date?

Mr. Campbell: Objected to as an attempt to impeach his own witness, if the Court please.

The Court: Objection sustained.

Mr. Gillen: All right, we will reach it in another way. I think that is all. [2688]

Mr. Campbell: No cross-examination.

(Witness excused.)

(Jury and alternate jurors admonished and recess taken at 3:45 p.m.) [2689]

Monday, February 11, 1952—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Thompson: At this time, your Honor, I would like to report that Mr. Campbell is ill this morning and will be unable to attend the trial. He expects to be here tomorrow.

Mr. Avakian: Your Honor, by previous arrangement the defense agreed to arrange for photostats of three ledger cards which were presented here in connection with the testimony of Mr. William Remmer and the arrangement, I believe, that photostats could be submitted as the exhibit and the original returned to Mr. Remmer. That is Exhibit 186.

Mr. Golden: We are withdrawing the originals of 186.

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The Court: Very well.

Mr. Avakian: In addition, your Honor, when the witness from the First National Bank of Nevada, Mr. Waldo, was on the stand, it was arranged that he would submit a photostatic copy of the signature card in the account of the Cal-Neva Corporation in the name of Cal-Neva Lodge, and we have that here and in view of the fact Mr. Campbell requested that he produce photostatic copies of two deposit slips, showing deposits in the Cal-Neva account, one in the amount of $47,300 on October 26, 1946, and the other in the amount of $78,634.29 on December 7, 1946, we have both of those deposit slips in photostat form [2690] also and are producing them at the request of the prosecution at this time.

Mr. Thompson: Thank you, Mr. Avakian. We offer them in evidence as part of exhibit of Cal-Neva Lodge account.

Mr. Golden: I think the signature card is already in as 185 and the ledger sheet is part of defendant's Exhibit I-1.

The Court: Exhibit 185 has been admitted and it includes that signature card.

Mr. Golden: It is the signature card at the date the bank account was opened and my recollection is it was submitted the other day and we are now offering the photostatic copy. Then the balance of the documents, I believe, are defendant's Exhibit I-1.

Mr. Thompson: I suggest the two deposit slips, one bearing date October 26, 1946, in amount of

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$47,300 for the Cal-Neva Lodge account, and the other dated December 7, 1946, showing deposit of $78,634.29 in the Cal-Neva Lodge Account be made a part of Exhibit I-1.

The Court: Is that satisfactory?

Mr. Golden: That is agreeable.

Mr. Avakian: In connection with the deposit slips showing deposit on December 7, 1946, the deposit slip shows a payment of that deposit and check in the amount of $74,678.29 and prosecution's Exhibit 173, which is already in evidence, which consists of exchange of correspondence between Mr. Weaver and [2691] Mr. Semenza in 1949, regarding that deposit, states that that particular check represented a transfer of funds from another bank account of Cal-Neva, Inc., in the same bank, carried in the name of Cal-Neva, Inc., to the bank account of Cal-Neva Lodge, and we have obtained from the bank a photostatic copy of the ledger card of the Cal-Neva bank account which was carried in the name of Cal-Neva, Inc., showing that on that same date there is a withdrawal of that account of the entire balance of that account, namely, $74,678.29, and in order that the full picture may be complete, we would like to offer that in evidence.

Mr. Thompson: We have no objection, your Honor. In that connection, I would like to suggest that a letter from Mr. Waldo, explaining certain alterations in the transfer of the ledger account be made a part of the exhibit.

Mr. Avakian: Yes, I would suggest that, too.

The Court: The ledger account with the letter

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attached is admitted as Defendant's Exhibit L-1.

Mr. Avakian: I would like to call the jury's attention to one item of the letter part, if I may.

The Court: Yes, sir.

Mr. Avakian: Defendant's Exhibit L-1, which is the ledger account of the bank, First National Bank of Nevada, in the name of Cal-Neva, Inc., shows that balance in that account on December 7, 1946, was $74,678.29 and it shows a [2692] withdrawal of that same amount on that same day, leaving a balance of zero, and the letter attached to that exhibit on the letterhead of the First National Bank, dated February 9, 1952, addressed to me, states as follows: (Reads from exhibit), and I think the deposit slip which was presented this morning from that Cal-Neva account shows that this 74 thousand dollar item was deposited in that other Cal-Neva account.

Mr. Thompson: So stipulated.

Mr. Gillen: May it please the Court, on Friday last there was present in court as the next witness to be called by the defense, Mr. James Jeffress. Mr. James Jeffress is the son of the late Robert L. Jeffress and he is the young man who is referred to by Mrs. R. R. Jeffress, the widow, and he is the young man also who operates the Christmas Tree. Now, the first occasion he was able to get in here was Friday, due to snow conditions up there. We didn't reach him on Friday afternoon and this morning about 7:30 we received a telephone call from him at Reno, advising us he was hopelessly snowed in and he would be unable to get through

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to come to court this morning. May I suggest this to your Honor, Mr. James Jeffress is being called to give testimony which raises the identical issue which was presented to your Honor in the matter of the testimony of Mrs. Jeffress, with relation to conversation with her late husband, in the matter of testimony of Mr. Woodburn, Sr., and in the matter of testimony of Mr. Graham, and it struck me, that [2693] as a practical matter and in the interest of saving time, we would assume that your Honor would pass upon the testimony of this young man the same as to those other witnesses with relation to conversations with a person now deceased, an alleged declaration against interest, so I will ask your Honor's suggestion—my suggestion would be, if your Honor feels that you would pass on this identical point and sustain an objection to that testimony, that we could make an offer of proof for our record and could make that any time during the day, in which event we would not ask Mr. Jeffress to return, because he may be snowed in for some time, from the appearance here.

The Court: I can see no objection to that procedure. Have you any objection to that, Mr. Thompson?

Mr. Thompson: We have no objection to that procedure, your Honor.

The Court: We will take that up later. You remind me of it.

Mr. Gillen: Yes, your Honor. Then the defense, your Honor, will call as its next witness Mr. John R. Golden.

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JOHN R. GOLDEN

being duly sworn, testified as follows:

Direct Examination

By Mr. Gillen:

Q. Will you state your name?

A. John R. Golden.

Q. Will you state your residence?

A. 99 Fernwood Drive, San Francisco. [2694]

Q. Will you state what is your business or profession? A. I am a lawyer.

Q. How long have you been practicing your profession?

A. Over twenty years, not counting time in the service; that, including the time I was in the army.

Q. How long were you in the army?

A. Under three years.

Q. By the way, as preliminary to some testimony which will arise later on, you at this time and since your service in the army, have you held a reserve commission in the army?

A. That is right.

Q. What is that commission?

A. Lieutenant Colonel.

Q. Will you state to what Bars or what departments are you admitted to practice?

A. Well, I am admitted to practice before the United States Court of Appeals for the 9th Circuit, United States District Court in California, all the courts in California, the United States Immigration Service, United States Court of Claims, possibly some others of minor importance.

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(Testimony of John R. Golden.)

Q. Where do you conduct your practice?

A. Usually in San Francisco.

Q. Where are your offices?

A. In the Crocker Building, 33 Post Street.

Q. With whom are you associated? [2695]

A. With yourself, that is Mr. Leslie Gillen, and we have a couple of young men in the office, Mr. Halley and Mr. Supera.

Q. Are you acquainted with the defendant in this case, Elmer F. Remmer? A. Yes, sir.

Q. And did you and your associate afford professional services to Mr. Remmer at an earlier time in connection with matters other than the present case? A. Yes, sir.

Q. In what particular matters?

Mr. Thompson: If the Court please, we object on the ground it is irrelevant and immaterial, unless it is offered to show an unpaid account but otherwise I do not know what the materiality of the proof would be.

The Court: Objection sustained.

Mr. Gillen: The reason I asked the question with regard to other matters, it is preliminary and explanatory of some matters that have been before the court by testimony of other witnesses in regard to the determination of certain business activities and the reason for——

The Court (Interceding): Very well. The ruling will be vacated and you may answer the question.

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(Testimony of John R. Golden.)

A. Well, as I recall the question, you asked me concerning matters previous to this case?

Q. That is right, previous to the income tax matter. [2696]

A. The particular matter was in connection with the Menlo Club in San Francisco, the same club which is talked about here.

Q. And that was in connection with a new interpretation placed on the law with regard to legal card games in San Francisco, is that right?

Mr. Thompson: Objected to as leading and also irrelevant.

Mr. Gillen: If I may explain to your Honor, I have this in mind. This establishes the reason for closing of an enterprise and the result of closing of that enterprise, the loss of some money not only to this defendant, but also to other partners in that enterprise.

Mr. Thompson: The only material fact is whether the enterprise closed or remained open and also the date of closing. So far as I am informed from the evidence so far, the Menlo Club was still operating on December 31, 1946, and anything that occurred thereafter is immaterial.

Mr. Gillen: There was some testimony developed and comment made about the fact that certain partners never got any money. We want to show that the enterprise, by reason of the interpretation of the law, was closed, to the loss of persons still invested in that enterprise.

The Court: We may be interested in whether or

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(Testimony of John R. Golden.)

not the enterprise closed, but I can not see that we are interested in the reason why it closed. [2697]

Mr. Gillen: Very well. It would only be explanatory and not invite speculation by the jury.

The Court: I don't see why we are interested in that or why it might invite derogatory speculation against the defendant. The jury will understand that the Court rules that it was not material.

Mr. Gillen: All right.

Q. Mr. Golden, can you tell us when the Menlo Club closed?

A. In April or early May, 1948.

Q. Can you tell us whether or not the 186 Club closed at or about the same time under the same circumstances? A. That is correct.

Q. Now, Mr. Golden, what was the first occasion upon which you and your associate were called upon to offer any professional services in connection with the income tax problem of Mr. Remmer?

Mr. Thompson: Objected to as immaterial.

The Court: Unless it is preliminary.

Mr. Gillen: It is preliminary.

The Court: We will hear the answer.

A. In February, 1950, when Mr. Remmer received a letter from——

Mr. Thompson: We object—the question has been answered.

The Court: Yes, it is answered.

Q. Can you tell us what gave rise to you and your associate coming into the case? [2698]

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(Testimony of John R. Golden.)

Mr. Thompson: Objected to as immaterial. Calls for speculation.

The Court: Objection sustained.

Q. When you went into the matter, what was the first matter in connection with the case that demanded your attention?

Mr. Thompson: Objected to as irrelevant, has nothing to do with the issues in this case.

The Court: Objection sustained.

Mr. Gillen: Of course, I think, your Honor, that the first contact with the Internal Revenue man, Mr. Campbell, and so on, is material in view of the testimony that has been offered here and admitted by the Court, to the effect that there was a lack of cooperation insofar as the defendant himself was concerned and insofar as the attorneys who had represented Mr. Remmer were concerned. There was testimony to the effect that there was great cooperation in the matter of turning over to the government, the Internal Revenue agents, the books and records of the various enterprises for their examination and investigation, but we have other testimony that subsequently there was a refusal to permit the defendant to be interviewed by the Internal Revenue men, there was a lack of cooperation by certain lawyers in the case, and we feel that we have a right to refute that by showing what was done with Mr. Golden and his associate, in the person of myself, and, at a subsequent time, Mr. Avakian, who was called in as an expert tax lawyer by [2699] us, what was done in connection

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(Testimony of John R. Golden.)

with the case and the matter of cooperation at that time.

Mr. Thompson: Well, the issue, your Honor, is not one of cooperation. The matter of Mr. Remmer's refusal to answer questions for the Revenue agents was material offered to show that the agents had tried to interview him in the course of their investigation and had conducted as thorough an investigation as possible and the fact of his refusal to make himself available as a material thing, what Mr. Golden may have thought or done about it, does not have any bearing upon the issues in this case.

Mr. Gillen: Counsel is not clairvoyant and can't very well determine in advance that it had no bearing on the issues. We not only have sworn oral testimony, but also extensive correspondence.

The Court: What is the question?

(Last question read.)

The Court: Objection sustained.

Q. Let me ask you, Mr. Golden, did you request a conference with Mr. Campbell and the Internal Revenue men in connection with the Elmer Remmer tax problem? A. Yes.

Mr. Thompson: May the answer go out, your Honor, to give me an opportunity to object?

The Court: Yes. [2700]

Mr. Thompson: I make the same objection.

The Court: Objection sustained.

Q. Did you have a conference with Mr. Campbell?

Mr. Thompson: I make the same objection.

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(Testimony of John R. Golden.)

The Court: Same ruling.

Q. Did you become acquainted with whether or not there was more than one problem that was faced by Mr. Remmer in connection with those tax problems?

Mr. Thompson: Same objection, also calls for his conclusion.

The Court: Objection sustained.

Mr. Gillen: Well, I will ask counsel, through the Court, if he will not stipulate——

Mr. Thompson: I object to requesting counsel to stipulate. If Mr. Gillen wants to make an offer of proof——

The Court: Yes, if there is to be any objection, we might excuse the jury and find out what the stipulation is or counsel might communicate privately.

Mr. Gillen: I will withdraw the request for stipulation at this time.

Q. Was it brought to your attention in any manner that a criminal prosecution was being considered in connection with the Remmer tax problems?

Mr. Thompson: I make the same objection.

The Court: Objection sustained. [2701]

Mr. Gillen: What is the ground of the same objection? I just hear same objection, same objection.

Mr. Thompson: It is irrelevant and immaterial, has nothing to do with the issues in this case, which relate to whether or not Mr. Remmer wrongfully attempted to evade his income tax for the years 1944, 1945, and 1946.

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(Testimony of John R. Golden.)

Mr. Gillen: Let us find out——

The Court: Yes, that is the basis of the Court's ruling.

Mr. Gillen: Let us find out, as a preliminary matter, may it please the Court, because if we do not lay the preliminary grounds that enables the jury to pick up the thread of this testimony here, the testimony on other material matters wouldn't sound like anything.

The Court: I can not see where this question is material. The ruling will stand.

Mr. Gillen: Now, so I may be guided and not call for continuous objections, the contention is, and your Honor has ruled, that it is immaterial whether Mr. Remmer and his attorneys——

The Court: I will rule on questions and I will rule on subsequent questions as they arise. I do not want to indicate a line of ruling in advance.

Q. Mr. Golden, were you ever requested at any time by Mr. Campbell to prepare a financial and net worth statement of the defendant, Elmer Remmer, to the government, in order that the government might determine whether or not there was [2702] any basis for the contention of fraud in connection with the Remmer tax problems?

Mr. Thompson: I make the objection it is incompetent, irrelevant and immaterial and nothing to do with the issues in this case, and also the question is leading, contains a subject matter which would be included in the witness' answer, if he was permitted to answer.

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(Testimony of John R. Golden.)

Mr. Gillen: It is very material, your Honor. There is contention here there has been no cooperation in matters of assisting, outside of originally giving the books, which they concede was done cooperatively, and also that Mr. Maundrell and Mr. Kyne, who looked after the books had cooperated with them to the extent of attending conferences and explaining matters in question in the books. However, beyond that there is a contention, and it was testified to by Mr. Weaver particularly, that there was a lack of cooperation to assist the government in arriving at any conclusion concerning a net worth of the defendant in this case and to assist the government in arriving at any conclusion regarding whether or not there was fraud or the absence of fraud. Now, we want to get that basis, your Honor, and establish in the record, then we can go on with the testimony, and I think it is only fair——

The Court: I do not recall any such testimony.

Mr. Gillen: You do not recall Mr. Weaver testifying that he requested an interview with Mr. Remmer in Mr. Thatcher's [2703] office?

The Court: Oh, yes; I recall that.

Mr. Gillen: That Mr. Remmer was present and that that was denied by Mr. Thatcher?

The Court: I recall that, yes.

Mr. Gillen: Now, we have an exhibit on the record here, Mr. Thatcher——

The Court (Interceding): But that has no relation to this question. Objection will be sustained.

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(Testimony of John R. Golden.)

Mr. Gillen: Now, Mr. Weaver also testified, and we can find it in the transcript——

The Court (Interceding): I have ruled.

Mr. Gillen: This is another matter.

The Court: I have ruled.

Mr. Gillen: Your Honor will recall I was absent two days when Mr. Weaver testified and Mr. Avakian just called my attention——

The Court (Interceding): There is nothing before the Court. I do not like these discussions in the presence of the jury. If you want to argue, I will send the jury out. There is nothing to argue about because there is nothing before the Court.

Mr. Gillen: I do not want to be placed in the position of always sending the jury out.

The Court: I do not want to, either, but I do not want [2704] any arguing in the presence of the jury.

Q. Did you, Mr. Golden, ever offer to undertake the preparation and furnishing to Mr. Campbell of a net worth statement of the defendant, Elmer Remmer?

Mr. Thompson: Same objection.

The Court: Objection sustained.

Q. Mr. Golden, are you acquainted with a man in San Francisco by the name of Jay Friedman?

A. Nathan Jay Friedman.

Q. What is that man's business or occupation?

A. He is a certified public accountant.

Q. Was he formerly employed by the United States government? A. Yes.

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(Testimony of John R. Golden.)

Q. And did you at any time negotiate with Mr. Nathan Jay Friedman and have him make any survey of the Remmer records in the hands of the United States government for any reason?

A. Yes.

Mr. Thompson: Objected to as immaterial.

The Court: Objection sustained.

Q. Did you at any time, Mr. Golden, undertake to obtain a release of a portion of the financial assets of the defendant Remmer, release from a lien which had been placed on them by the government, and offer to post a surety bond to protect the government so that funds would be available to employ accountants to prepare a net worth statement to supply the government? [2705] A. Yes——

Mr. Thompson: May the answer go out so I may have an opportunity to object?

The Court: Now, you are a lawyer, Mr. Golden, you shouldn't hurry those answers. It is all right for a layman perhaps. The answer will be stricken and objection sustained.

Mr. Thompson: Entirely irrelevant, your Honor.

The Court: The answer is stricken and objection is sustained.

Q. In connection with the Remmer tax problems between February of 1950 up until the time that the indictment was filed, as I recall, April 9, 1951, how many government men or persons in official positions did you confer or correspond with?

Mr. Thompson: Objected on the ground it is immaterial and irrelevant and has nothing to do with the case.

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(Testimony of John R. Golden.)

The Court: Objection sustained.

Mr. Gillen: Now——

The Court (Interceding): There is nothing before the Court.

Mr. Gillen: You ask the people——

The Court: The Court has ruled.

Mr. Gillen: You don't want to hear from me?

The Court: I will, yes; we will send the jury out.

Mr. Gillen: Well, I am in the position, as much as I [2706] do not want to discommode the jury——

The Court: Well, I do not want to either. If you do not want to proceed——

Mr. Gillen: Well, I can't proceed.

The Court: What are you talking about now?

Mr. Gillen: I want to explain my position.

The Court: The Court takes full responsibility for sending the jury out.

Mr. Gillen: If I am not able to explain my position, I will have to do it outside of the hearing of the jury.

The Court: All right. Jury and alternate jurors admonished and excused at 10:40 a.m.

(In the absence of the jury.)

OFFER OF PROOF REGARDING JAMES JEFFRESS AND JOHN R. GOLDEN

(Feb. 11, 1952—Notebook 342, PP 53-79.)

The Court: I think it might be a good time to make any offer of proof. Perhaps this present situation can be taken care of by offer of proof. There

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is nothing before the Court. No reason why I should listen to you.

Mr. Gillen: Well, it is my understanding——

The Court (Interceding): I have ruled and there is no question before the Court but if you have an offer of proof I will be glad to hear it, but I am not going to sit and listen to argument on any questions I have ruled on. I am always glad to hear, if there is a question which in my mind is a difficult one, hear debate and I am willing to set aside a ruling, but I am not going to sit and listen to an argument on matters which do not appear to me to be in question. You may take an exception.

Mr. Gillen: What is your Honor's pleasure as to which matter you would entertain—as to the offer of proof of James Jeffress or offer of proof——

The Court: Any order you take would be satisfactory to me.

Mr. Gillen: I think, may it please the Court, that we might as well, so shortly after the testimony of Mrs. Jeffress, give this offer of proof of James Jeffress.

The Court: Very well.

Mr. Gillen: May it please the Court, the defense offers to prove by the testimony of James Jeffress, whom, as I stated to your Honor, was here on Friday and whom I explained heretofore to your Honor advised us this morning that he is now snowed in and unable to reach court today, the defense offers to prove by his testimony that in 1940, his mother, the first wife of Robert L. Jeffress, his father, Robert L. Jeffress, being the person referred to in

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connection with the $50,000 loan to Mr. Remmer in 1946, to augment the account of the Cal-Neva Lodge; that his mother died and pursuant to her Lodge; that his mother died and pursuant to her expressed request, whatever of the community property accumulated by her husband, Robert L. Jeffress, and herself she desired to have distributed equally between her son, James Jeffress, the witness who was unable to reach here today, and her daughter. If I recall, that young woman's name was mentioned by Mrs. Jeffress as Carolyn Jeffress. That Mr. James Jeffress signed over to his father an authority to use his share of the assets, which as I am informed and the testimony would be, was not in actual cash, but was interest in real property and also in stocks. The testimony of Mr. James Jeffress would show that he entered the United States Army in 1941, and that he was stationed at Camp Roberts, which is located near Paso Robles, about 200 miles south of San Francisco.

The testimony will show that in February, 1943, he had a discussion with his father, because of the fact that he was in the army and expected that he might be transferred to some other point, regarding their finances, particularly his interest in his mother's share of the community estate and that at that time in 1944, July of 1944, prior to his being transferred to another point, namely a camp in Missouri, that his father told him that in February of 1943, that is after Robert L. Jeffress had purchased a half interest in the Ambassador Bar in San Francisco, that he had borrowed the sum of ten thousand

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dollars from Elmer Remmer and that he then, in July, 1944, still owed Elmer Remmer the ten thousand dollars. Mr. Jeffress would testify that he transferred from Paso Robles to a camp in Missouri in December of 1944, and that he subsequently thereto was sent overseas to the European theatre of war and that he returned from overseas and was discharged from the army in October of 1945. Mr. James Jeffress would testify that it came to his attention that in the summer of 1947, and for some time thereafter, that Mr. Robert L. Jeffress had lost heavily at gambling. Mr. James Jeffress would testify that it came to his attention that in September of 1946, that there was the sum of $50,000 loaned by his father, Robert L. Jeffress, to Elmer Remmer, for the purpose of augmenting the Cal-Neva bank account and that that matter came to his attention because at that time Mr. James Jeffress was working at Cal-Neva Lodge and that funds became short in the bank account and Mr. Jeffress loaned Elmer Remmer $50,000, which was deposited in the bank account, and your Honor recalls there was testimony and exhibits in the way of telegraphic transfer from the Bank of America.

The Court: What year was that in, Mr. Gillen?

Mr. Gillen: In September of 1946. If I recall, the loan was made, the money was withdrawn by Mr. Jeffress on September 27, 1946, and the actual credit under the telegraphic transfer was made at the First National Bank of Nevada on the 28th of September of 1946.

Mr. James Jeffress would testify that the follow-

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ing year, when he learned that his father was gambling heavily and losing, that it also came to his attention that some of his father's gambling obligations had been underwritten and paid off by Elmer Remmer. Mr. James Jeffress would also testify that in July of 1948, Mr. James Jeffress, having for some time been employed or had a gaming concession at the Lodge known as the Christmas Tree, that he negotiated to purchase the Christmas Tree with another partner and that he was in need of some cash to meet the down payment and that he went to his father and he asked his father if his father could supply him with any cash, in the way of either returning some of his mother's funds to him or making a loan to him, and at that time his father told him—this is declaration against interest, which we assume your Honor would rule on, because it is a debatable problem—that his father told him he was unable to give him any cash, that he had lost heavily the previous year in gambling and that he was practically broke. We offer to prove that Mr. James Jeffress would testify that he then asked his father specifically: "You loaned $50,000 to Bones Remmer. Does he still owe you any of that?" and that Mr. Robert L. Jeffress stated to him: "Bones took up my gambling debts and paid me off last year," which would mean the year 1947.

Mr. James Jeffress would also testify that by other means and in another manner he was able to raise the necessary money and that he did, in fact, purchase an interest in the Christmas Tree in July of 1948, and that he took over the operating interest

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in the Christmas Tree on August 1, 1948, and has been the owner of the Christmas Tree since that time up to the present time.

Mr. James Jeffress would also testify that in the year 1948, his father, being financially impoverished, that he employed his father in connection with the gaming activities of the Christmas Tree and that his father made his home there with Mr. James Jeffress and his family in 1948, and that Mrs. Edna Jeffress, who testified last Friday, came up and stayed from time to time with him.

Now, may it please the Court, I have in mind the number of things that I have referred to that Mr. James Jeffress would testify to would obviously not be objectionable in themselves, but those matters were referred to—they are only preliminary to corroborate matters—they had to be referred to in order for your Honor to follow the important matters which would be the existence of the conversations with his now deceased father, in which his now deceased father made declarations against his own interest.

The Court: That is the substance of the offer of this declaration at this point?

Mr. Gillen: Yes, your Honor. In each instance where there was a conversation included in the declaration against interest, that is the reason I suggested the offer of proof.

Mr. Thompson: If the Court please, we object to the offer upon the ground it calls for hearsay evidence and that the proof offered is not the primary

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evidence of the transactions which are sought to be proven.

The Court: The offer will be rejected. Objection to the offer is sustained.

Mr. Gillen: Very well. Now in regard to the testimony of Mr. Golden, your Honor, this is rather by way of explanation, your Honor, than an offer of proof. We have some testimony that came primarily from Mr. Weaver. Other agents had testified previously that in the preliminary work, investigating the tax problems of Elmer and Helen Remmer, that they had received fullest cooperation, in that Mr. Maundrell and Mr. Kyne and others turned over the books and records to them, and they also made statements and conferred with them on occasions, that they were required to. We have testimony, however, particularly from Mr. Weaver, to the effect that he was endeavoring to obtain a statement or have a conference with Mr. Remmer, the defendant, and that an arrangement was made to meet at Mr. Thatcher's office, Mr. John P. Thatcher being the one who attended to that arrangement, and that he appeared in Mr. Thatcher's office with certain other members of his staff, Mr. Morgan and Mr. Harkness and the young lady stenographer, and he contended at that time not only did Mr. Thatcher refuse to permit Mr. Remmer to confer or make a statement to him, but also Mr. Remmer specifically himself—Mr. Weaver contending Mr. Remmer was present in Mr. Thatcher's office—refused to make a statement. Mr. Weaver

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didn't testify to the prepared statement that was handed to him by Mr. Thatcher.

Now we are prepared at this time to refute that particular testimony of Mr. Weaver's. We believe that we have refuted, by the testimony of Mr. Thatcher, the statement of Mr. Weaver and the contention that Mr. Remmer was actually present and in their presence at the time this refusal was made. We believe that that has been refuted by Mr. Thatcher, who said that in his opinion Mr. Remmer was not present in the office and never was in the presence of Mr. Weaver and the other agents.

The Court: Have you in mind the date of the conversation that was had with Mr. Thatcher?

Mr. Gillen: It was in April of 1948.

Then, if your Honor will recall, in Mr. Thatcher's testimony he stated that prior to the planned or agreed meeting of April 8, 1948, that he had an interview with Mr. Remmer and with Mr. Maundrell concerning the Remmer enterprises and that in anticipation that some situation might arise wherein the matter of fraud or criminal prosecution should be mentioned, as contemplated, that he had prepared in advance a statement which was offered here as Defendant's G-1, a typewritten statement, in which he, as attorney at that time for Mr. Remmer, or one of the attorneys at that time for Mr. Remmer, had expressed his position, and your Honor will recall, without taking the time to read the entire statement—I can hand it up to your Honor—Mr. Thatcher's written statement said that Mr. Remmer would explain any specific matters that

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the Bureau might state, if they would inform Mr. Thatcher what particular problems confronted them or they wanted clarified, because his personal investigation of the matter had not disclosed any fraud, and if they would inform Mr. Thatcher of any specific instances any items or accounts or circumstances they wanted clarified that they thought were tainted with the appearance of fraud, that he would have Mr. Remmer do that.

Now Mr. Golden will testify that the first that we were called into the matter and began to actively participate in the matter was when Mr. Remmer received, under date of February 14, 1950, from Mr. Campbell a letter, advising him that the office of Mr. Campbell had under consideration a recommendation involving the institution of criminal proceedings against Mr. Remmer for violation of the Internal Revenue laws, with respect to his income tax, and the letter also went on to say that "a conference will be granted at your request at a date agreeable to you," conference at Mr. Campbell's office.

Now Mr. Golden will testify that a conference was requested, and in fact more than one conference was had, and immediately Mr. Campbell advised Mr. Golden and specifically advised other counsel, including myself, that what he desired was a net worth statement from the taxpayer, Mr. Remmer. Mr. Golden would testify that he advised a net worth statement would be prepared and would be submitted to Mr. Campbell, but Mr. Golden pointed out that the plight of the defendant, Remmer, at

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the time was that all of his assets, including cash, had been levied upon under a so-called jeopardy assessment, that the amount of assessment was something in excess of 800 thousand dollars, and, of course, the property assessed was considerably short of 800 thousand dollars, but it did encompass and embrace all of the assets of the defendant, and Mr. Golden pointed out that in order to prepare a net worth statement, as good a net worth statement as could be prepared under the circumstances, it would be necessary to employ the services of certified public accountants, and in order to employ certified public accountants, it would be necessary to have funds to pay them, and Mr. Golden suggested that if there was some way of releasing part of the assets that were under assessment by the government under the jeopardy assessment, that Mr. Remmer would arrange to furnish a surety bond in the full amount of money that the government would release. There was an item, if I recall correctly, there was one asset in the form of $35,000 money that had come as part of the escrow money from the sale of Cal-Neva into the First National Bank of Nevada, and it was suggested by Mr. Golden that if $25,000 of that, or the entire $35,000 of it, could be released, that Mr. Remmer would furnish a surety bond from a regular surety company to insure the United States government against any loss for the amount that was released.

The testimony of Mr. Golden would show that Mr. Campbell told Mr. Golden that there were ways of getting funds released for just such purposes and

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referred him to a gentleman by the name of Nickell, who was Deputy Collector of Internal Revenue at San Francisco, and the testimony would show that Mr. Golden did communicate with Mr. Nickell immediately and Mr. Nickell verified the fact that there was a procedure for release of funds from jeopardy assessment for the purpose of enabling a taxpayer to prepare defense or to supply information to the government in connection with his tax problems and that the usual procedure was to have a surety bond, either in the amount to be released, or, depending on the discretion and judgment of the Collector of the particular district, twice the amount. In other words, if we wanted to withdraw 25 thousand dollars, depending upon the judgment and administrative discretion of the Collector of the district, he could order a 25 thousand dollar surety bond will suffice or he could say, "I want $50,000, twice the amount of money that I release."

Now Mr. Golden would testify that in contemplation of preparing such a net worth statement for Mr. Campbell, that it was discussed that the preparation of a net worth statement and the clarification of the affairs of Mr. Remmer for the government might very well solve the whole matter and obviate any necessity to go any further, excepting to make an adjustment under the civil claim of any unpaid tax that might be shown to be due. That in contemplation of that Mr. Golden engaged—because all the records were then in San Francisco in the hands of the government at 100 McAllister Street, I presume in the room Mr. Weaver mentioned—that Mr.

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Golden had a Mr. Nathan Jay Friedman, a former Internal Revenue accountant, certified public accountant, who was at that time, and still is, in private practice as a certified public accountant in San Francisco, had him go and look at these records and make certain computations, determining what length of time and the amount of money it would take to properly investigate all of these records, with a view of preparing a net worth statement and furnishing it to Mr. Campbell.

Now, your Honor, it will be shown also by the testimony of Mr. Golden—it is my recollection your Honor stated that we would be permitted to that records other than the records produced here were in the hands of the government, and that we were permitted to see those records, that is, records in excess of what have been used here in this net worth matter. That Mr. Golden's testimony would also show the existence in the hands of the government of records that were never brought into this court and that were used in connection with the net worth theory that has been employed by the government in this case.

Now Mr. Golden's testimony would also show that in his conversation with Mr. Nickell, when Mr. Nickell informed him there were means provided for the release of assets that were under assessment, that the government would require a surety bond and that in all probability a surety company would require some collateral, and he wanted to know whether or not Mr. Remmer would be able

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to furnish some collateral. Mr. Golden will testify that he told Mr. Nickell that he was almost certain that Mr. William Remmer, the brother of Elmer Remmer, would supply any collateral required, but that he would confirm that with Mr. William Remmer. Mr. Golden will testify that upon being told by Mr. Nickell that the amount of surety bond would be left to the discretion of the Collector of the particular district, which in this district would have been Mr. Douglas, in the Nevada district, that Mr. Golden, after his interview in confirmation of these facts with Mr. Nickell, confirmed the fact that Mr. William Remmer would be willing to furnish collateral required by a surety company and then Mr. Golden did communicate with Mr. Douglas, the Collector for the Nevada District, and requested Mr. Douglas to advise him what bond he would require for the release of the $35,000 cash from the First National Bank of Nevada, that cash being money that was paid by the Adler interests to the First National Bank in connection with the purchase of Cal-Neva. There is correspondence available, but to give your Honor the sum and substance of it, Mr. Douglas stated that he would inquire into the problem, that he would advise Mr. Golden in the next day or two. If I recollect, this was not only a telephone call to Mr. Douglas, but also a letter to Mr. Douglas, and the next day or two, it would appear from Mr. Golden's testimony, and also supplemented by actual correspondence, Mr. Douglas advised by letter to Mr. Golden that they would release $35,000 for the purpose of enabling Mr.

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Remmer to pay for accountants and so on, if Mr. Remmer would post a surety bond for the full amount of the lien existing, namely, in the amount of $867,373.52. If Mr. Remmer would post a surety bond in that amount, Mr. Douglas would release $35,000 in cash.

Mr. Golden's testimony would be that he brought it to the attention of the government that in order to obtain such a bond, namely an amount of 867 thousand dollars, that the surety company, any surety company would want collateral in the amount of 867 thousand dollars and that they would require a premium of ten per cent of the amount of the bond, which would be something in excess of 86 thousand dollars, so in other words, under that offer made by Mr. Douglas and the government, if Mr. Remmer wanted to get 35 thousand dollars in cash, he would have to give 867 thousand dollars in collateral and 86 thousand dollars in cash to pay the premium, to get 35 thousand dollars. Mr. Golden pointed out that that was not only impractical but impossible, and Mr. Golden's testimony would show that repeated efforts were made on the basis of supplying a surety bond to obtain the release of 35 thousand dollars, so that he could pay the expenses of investigation by accountants, and also that he could pay some attorneys' fees and some other attendant expenses that necessarily would arise under the circumstances, and in the event this money was made available, that an honest and earnest endeavor would be made to supply the government with as complete a net worth statement as could be

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gleaned from the records and prepared by competent certified public accountants.

Now Mr. Golden's testimony would show that this matter was carried to Washington, to Mr. Oliphant, who was the chief counsel of the Bureau of Internal Revenue at that time, it being called to our attention that insofar as any prosecution aspects of the case, that that belonged properly to the Department of Justice, and anything referring to payment of tax, release of funds under surety bond, properly belonged to the Treasury Department or the Internal Revenue, and Mr. Golden's testimony would show, your Honor—I am not now making formal offer of proof, I am merely explaining the testimony, the necessity of going into——

The Court: Haven't you made an offer of proof in all this time?

Mr. Gillen: I thought your Honor wanted to be informed.

The Court: I thought you were making an offer of proof.

Mr. Gillen: Well, your Honor, the record will show I initially told your Honor this was not by way of offer of proof, although I had to refer to testimony——

The Court (Interceding): I shouldn't have sat all this time listening if I thought it wasn't an offer of proof.

Mr. Gillen: I thought your Honor wanted an explanation of why Mr. Golden was on the stand and I think if your Honor will refer to my initial remarks, your Honor will see——

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The Court (Interceding): Well, I misunderstood you. We will call the jury in.

Mr. Gillen: What is the situation?

The Court: I don't know. I don't know what you have been talking about.

Mr. Gillen: You don't know what I am talking about?

The Court: No. I know what you are talking about, but I don't know the purpose if it is not an offer of proof.

Mr. Gillen: The purpose was, as I stated, and if your Honor did not so understand, I should have been stopped before I talked, I said initially——

The Court (Interceding): It is not an offer of proof?

Mr. Gillen: No.

The Court: Very well.

Mr. Gillen: Does your Honor want me to make an offer of proof?

The Court: No.

Mr. Gillen: Well, then, we will only get into difficulties here, if your Honor hasn't learned anything from my actual——

The Court (Interceding): I don't want to place myself in the position of directing or suggesting to you how to carry on your case.

Mr. Gillen: Let me ask your Honor this—from what I have told your Honor, is it your Honor's opinion now that all of these matters that I referred to in refutation of the contention that there was no cooperation from this defendant, further than initi-

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ally furnishing his books and records to the government, is irrelevant?

The Court: I don't see any occasion for ruling. There is nothing before the Court.

Mr. Gillen: Your Honor has been ruling on it. Might I point this out to your Honor——

The Court (Interceding): I only rule on questions.

Mr. Gillen: May I point this out to your Honor. You see my only thought is, if your Honor rules on a prior objection, and your Honor rules on then a considerable number of other questions that are to be asked and give rise to irritation on your Honor's part, I am deliberately disobeying orders——

The Court (Interceding): Let us call the jury. Do you want to go on?

Mr. Gillen: I want to make a further observation without any jury.

The Court: If you have a question to ask this witness, fine.

Mr. Gillen: All right, I want to make an offer of proof.

The Court: All right, make an offer of proof.

Mr. Gillen: I just wanted to tell your Honor——

The Court (Interceding): I don't want to hear.

Mr. Gillen: How can your Honor possibly rule if you don't know what I am talking about? How does your Honor know, how can you know my contentions——

The Court (Interceding): I am not going to hear your contentions until they come up in the orderly

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process of procedure. What is there before the Court here?

Mr. Gillen: There is this before the Court: I have told you that I am attempting to refute the testimony that gives an impression of guilt.

The Court: Just a minute—has there been a question propounded to which an objection has been made and the ruling still pending?

Mr. Gillen: Was there a question that I asked that was material——

The Court (Interceding): Just answer this question. Is there a question now pending before this Court on an objection?

Mr. Gillen: No, there isn't, I don't think.

The Court: Very well. Is there an offer of proof pending before the Court?

Mr. Gillen: Well, I will make an offer of proof.

The Court: Very well, I will be glad to hear it.

Mr. Gillen: If your Honor won't listen to anything else, I am compelled to make an offer of proof.

The Court: I would like to hear it.

Mr. Gillen: But I would like your Honor to receive that verified testimony to refute that evidence, insinuations of guilt.

The Court: If you want to make an offer of proof; otherwise I won't.

Mr. Gillen: All right. I might say that Mr. Golden's testimony would be quite lengthy and the offer of proof would take some little time.

The Court: All right, proceed.

Mr. Gillen: I do not know whether your Honor

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would want to dismiss the jury until this afternoon, because I think it will take better than half an hour.

(Jury returned into court, admonished and excused at 11:20. Five-minute recess.)

11:30

(Defendant present.)

Mr. Thompson: Your Honor, I wonder whether this would be a proper time to take up the other matter you had in mind this morning regarding the bond, the subpoena from California.

The Court: You mean about that subpoena in San Francisco?

Mr. Thompson: Yes.

The Court: Well, I heard from the newspapers, of course, that the defendant had been subpoenaed to appear in another court as a witness, in the United States District Court for the Northern District of California.

Mr. Gillen: We spoke to your Honor about that matter this morning.

The Court: What do you have in mind that we should take up at this time, Mr. Thompson?

Mr. Thompson: I understood you made a suggestion to defense counsel regarding bond for production of the defendant.

The Court: I am going to make an order at each adjournment.

Mr. Gillen: Yes, I heartily agree with that, and I might state to your Honor that we were, and I

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believe as the close of the day approached, to send a wire to the United States District Judge, advising him of our predicament as to the appearance of the witness and as to two or three exhibits that were called for, and we were going to send that wire Tuesday or Wednesday to Judge Lemmon. We did not know until we saw in the paper this morning what district judge was going to participate at that trial.

The Court: So there is nothing to worry about at this time?

Mr. Gillen: No, your Honor.

Now, may it please your Honor, in the interest of your Honor's time—everybody's time—may it be stipulated and agreed that all of the references that I have made by way of explanation to your Honor just before the recess, regarding testimony that would be given by Mr. Golden, be included and embraced in, by reference, the offer of proof that I now ask permission to make.

Mr. Thompson: That is satisfactory, your Honor.

The Court: Well, it will be so understood that the statement made in regard to Mr. Golden's testimony will be reinstated. This order I made to strike will be vacated.

Mr. Gillen: And it will be included in my offer of proof and I will go on from there, not to take up too much time.

The Court: All right, go ahead.

Mr. Gillen: Shall I proceed then?

The Court: Yes, sir.

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Mr. Gillen: Mr. Golden will testify, your Honor, that at the request of Mr. Golden in the month of May, 1950, there was held an informal conference, at which conference were present Mr. Campbell, Mr. Brady, and Mr. Weaver for the government; Mr. Golden for the defendant, and Mr. Nathan Jay Friedman, the certified public accountant, who has heretofore been referred to, and that Mr. Campbell at that time advised Mr. Golden that the government contended that there were understated for 1945, 265 thousand odd dollars and there was contention of understatement for 1946, in amount of 190 thousand dollars and that those figures were obtained from the figures that were to be used in the civil claim for the payment of taxes against Mr. Remmer, and Mr. Campbell stated at that conference that if a criminal prosecution were determined upon, that the government would use the net worth theory of attempting to arrive at any increase in net worth of the defendant for the years involved. Mr. Campbell said that this might be obviated and the problem solved by the supplying by the defendants of a net worth statement and that Mr. Golden at that time stated that in order to give a net worth statement, that money would be needed for the purpose of hiring accountants; and then we might pick up what I mentioned to your Honor about the verification of Mr. Nickell, also of Mr. Douglas and also of Mr. Oliphant, concerning the release of funds to pay expenses of preparing a net worth statement.

Now Mr. Golden would testify that Mr. Fried-

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man, at Mr. Golden's request, did make a survey of the Remmer records, either personally or by means of some other account employed by him, at 100 McAllister Street, the government office where the records were, and that Mr. Friedman gave an estimate, or attempted to determine the amount of time and the cost of a complete, comprehensive survey, in order to be able to try to prepare a net worth statement. There was a formal conference, Mr. Golden will testify, in the month of October, 1950, at 100 McAllister Street. Present were the same people, each time, including in that conference Mr. Shelton in addition to the people named before; namely, Mr. Campbell, Mr. Weaver, Mr. Brady and Mr. Shelton was there. Mr. Golden will testify that at that conference Mr. Golden pointed out to Mr. Campbell that in his opinion Mr. Remmer was being put at a great disadvantage, that no money was released from his assets in order to enable him to prepare a defense against any contemplated action, or defense against any civil claim, and also the defense could not find out what the case was about, what points the government contended were to be frowned upon, and no progress had been made and the records were unavailable, in fact, that they were all in the government's office and the accounts were only able to go up to the government office and work at certain hours on those records. Mr. Golden would testify that Mr. Campbell said, "If you can get a net worth statement, I will try and help you on the matter of release of some funds," and Mr. Golden said, "It

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is developing into a vicious circle and I don't know how we can get a net worth statement without having money to employ people who can prepare a net worth statement," and explained to Mr. Campbell we were not accountants and were babes in the woods so far as preparing a net worth statement and the matter of a net worth statement was one for an accountant and no statement could possibly be obtained without money. Mr. Golden would also testify that he then asked Mr. Campbell if Mr. Campbell would agree to postpone any further action in the matter until the end of the year and Mr. Golden would determine what possibly could be done in the way of raising funds for the purpose of trying to supply the government with a net worth statement, in the hope of satisfying the government there was no fraud in the case. Mr. Campbell agreed to postpone further action or hold in abeyance until the end of the year. This was the hearing in October.

Now subsequent to that time Mr. Friedman made an estimate that satisfied him that it would require a substantial amount of money and because of the lack of funds, Mr. Friedman withdrew and notified the government that he was withdrawing as an accountant in the case. Mr. Golden will testify that on December 11, 1950, Mr. Campbell phoned him and told him that now the government had decided to include the year 1944, although previously Mr. Golden had been assured the year 1944, was not involved, and Mr. Campbell pointed out that since the statute would run in March of 1951—Mr.

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Campbell was under the impression, and so stated, that the statute would run on March 15, 1951. However—I know what is bothering Mr. Shelton—it was later learned that the statute would not run out until April 13, 1951, the reason being it developed that in the year 1944, a 30-day extension had been granted by the government. Instead of demanding Mr. Remmer be required to pay the tax on March 15th, we were granted an extension until April 15th and the tax was paid April 13th, which extended their period for that number of days. However, Mr. Campbell was initially under the impression the statute would run on the year 1944, on March 15, 1951. Mr. Campbell referred in that telephone conversation with Mr. Golden to the possibility of obtaining a net worth statement and Mr. Golden told Mr. Campbell, and will so testify, that at that time he advised Mr. Campbell that the defendant was in much the same position he had originally been in—it was a matter of attempting to obtain funds for the purpose of hiring accountants to make the net worth appraisal.

In January of 1951—I might state to your Honor this is the original correspondence here, so far as government letters are concerned, carbon copies so far as our correspondence with the government is concerned—Mr. Campbell advised Mr. Golden in person—Mr. Golden had gone to Mr. Campbell's office—that the case was being sent to Washington with a recommendation for consideration and determination of some disposition. This statement on the

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part of Mr. Campbell to Mr. Golden was confirmed by a letter.

On February 8th, and for several days thereafter, Mr. Golden will testify that Mr. Gillen, his associate, was in the East on another matter and during his visit there went and obtained an interview with representatives of the Department of Justice and of the Treasury Department, and the purpose of this interview was primarily to request that the year 1944, be omitted, upon the grounds that initially the defendant and defense counsel had been advised that the year 1944, was not involved and that any plans or attempts to prepare a defense had omitted the year 1944, and also the further ground that if the year 1944, were omitted, that would afford the defendant further time to supply a net worth statement, because then the first year in question would be the year 1945, and the statute would not run on the year 1945, until 1952, so that there would be ample time for the defendant to make efforts to accumulate some means of preparing for his defense and furnish the government with a net worth statement, and also at that time Mr. Gillen requested a conference at a future date; that the office of Gillen and Golden wrote for conferences upon the return of Mr. Gillen to both departments, requesting the Justice Department to afford us a conference on the merits of the case itself and requesting the Treasury Department to afford us a conference on the matter of releasing some funds from the assets that were tied up in Nevada, in order to enable the defendant to prepare his case.

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Both departments agreed to grant conferences and set dates. The initial date, if I recollect, was March 16th, it having been learned in the interim that the statute for the year 1944, would not expire until April 13th, because of the 30-day extension that had been granted in allowing payment of tax.

Now at this point and approximately at this time the lawyer, Spurgeon Avakian, through personal friendship with Mr. Gillen and with Mr. Golden, was prevailed upon to enter the case as technical tax lawyer, although no fee arrangement could be made with him at that time. In other words, Mr. Golden will testify that the predicament of the defendant from a financial standpoint was made clear to Mr. Avakian and he was prevailed upon, through personal friendship with Mr. Golden and myself, to enter the case, and that he was prevailed upon also to go with Mr. Gillen to Washington to attend the two conferences that were heretofore mentioned.

Mr. Golden will testify, and would offer in support thereof correspondence, to the effect that the two conferences were postponed from March 16th to March 21st and that Mr. Gillen and Mr. Avakian made plane reservations with the United Air Lines to fly to Washington, D. C., in time for the conferences on March 21st and also made reservations at the Mayflower Hotel in Washington, D. C., for accommodations during their stay there, and that on March 14th, 1951, at five o'clock on the night of that day, there was filed in Washington and received in San Francisco at 5:41 p.m., the following

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telegram: (Reads.) And thereafter the conference with the Treasury Department, concerning the release of funds, was likewise cancelled.

Now the testimony of Mr. Golden will further show that at about that time Mr. Golden was serving in the United States Army for the period of time required for commissioned reserve officers to serve, and that on March 28th there was arranged to have a meeting with Mr. Campbell, and Mr. Golden was in uniform at the time, appeared at the meeting—had gotten leave from the army—which was between Mr. Campbell, Mr. Gillen, Mr. Golden and Mr. Avakian—that was on March 28th—that we at that time informed Mr. Campbell that the scheduled conference at Washington had been arbitrarily and suddenly cancelled and that we were still in the same predicament that we were, that no conference had been held, and asking him what his information was and what he contemplated would happen and what possibility there was for us getting funds for the defendant, in order to prepare a net worth statement, and Mr. Campbell at that time said if we gave him a present net worth statement that he would recommend that some funds be released, but that it was not up to him whether or not funds would be released. The attorneys for the defense present pointed out again we were faced with a vicious circle, that we were unable without financial assistance to engage the services of people who could prepare a net worth statement and that, therefore, we did not know just exactly what could be done.

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The Court: We will take a recess at this time before you go into another subject and I am going to make an order now that the defendant be, and appear in this court room for resumption of this trial at one o'clock, and that the defendant be and appear at all future sessions of this court in the case of the United States of America vs. Elmer F. Remmer, No. 12,177, as such sessions shall occur, and that he will remain under the jurisdiction of this Court and not depart from the jurisdiction of this Court from the present time until the conclusion of this trial, or until the further order of this Court.

I think that would obviate the necessity of making the order at each succeeding session.

Mr. Gillen: I believe so, your Honor.

The Court: Remember the order that he is not to leave the jurisdiction of this court, and, of course, the purpose of this is the things that we have heard in the last few days, and that is the only reason I am making these orders.

Mr. Gillen: I understand. I think that covers the situation.

(Recess taken at 11:45 a.m.)

Monday, February 11, 1952—Afternoon Session
1:00 P.M.

(Defendant present.)

The Court: I want to get the benefit of counsel's views on some matters which are running through my mind in regard to this subpoena situation. Now it is a situation that is a novel one with me, to say

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the least. I have never encountered one similar to it and I don't propose willingly, or by failure to take any action which I might be authorized to take, to permit this trial to be interrupted by taking of the defendant out of the jurisdiction of this court and placing him in San Francisco in response to that subpoena. Now we may strike some difficulties or encounter them, and I want you to know that I am going to take any action that appears to me to be available to prevent that thing and I hope I can find some way of doing it without an inconvenience to the defendant, but if my only resort is some action that is an inconvenience to the defendant, if that is the only thing I can do, I am going to do it.

Mr. Gillen: As I see the whole picture, it is jurisdictional that the defendant be present at his own trial. That case started before this other case commenced and is still in progress and the defendant should remain here at all times in this matter at all sessions in this case, until ultimately acquitted by the verdict or discharge of the jury for any other reasons. Now it strikes me the position of the court in the Northern Division of California simply is that the man is on trial and unavailable as a witness at this time. However, as a matter of courtesy, the Court should be formally advised of it and we have a telegram prepared, which we determined is a little early to send until we observe the outcome of this matter. It would seem to me—of course, this trial is just starting and it will be some days before they conclude the prosecution's case—I do

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feel that perhaps if your Honor employed the informal means of communicating yourself with Judge Lemmon, that would materially assist the entire matter. We would supplement that with a telegram so that it would be on record, but the defendant is jurisdictionally required to be here and under the circumstances, of course, it would seem to me if his testimony was absolutely imperative to the prosecution's case down there, that they could even resort to a deposition up here or they could interrupt the trial down there for a day or two until he was available. Now I do not think any should disturb the procedure of the trial in this court. I agree with your Honor that it shouldn't. Now the defendant is here, attending every session of this trial of his own case and I believe there would be no difficulty encountered, particularly if your Honor was to communicate with Judge Lemmon. It might be that Mr. Thompson would call Mr. Tramutolo's office.

The Court: I believe I will call and if I do not have an assurance tonight that a demand will not be made to enforce the presence of this defendant there, I am going to take some action of my own.

Mr. Gillen: I do not know what action your Honor contemplates.

The Court: It may be a little bit drastic for the defendant, but I am going to take it because I am not going to sit idly by and allow this person interferred with by the United States attorney for the Northern District of California or by any member of the Court down there.

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Mr. Gillen: Well, here is the situation. There is no question in your Honor's mind that the defendant will appear at all callings of the case. The defendant has a large bail posted here.

The Court: What would happen in the event he did not appear Friday and was cited for contempt?

Mr. Gillen: He would have to fix that down there.

The Court: I may require a new bond to the effect that he remain at all times in the jurisdiction of this court.

Mr. Gillen: He is subject to that on his own bond. If he violates it, he would forfeit his bond.

The Court: That is what I had in mind when I said it might inconvenience the defendant. I will require a new bond and have to have inserted to the effect that he shall not leave the jurisdiction of this court during the progress of this trial. I do not know what is going to happen, but I do not want to catch counsel by surprise. I want them to know what I am thinking about.

Mr. Gillen: Of course, your Honor, the defendant can not help being subpoenaed by another court. Suppose a man was lying in bed with a body cast, then what could they do about it. They would have to come up and take his deposition.

The Court: I am somewhat surprised they would have a subpoena served under the conditions. They know this trial is in progress. I am a little surprised the Department of Justice in California would reach out and take the defendant out of this court when he was on trial.

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Mr. Gillen: I hope your Honor will not act hastily to the detriment and inconvenience of the defendant in this case.

The Court: The defendant is absolutely innocent of being involved in this situation, he can not help that, but I am going to take any step that occurs to me necessary to prevent an interruption of this trial and I want to tell you I have in mind, if it becomes necessary, to require a new bond with the expressed condition in it that this defendant does not leave this jurisdiction, unless I am assured that the authorities there, the United States attorney's office and the judge of the court there, do not intend to insist on his presence there Friday.

Mr. Gillen: Of course, I don't know where a new bond would make any difference. The only thing I can see in this instance, if they wanted to arbitrarily in California fine him for contempt. I know Judge Lemmon and have tried many cases before him. I do not anticipate Judge Lemmon, if acquainted with the circumstances, would be arbitrary at this time. I do not anticipate any trouble from Judge Lemmon.

The Court: I do not think the judge will be arbitrary but I don't appreciate the fact that the attorney representing the government would subpoena Mr. Remmer under these circumstances for a time that his trial is in progress and I know they must have known that.

Mr. Thompson: If the Court please, I would like to suggest that neither Mr. Tramutolo or the assistant handling the case or myself could have said

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actually on what date Mr. Remmer would be available and the service of the subpoena does not indicate any indication on their part to interfere with the trial of this case. As a matter of fact they did not telephone me—I don't know whether they telephoned anybody else connected with the government's staff, but if they had, I would not have been able to tell them whether or not Mr. Remmer would be available Friday, next Monday, next Tuesday or any particular time. I do not think any criticism should be directed toward them. They merely served the subpoena, which must be responded to as required, but if it is not responded to, it will be for good legal cause.

Mr. Gillen: I think so, your Honor and, of course, I think your Honor knows we wanted this subpoena served on Mr. Remmer as much as we wanted the measles.

The Court: I know that. I think it might wait until tomorrow. I really don't know what to do, but that is one of the things I might have to do. I am going to take any means possible to prevent the defendant from being absent from this trial.

Mr. Gillen: I can assure your Honor he will not be absent from this trial.

The Court: Very well.

Mr. Gillen: May it please the Court, I can very rapidly conclude this offer of proof. The witness, Golden, would testify that following the conference in Mr. Pike's office in Nevada and following the return of the indictment against this defendant on April 9, 1951, to surrender the defendant on April

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10, 1951, that in the month of September of 1951, Mr. Semenza, the certified public accountant of Reno, Nevada, was prevailed upon, without the defendant or the defense counsel being able to make any financial or fee arrangement with him, was prevailed upon to undertake the accounting task in the case and he requested that he have certain records and that attorneys Avakian and Golden communicated with Mr. Campbell, requesting that those records be turned over to Mr. Semenza. That these records that Mr. Semenza found necessary to have were records concerning various enterprises in which Mr. Remmer had an interest, which have been mentioned here and, also, of course, of the various enterprises and those books and accounts and records were then and at that time in the hands of the government departments, and in response to the request that those records be turned over to Mr. Semenza, so he could do the accounting task necessary to the defense of this case, Mr. Campbell refused, but said that if two conditions were met he would consider making the records available, the conditions being (1) that the defense make a proper showing of Mr. Remmer's interest in the records and books of account, and (2) that the defense should furnish him with written consent of the third parties from whom certain of the records were obtained; and third, he declined to give the names of those third parties from whom certain of the records were obtained.

That, I believe, your Honor, would conclude the offer of proof of testimony that would be given by

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the witness, John Golden, who is on the witness stand.

1:15 P.M.

Afternoon Session—February 11, 1952

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

Mr. Gillen: May it please the Court, in view of your Honor's ruling on the offer of proof, the defense has no further questions of Mr. Golden.

Mr. Thompson: We have no cross-examination.

The Court: You may be excused.

Mr. Avakian: Your Honor, the defendant will call as its next witness Mr. Lawrence J. [2707] Semenza.

LAWRENCE J. SEMENZA

a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct Examination

By Mr. Avakian:

Mr. Avakian: Your Honor, later on in Mr. Semenza's testimony the defense proposes to offer in evidence a rather lengthy statement of 21 pages and I thought perhaps, since the prosecution will undoubtedly want to have some of their accountants examine that, also before your Honor rules on the offer, it might save time if I could hand a copy not only to government counsel but perhaps the agents to whom they might want to refer to the matter so

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(Testimony of Lawrence J. Semenza.)

they could examine it. I will have that marked and hand a copy to them.

Q. Mr. Semenza, have you prepared a certain set of documents setting forth accounting analysis of the evidence in this case? A. I have.

Q. Would you hand me that, please?

Mr. Avakian: Your Honor, I will ask that the document handed me by the witness, consisting of 21 pages, bound together with a gray manila folder and entitled, "Elmer F. and Helen Remmer Accounting Statements Prepared by Lawrence J. Semenza," be marked at this time for identification as the defendant's next exhibit.

The Clerk: M-1.

Mr. Avakian: And may the record show at this time I hand a copy of Defendant's Exhibit M-1 for identification to [2708] counsel for the prosecution.

Q. Would you state your full name and address?

A. Lawrence J. Semenza, 111 Greenwich Drive, Reno.

Q. What is your business or occupation?

A. Certified public accountant.

Q. Where is your place located?

A. 29 E. 1st Street.

Q. Does your business have a firm name?

A. Semenza & Kottenger.

Q. Mr. Semenza, would you state briefly your education in college in connection with accounting matters, that is, your formal school education?

A. I am a graduate of the University of Nevada,

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(Testimony of Lawrence J. Semenza.)

received an AB degree in economics in 1925; received an MA degree from the University of California in 1927, in economics. I completed a correspondence course with the Waldon School of Commerce in Chicago in accounting.

Q. Have you done any teaching in any school in the field of accounting?

A. I taught one year in the University of Nevada, from August, 1927, to May of 1928. Taught economics and business administration.

Q. Can you tell us when you first commenced in the practice of accounting?

A. In the year 1928, I became a Deputy State Bank Examiner [2709] and Auditor for the State of Nevada.

Q. And how long did you hold that position?

A. I held that position until February of 1931.

Q. And what did you do at that time?

A. At that time I was employed by George K. Edler, certified public accountant, practicing in the City of Reno.

Q. How long did you continue in that employment, Mr. Semenza?

A. I continued in his employ until 1936, when he took me in partners with him.

Q. And from the time you became a partner with him in 1936, from then on, did you continue for a time in partnership with him?

A. I continued for approximately two years. At that time I purchased his interest and practice in my own name until 1942.

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(Testimony of Lawrence J. Semenza.)

Q. And what happened in 1942?

A. In 1942, I formed a partnership with William B. Kottenger under the name of Semenza & Kottenger and am still associated.

Q. You are still continuing in that partnership with him? A. I am.

Q. Mr. Semenza, during the period of your practice as an accountant, was your practice interrupted for any period of time by military service?

A. Yes, in 1942, I went with the United States Navy.

Q. How long were you in the United States Navy?

A. Until December 6th, I believe it was, of 1945. [2710]

Q. And during that period of time what type of work were you doing for the United States Navy?

A. I was in cost inspection service and shipyards.

Q. Where was that?

A. San Francisco, Alameda and Oakland.

Q. Can you state briefly the nature of your duties in connection with the cost service of the United States Navy?

A. Mostly consisted of determination of amounts due contractors on their cost-plus contract basis and additional amounts due under fixed price contracts to escalator owners on labor and materials.

Q. So during that period you were engaged for the navy in accounting work, is that correct?

A. I was.

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(Testimony of Lawrence J. Semenza.)

Q. Did you have any supervisory position in that connection?

A. Yes, I was cost inspector of United Engineering Company in Alameda and San Francisco and the Amship Corporation in Alameda. For a time prior to that I was in charge of the staff of accounting, auditing a number of small industrial plants.

Q. Can you state approximately how many accountants were under your supervision in the staff at the Navy at that time?

A. At times there were forty or fifty.

Q. In your practice with Mr. Kottenger under the name of Semenza & Kottenger, do you have other accountants employed in your office? [2711]

A. We have.

Q. Can you state approximately how many other accountants are in your office?

A. We have approximately twelve.

Q. Is that in addition to Mr. Kottenger and yourself? A. Yes.

Q. In other words, there are a total of 14 accountants in your office? A. That is correct.

Q. Can you tell us the geographical area in which you engage in your accounting practice?

A. Well, the entire State of Nevada, northern California, and some work in San Francisco.

Q. And during the past few years have you had active accounts, clients, in California as well as Nevada? A. We have.

Q. Would you state generally, Mr. Semenza, the

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(Testimony of Lawrence J. Semenza.)

types of businesses of the clients for which your office has been doing accounting work during the past few years?

A. Well, mining companies, industrial plants, mercantile business, ranching, manufacturing, municipal accounts, insurance clients and then miscellaneous individual accounts.

Q. Is your office the largest accounting office in the State of Nevada?

A. So far as I know it is. [2712]

Q. Do you hold any official positions with the State government of Nevada?

A. I am a member of the Nevada State Bar of Accountants.

Q. Are you also president of the Nevada State Bar of Accountants? A. I am at present, yes.

Q. How long have you been a member of the Nevada State Bar of Accountants?

A. Ten or 12 years.

Q. How long have you been president of the State Bar? A. The last two terms.

Q. How many years would that be?

A. That would be about eight years.

Q. And are you a member of any professional accounting societies? A. I am.

Q. Would you state the societies?

A. A member of the Nevada State Association of Certified Public Accountants, the California State Society of Certified Public Accountants, the American Institute of Accountants.

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(Testimony of Lawrence J. Semenza.)

Q. Do you hold a certification as a certified public accountant from any States?

A. State of Nevada and State of California.

Q. And are you admitted to practice before the Treasury Department of the United States? [2713]

A. I am.

Q. Can you tell us approximately how long you have been admitted to practice before the Treasury Department? A. Since 1934.

Q. From 1934 to the present have you actively represented clients before the Treasury Department?

A. I have, except for the period I was in the Navy.

Q. With that exception you have been continuous? A. Yes.

Q. Now, Mr. Semenza, are you acquainted with the defendant in this case, Elmer F. Remmer?

A. I am.

Q. Can you tell us approximately how long you have been acquainted with him?

A. Approximately 20 years.

Q. Have you, in your professional capacity as a certified public accountant, ever done any accounting work for him? A. Not directly.

Q. Have you done any work as an accountant for any corporation in which he has been a stockholder? A. Yes.

Q. Will you state which one?

A. Cal-Neva, Inc.

Q. That is a corporation which was at one time

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(Testimony of Lawrence J. Semenza.)

owner and operator of a resort known as Cal-Neva Lodge at Lake Tahoe? [2714] A. It is.

Q. Approximately during what period of time were you the accountant for that corporation?

A. Approximately from 1931 on.

Q. Until when? A. The time it was sold.

Q. And that would be to 1948 or 1949?

A. That is correct.

Q. And during that time was Mr. Remmer the active manager of that business? A. He was.

Q. Now, subsequent to the sale of Cal-Neva in 1948 or 1949, have you done any work as an accountant in connection with the personal income tax matters of Mr. Remmer? A. I have.

Q. Will you state when you first commenced doing that type of work?

A. In the summer of 1949 I was engaged by the firm of Thatcher, Woodburn and Forman to assist them in the preparation of petition to the Tax Court, covering certain proposed assessments of income tax against Mr. and Mrs. Remmer.

Q. And can you state the tax years that were involved in that case?

Mr. Thompson: Objected to as immaterial.

The Court: Objection sustained. [2715]

Q. Were the tax years involved in that case, did they include the years 1944, 1945 and 1946?

A. They did.

Q. And you said that you were engaged for the purpose of assisting the firm of Thatcher, Woodburn and Forman in preparing a petition to be filed

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(Testimony of Lawrence J. Semenza.)

with the Tax Court, and is that case in the Tax Court still pending?

Mr. Thompson: Objected on the ground it is irrelevant and immaterial.

The Court: Objection sustained.

Q. Well, since 1949 have you still been engaged in accounting aspects of that Tax Court matter?

Mr. Thompson: Same objection.

The Court: Same ruling.

Mr. Avakian: Well, your Honor, if I understand the basis of the ruling——

The Court: It is immaterial.

Mr. Avakian: Well, I think it is material.

The Court: Well, you and I disagree.

Mr. Avakian: Well, I can't explain my views to you?

The Court: No, no.

Mr. Avakian: Very well.

Q. Now, have you at any time engaged in any accounting work in connection with criminal tax charges which have been brought against Mr. Remmer with respect to the years 1944, 1945 and [2716] 1946? A. I have.

Q. And will you state when you became engaged in that work? When did you commence that phase of the work?

A. It was in the month of October, 1951.

Q. Will you state who engaged your services at that time? A. Mr. John Golden.

Q. And for the purpose of indentification, that

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(Testimony of Lawrence J. Semenza.)

is the Mr. Golden who sits at the defense counsel table in this case? A. It is.

Q. Now, prior to the time that you were engaged by Mr. Golden to work on the criminal aspect of the case, did you at any time have any conferences with a special agent of the Bureau of Internal Revenue by the name of Ray Weaver?

Mr. Thompson: Objected to as immaterial.

The Court: Read the question.

(Question read.)

The Court: Answer the question yes or no.

A. Yes.

Q. Will you state approximately when you had the first such conference?

A. Oh, I would think it would be in say 1948.

Q. And calling your attention specifically to the date of July 11, 1949, did you have a conference with Mr. Weaver on that date? [2717]

A. Yes, I did.

Q. Where was that conference held?

A. In his office in San Francisco.

Q. And that is located at 100 McAllister Street?

A. Yes.

Q. I call your attention, Mr. Semenza, to prosecution's Exhibit No. 70, which you have previously identified in this case, as a list of records which were turned over to you by Mr. Weaver on July 11, 1949, and I will ask you to look at that and tell me whether the conference which you have just mentioned on July 11, 1949, was connected with the

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(Testimony of Lawrence J. Semenza.)

giving to Mr. Weaver by you of the receipt which you hold in your hand? A. It was.

Q. And did you at that time obtain from Mr. Weaver's possession various books and records that are mentioned in Exhibit 70? A. I did.

Q. Now, that was on July 11, 1949, and was your obtaining of those books in connection with the matter pending in the Tax Court at that time?

A. It was.

Q. And did you state to Mr. Weaver the purpose for which you desired to examine those books?

A. Well, probably, generally.

Q. And would you state, to the best of your recollection, [2718] what you stated to him?

A. Well, Mr. Weaver informed me that there were other records available besides those listed here and I told him at the time that I would be unable to take all of them, that I could only make a general examination of the records, we only had a limited time in which to prepare this petition; consequently I did not want all of the records at that time.

Q. Did you see generally other records in Mr. Weaver's possession at that time relating to the various enterprises in which Mr. Remmer had interests?

A. There were other records there in the room, a number of boxes.

Q. Will you state approximately how many boxes of those records there were, aside from the documents which you took away with you?

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(Testimony of Lawrence J. Semenza.)

Mr. Thompson: Objected to as irrelevant and immaterial, has nothing to do with the issues before the Court.

Mr. Avakian: May I be h rd before your Honor rules on that question, unless your Honor is satisfied——

The Court: You may answer the question.

A. There were a number of boxes there, five or six boxes, I would say, at least.

Q. And did Mr. Weaver make any statement to you as to whether or not the additional records in those other five or six boxes would be available to you for future examination if you [2719] desired?

A. Yes, he indicated I would be able to have access to them.

Q. Now, did you, immediately following that conference with Mr. Weaver, take the records mentioned on Exhibit 70 to Reno?

A. Yes, I took them in my own car and returned with them.

Q. And did you immediately thereafter make any examination of those records? A. We did.

Q. When you say "we," state whom you mean?

A. My office staff and myself.

Q. Were you working in conjunction with any one else at that time?

A. At that time I was working with Mr. Thatcher.

Q. And that was in connection with this civil Tax Court case that you mentioned? A. It was.

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(Testimony of Lawrence J. Semenza.)

Q. Would you state the accounting purpose of the examination you made at that time?

Mr. Thompson: Objected to as immaterial.

The Court: Objection sustained.

Mr. Avakian: Could I be heard on that, your Honor?

The Court: No.

Q. Could you state approximately how long it was after July 11, 1949, that you completed the examination which you were making at that time of the records and books mentioned on [2720] Exhibit 70?

Mr. Thompson: I make the same objection.

The Court: I can't see where it is material.

Mr. Avakian: The materiality is this—I want to show by this witness, first of all that there are many books and records never produced in court by the prosecution, and secondly, the examination made at that time of the records which were turned over to him was for a limited purpose, which was in effect for a short time only and was not connected with the criminal charges in this trial, as bearing, your Honor, on the question of (1) the adequacy of the records maintained, and (2) the opportunity given to the representatives of the defendant to examine the records of these enterprises which had been turned over to the government. All those issues, I think, have been injected into this trial.

The Court: Objection sustained.

Q. Did you at some subsequent time turn the

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(Testimony of Lawrence J. Semenza.)

documents and books mentioned on Exhibit 70 over to another accountant?

Mr. Thompson: Objected to as already asked and answered. We are going over ground that was covered early in December with this witness.

The Court: He has already testified to these matters.

Mr. Avakian: Well, I don't recall just what testimony Mr. Thompson has in mind.

The Court: You may answer this [2721] question.

A. Yes, I turned them over to another accountant.

Q. Can you state who that accountant was?

A. Nathan Jay Friedman of San Francisco.

Q. Was Mr. Friedman likewise working on the matter in conjunction with Mr. Golden?

A. He was.

Q. And the records were turned over to him because they related to San Francisco enterprises?

A. That is true.

Q. Now, you said that approximately in October, of 1951, you were engaged by Mr. Golden to work on the accounting aspects of the criminal charges which had been brought against Mr. Remmer for the years 1944, 1945 and 1946. Did you at that time make any further examination of the books and records which are mentioned on Exhibit 70?

Mr. Thompson: I make the same objection, it is immaterial.

The Court: Objection sustained.

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: Could I have the opportunity of explaining to your Honor the materiality of this?

The Court: Let us proceed.

Mr. Avakian: I have this in mind; in direct examination counsel were permitted to state the exhaustive——

The Court: The ruling will stand.

Q. Now, Mr. Semenza, are the books and documents which are [2722] mentioned in Exhibit 70 all in evidence here in this case? A. They are.

Q. Are there books and records of the various enterprises, in which Mr. Remmer had an interest and which have been mentioned in this trial here, are there books and records of those enterprises which Mr. Weaver had in his possession in July of 1949, which have not been presented in evidence here?

Mr. Thompson: I make the same objection, immaterial, calls for the witness' conclusion.

The Court: Well, the objection will be overruled.

A. There are.

Q. And have you ever, Mr. Semenza, examined those books and records which were in Mr. Weaver's possession then and which you state are not in evidence here? A. I did not.

Q. Now, did you, Mr. Semenza, request that arrangements be made for you to examine those other books and records in doing your accounting work in preparation for this trial?

Mr. Thompson: Objected to on the ground it calls for hearsay. He says did he request. Our at-

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(Testimony of Lawrence J. Semenza.)

tention is not directed to any particular conversation, who was present.

The Court: You may answer the question yes or no. A. I did.

Q. Were you ever shown any of those other books and records? A. I was not. [2723]

Q. Now, Mr. Semenza, would you state whether, from an accounting point of view, it is customary to examine all books, records and other documents of an accounting nature, in making an income tax analysis of the income of a particular business?

Mr. Thompson: Objected to, if the Court please, upon the ground it is incompetent, it is immaterial what is customary. So far as accounting procedure, if this witness is to testify to any matters germane to this case, his answer will be based upon the books and evidence before the Court.

The Court: Objection sustained.

Mr. Avakian: Your Honor, that is an important point I understood your Honor said we could go into as part of the defense. You recall the prosecution witness said the books and records were inadequate. We would like to show the adequacy can not be determined unless they were all looked into.

The Court: We have evidence this witness has never seen these records.

Mr. Avakian: As I say, under proper accounting you do not determine whether the books are adequate until you look at all, you have to look at all of them.

The Court: I still think it would be immaterial.

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(Testimony of Lawrence J. Semenza.)

An answer from this witness would not indicate the very thing you are asking about had not been done.

Mr. Avakian: No, your Honor, it would be in direct refutation of testimony of the prosecution witness that the records [2724] are inadequate.

The Court: The ruling will stand.

Q. Now, Mr. Semenza, on approximately December 7th or 8th, 1951, either one, the books and records which are mentioned on Exhibit 70, which you hold in your hand, were deposited with the clerk of this court by the defense, pursuant to the order of the Court. Had you at that time completed your examination of those books and records?

A. I had not.

Q. And have you subsequently made further examination of those books and records while they have been in custody of the clerk here in court?

A. I have.

Q. And have you heard or read the transcript of all of the testimony given by the witnesses in this case? A. I have.

Q. You have been present during most of the trial personally? A. I have.

Q. And as to the days you were not present, you have read the transcript? A. Yes.

Q. And have you personally examined all of the documentary evidence which has been introduced in this case? A. I have.

Q. And have you made an examination of all of the testimony [2725] and all of the documentary evidence in this case for the purpose of making an ac-

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(Testimony of Lawrence J. Semenza.)

counting analysis of the net income of Elmer and Helen Remmer for the years 1944, 1945, and 1946?

A. I have.

Q. And have you prepared a written report, setting forth the analysis which you have made?

A. I have prepared statements.

Q. And those are contained in the 21-page document which has been identified as defendant's Exhibit M-1? A. They are.

Q. And in preparing those accounting statements, have you given consideration to all of the testimony and all of the documentary evidence in this case? A. I have.

Q. And have you limited yourself to the testimony and the evidence which has been introduced in this case? A. I have.

Q. And does defendant's Exhibit M-1 represent, to the best of your knowledge and ability the accounting analysis of the testimony and documentary evidence in this case with respect to the subject matters that are in the statement? A. Yes.

Mr. Avakian: Your Honor, at this time we would like to offer defendant's Exhibit M-1 for identification in evidence.

Mr. Thompson: Your Honor, I request an opportunity to [2726] read it. It may take some time.

The Court: Yes. Have we reached a stage where it will require some time for the examination of that document?

Mr. Avakian: I was going to suggest this. Perhaps we can defer your Honor's ruling on this mat-

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(Testimony of Lawrence J. Semenza.)

ter and I can examine as to other matters until the customary recess time and then counsel can examine the document during recess. Will that be satisfactory?

Mr. Thompson: Satisfactory with me.

The Court: Very well.

Q. In your practice as a certified public accountant during the past 20 years or so, have you done accounting work for partnerships, Mr. Semenza?

A. I have.

Q. And I take it also for individuals and corporations? A. That is true.

Q. And can you give us an idea as to whether or not your experience with partnership accounting has been limited or extensive?

A. It is extensive.

Q. Have you had partnership accounts continuously during the entire period of your practice?

A. A large number of them.

Q. And have you prepared a large number of partnership income [2727] tax returns?

A. I have.

Q. And are you familiar with the accounting practices and procedures relative to the preparation of partnership returns and relating to the preparation of financial statements for partnerships?

A. I am.

Q. Have you, Mr. Semenza, in your experience as an accountant, encountered the situation of a partnership in which one partner contributed the initial capital investment for the partnership under

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(Testimony of Lawrence J. Semenza.)

an agreement, whereby the other partner or partners would build up their capital investment in the partnership by leaving a portion of their profits in the business?

Mr. Thompson: Objected to on the ground it is immaterial whether he encountered these problems in his business.

Mr. Avakian: It is preliminary, your Honor, to lay the foundation for a question. I just want to establish his familiarity with partnerships.

The Court: You may answer the question.

A. I have.

Q. Can you give us any idea as to whether your familiarity with that problem has been limited or extensive?

Mr. Thompson: Same objection.

The Court: Objection sustained.

Mr. Avakian: It asks for the scope of his experience. [2728]

Mr. Thompson: It calls for conclusion.

Mr. Avakian: I want to find out whether he has a limited experience or extensive.

The Court: Objection sustained.

Q. Mr. Semenza, in determining the portion of the profits of a partnership, which the individual partners should report in their individual income tax returns, is it proper and customary accounting procedure to base that on their share of the profits, or is that based on the amount of money that each particular partner withdraws from the business during the year?

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(Testimony of Lawrence J. Semenza.)

A. It is based on the distributive share and not the amount of withdrawal by the partner.

Q. Will you state what you mean by the term "distributive share"?

A. Well, the profit of the partnership is determined and then the shares of each partner of that total profit is determined and that is the amount that each partner must report in their individual income tax return.

Q. Does the amount that is actually withdrawn during the year by each partner have any bearing on the amount upon which the partner has to pay income tax? A. No.

Q. And will you state whether or not in the case of partnerships it frequently occurs that partners actually draw from [2729] the business amounts which are different from their share of the profits?

Mr. Thompson: Objected to as immaterial what happens in other partnerships.

The Court: Let me have the question?

(Question read.)

The Court: Objection sustained.

Mr. Avakian: The purpose of that question is to refute the contention of the government that because there were unequal drawings from the business they actually were not partnerships. We want to show that this is a customary happening, in the field of partnerships. There is nothing unusual about that, so the jury may have a proper setting

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(Testimony of Lawrence J. Semenza.)

in which to determine what inference it should or should not draw.

The Court: Let me have the question again?

(Question read.)

The Court: You may answer.

A. Yes.

Q. Now, Mr. Semenza, from an accounting point of view, can you state how the partner's share of the profits and the partner's capital investment in a partnership business are customarily recorded on the books of the partners?

A. The end of an accounting period, if a partnership realizes a profit, the partnership part of the credit is credited to the partner's capital. [2730]

Q. What is done with respect to any drawings?

A. Any drawings during the year would be charged to the partner's capital account.

Q. And what does the balance of any particular account represent?

A. Net investment of the partner in the partnership.

Q. So if the partner fails to withdraw his profits, then the balance of his account, showing his investment in the partnership, is increased by that amount? A. That is correct.

Q. And any amount that he withdraws then reduces the balance of his investment in the business?

A. That is true.

Q. And is the term "capital account" used to designate, in accounting terminology, the credits and

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(Testimony of Lawrence J. Semenza.)

charges to the account of the particular partner in the business?

A. The net investment of the partner in the business.

Q. Now, Mr. Semenza, I am going to call your attention to prosecution's Exhibit 173, which is an exchange of correspondence between Mr. Weaver and yourself in October and November of 1949, and direct your attention particularly to the reference in that correspondence to a credit in the books of Cal-Neva, Inc., to the account of Elmer F. Remmer, in the amount of 50 thousand dollars in September of 1946, and also to a deposit of 50 thousand dollars in Cal-Neva Lodge account [2731] in the First National Bank of Nevada on September 28, 1946, and I am going to ask you whether, subsequent to the date of the correspondence in Exhibit 173, you made any further investigation with respect to that item of 50 thousand dollars? Answer that yes or no.

A. Yes.

Q. I call your attention to defense Exhibit A-1, which is a promissory note dated September 27, 1946, in amount of 50 thousand dollars, from Elmer F. Remmer to Robert L. Jeffress, and I will ask you whether or not you saw that document any time prior to its introduction in evidence in this trial?

A. I did.

Q. Would you state when it was that you first saw that document?

A. Some time in the year 1950.

Q. And can you tell us what part of the year it was?

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(Testimony of Lawrence J. Semenza.)

A. It was in the first half of the year.

Q. And where was it that you saw that document?

A. It was delivered to me by Robert Jeffress in my office.

Q. In Reno? A. That's right.

Q. And by Robert Jeffress you refer to the late Robert Jeffress, whose widow was on the stand here last Friday? A. I do.

Q. Were you personally acquainted with him during his lifetime? [2732] A. I was.

Q. And prior to the time that he delivered that document to your office, had you had any conversation with Mr. Jeffress regarding the note? Will you answer that question yes or no? A. Yes.

Q. Now, when Mr. Jeffress brought that note to your office in the early part of 1950, did he leave it at your office at that time or did he take it away with him? A. He left it in my office.

Q. Approximately how long did that note remain in your possession?

A. Until about November of 1951.

Q. And did you turn it over to some one else at that time?

A. I turned it over to Mr. Golden at that time.

Q. And that is John R. Golden, the defense counsel? A. It is.

Q. And it was in your possession continuously during the interim? A. It was.

Q. At the time Mr. Jeffress delivered that note to you, did you have any conversation with him

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(Testimony of Lawrence J. Semenza.)

with respect to the date of payment of the note, if any? A. I did.

Q. And what was that conversation? [2733]

2:10 P.M.

(Notebook 343, PP. 25-29.)

RE: SEMENZA'S CONVERSATION WITH MR. JEFFRESS

Mr. Avakian: Your Honor, in connection with the objection that has been made and sustained, we would like to make an offer at this time of proof by this witness to the effect that the witness would testify at the time Robert L. Jeffress delivered possession of defendant's Exhibit A-1 to Mr. Semenza in the early part of 1950, Mr. Semenza asked Mr. Jeffress if the note had been repaid and if so when, and Mr. Jeffress stated to Mr. Semenza that the note had been repaid by Mr. Remmer during 1947 and 1948 and that Mr. Semenza told Mr. Jeffress that he was particularly interested in knowing whether any part of the note had been repaid prior to the end of 1946 and that Mr. Jeffress replied that the entire $50,000 had been repaid after 1946.

Now, in connection with that offer, your Honor, I am sure your Honor is familiar with the lengthy discussions we have of declaration against interest and I, for that reason, will refrain from going into it further.

I would like to make only this one observation, that in respect to this particular transaction, the

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(Testimony of Lawrence J. Semenza.)

only two parties to the transaction; namely the holder of the note, Mr. Jeffress, and Mr. Semenza, Mr. Jeffress being now dead, the only witness who could possibly testify as to what occurred or what was said during that conversation is Mr. Semenza, because he is the only remaining witness who knew about the conversation.

The Court: The offer will be rejected.

Mr. Thompson: We make the same objection, your Honor.

The Court: Yes.

Mr. Avakian: Mr. Gillen thought I should call your Honor's attention that the conversation in this instance was a part of the actual surrender of the document and it is not a conversation unrelated to a transaction, but actually was a part of the transaction; namely, the surrender of the note, the surrender of the note itself being some indication of the status of the matter. A conversation with relation it throws an additional light that cannot be present in connection with unrelated transactions.

The Court: The ruling will stand.

Mr. Thompson: Objected to as calling for hearsay, your Honor, incompetent.

The Court: Objection sustained.

Mr. Avakian: I think, your Honor, that raises the same question of declaration against interest.

The Court: The objection is sustained.

Mr. Avakian: I just wanted to say in connection with the next recess, we would like to make an offer of proof on that.

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(Testimony of Lawrence J. Semenza.)

The Court: I see.

Mr. Avakian: If that is agreeable, we would like to do that, your Honor.

The Court: Yes, all right.

Mr. Avakian: Your Honor, we have reached the point in Mr. Semenza's examination where we would like to have the exhibit which he has prepared received in evidence because further examination will relate to that. May we suggest we take a recess, for the two purposes of making proof and so counsel may examine the exhibit.

The Court: Yes, we will excuse the jury.

(Jury and alternate jurors admonished and excused at 2:10 p.m.)

(In the absence of the jury.)

(NB 343, pp. 25-27.)

2:35 P.M.

(Defendant present with counsel.) [2734]

(Presence of the jury and alternate jurors stipulated.)

Mr. Thompson: At this time, your Honor, the defense has offered in evidence Exhibit M-1 for identification. We request permission to ask three or four questions on voir dire.

The Court: You may do so.

Q. (By Mr. Thompson): As I understand your testimony, Mr. Semenza, this Exhibit M-1, which contains a number of statements, constitutes your

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(Testimony of Lawrence J. Semenza.)

own personal analysis of the records in evidence in this case, is that correct? A. It does.

Q. And you recognize, do you not, that in many respects the evidence is conflicting and you were required to take one view of the evidence rather than a contrary view, in preparing the statements?

A. That is true.

Q. You also recognize, do you not, that in certain respects the items contained in some of the statements are based upon your own assumptions or conclusions, rather than actual direct evidence of the fact itself?

Mr. Avakian: It appears to me this is more properly cross-examination rather than voir dire.

Mr. Thompson: I think it is proper voir dire to show the foundation for the exhibit.

The Court: It seems to me it is calling for some matter on which the matter is based. [2735]

Mr. Avakian: I have no objection to counsel asking questions, but I did not want him to go into cross-examination before the exhibit was explained.

The Court: Let us have the question.

(Question read.)

A. My conclusions are based on evidence in this case.

The Court: I do not believe the witness understood the question. If he did, I did not.

Mr. Thompson: Permit to withdraw. I will reframe the question.

The Court: Yes.

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(Testimony of Lawrence J. Semenza.)

Q. In preparing the statement contained in Exhibit M-1 for identification, it was necessary for you to draw inferences from certain evidence in the case in the situation where direct evidence of a particular fact is not in evidence?

A. If there was not sufficient evidence, I eliminated it from my statement.

Q. But that still was your personal opinion as to whether or not the evidence was sufficient?

A. Yes.

Q. And in the event your opinion in that connection should be wrong, or the jury should take a contrary opinion, your statements would be different as contained in this Exhibit M-1?

Mr. Avakian: I think that is clearly cross-examination [2736] rather than voir dire.

The Court: You will pardon me. I wonder if this isn't what you are trying to get at. On direct examination Mr. Semenza testified that this exhibit was based upon all the testimony in the case or the documentary evidence, as well as oral testimony. Now, isn't the purpose of this question to inquire whether or not it also contains matters of his opinion, isn't that the question?

Mr. Avakian: Your Honor, if I may restate the testimony, I believe Mr. Semenza testified that in preparing this exhibit he took into consideartion all of the testimony in evidence and that this represents his accounting analysis of the evidence, based on his best ability and judgment. That, I believe, is the foundation that was laid in his testimony for it.

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(Testimony of Lawrence J. Semenza.)

If what counsel is stating is that there are matters in evidence here from which more than one inference could be drawn, I will be willing to stipulate generally that there is evidence in the record from which more than one inference can be drawn.

Mr. Thompson: And in preparing his statement, he was required to choose between those inferences.

Mr. Avakian: I do not like the word "required." I believe he said he used his best judgment.

Mr. Thompson: I mean in order to reach the result he put down on the paper. [2737]

Mr. Avakian: He used his best judgment, yes.

Mr. Thompson: May I have the question read?

(Question read.)

Mr. Avakian: Your Honor, I object, first on the ground it is not proper voir dire; rather it is cross-examination; secondly, it is an argumentative type of question; third, it is incomprehensive to me, because if the jury should take a different view, would Mr. Semenza's conclusion be different—I don't understand what he means by that. Mr. Semenza's conclusion might remain the same.

The Court: Will you reframe the question?

Mr. Thompson: I will withdraw the question, your Honor.

Q. Mr. Semenza, in instances where the evidence was in conflict, and in instances where more than one inference might be drawn from the evidence, in preparing this statement, it was necessary for you to adopt one opinion of your own, was it not?

A. Certainly.

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(Testimony of Lawrence J. Semenza.)

Mr. Thompson: I have no objection to Exhibit M-1.

The Court: Exhibit M-1 may be admitted in evidence.

Mr. Avakian: Your Honor, the first three pages of Exhibit M-1 are in the nature of summaries, you might say, setting forth the results, and the remaining 18 pages show in considerable detail the supporting data. We have reproduced in enlarged form on placards the three summary pages, similar to [2738] the enlargement which the prosecution made of its Exhibit 183, and if there is no objection, we should like to have these enlargements likewise received in evidence, so they can be exhibited before the jury and permit the jury to follow more intelligently our questioning.

Mr. Thompson: No objection.

Mr. Avakian: I would request then that these be marked exhibit 1 with reference to page 1 in the exhibit to which they refer. This first one would be marked Exhibit M-1 page 1; the second would be marked Exhibit M-1 page 2; and the third would be marked Exhibit M-1, page 3.

The Court: They are all admitted in evidence.

Q. Mr. Semenza, in preparing defendant's Exhibit M-1, did you have any discussions with me with regard to the form and content of the exhibit?

A. Only general discussion.

Q. And do any of the contents of the exhibit represent items which you inserted on my instruction? A. No, they do not.

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(Testimony of Lawrence J. Semenza.)

Q. Do they in every instance represent your own independent judgment as an accountant?

A. They do.

Q. Would you turn to page one of defendant's Exhibit M-1 and state to us what that represents?

A. Page 1, Exhibit M-1 presents the income from these various [2739] sources as shown in the evidence in this case and from the records. It compares it with the income reported in the individual returns of Elmer and Helen Remmer.

Q. When you say from evidence and records, are you referring to the records which are in evidence here?

A. Yes, I mean the witness' testimony and the documentary evidence admitted here.

Q. And have you set forth in the column entitled 1944, the results of your analysis as to Elmer and Helen Remmer's share of the income of each of the enterprises listed on page 1 as shown by the evidence in this case? A. I have.

Q. And will you tell us the total income of Elmer and Helen Remmer for the year 1944, as you have set forth in your exhibit?

A. $11,253.07.

Q. And have you also set forth the income reported by Mr. and Mrs. Remmer in the return which they filed for that same year?

A. I have.

Q. And those are the returns which are in evidence here? A. They are.

Q. And what is the amount of that?

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(Testimony of Lawrence J. Semenza.)

A. Twenty thousand dollars.

Q. And have you made a similar statement and analysis with respect to the year 1945?

A. I have. [2740]

Q. And what is the amount of the income of Elmer and Helen Remmer for the year 1945 which you determined from your analysis of the testimony and exhibits? A. $74,958.82.

Q. And what is the amount shown on the returns of Elmer and Helen Remmer for the year 1945 which are in evidence in this case? A. $71,808.27.

Q. Have you made a similar computation for the year 1946? A. I have.

Q. Will you state the amount that you determined as the income of Elmer and Helen Remmer for the year 1946? A. $38,215.76.

Q. And what is the amount shown on their returns for the year 1946 which are in evidence here?

A. $37,254.31.

Q. Now, have you also set forth on that same page a column representing the total of these computations for the three years combined?

A. I have.

Q. And would you state the amount of income of Elmer and Helen Remmer for the three years combined which you determined from your analysis of the evidence? A. $124,427.65.

Q. And what is the amount which they reported on the returns [2741] they filed which are in evidence in this case? A. $129,062.55.

Q. Have you also set forth on page 1 the differ-

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(Testimony of Lawrence J. Semenza.)

ence between the amount which you determined as the correct income and the amount which they reported as their income? A. I have.

Q. Now, I note that in the exhibit in typewritten form on page 1, and elsewhere through the exhibit also, there are certain figures which are enclosed with a bracket mark. Can you explain what that parentheses mark signifies?

A. That means it is less than income shown in my statement.

Q. I was asking you generally what does enclosure of a figure in parentheses mark indicate in accounting business?

A. A reduction or loss.

Q. And in the enlargement which has been prepared for the assistance of the jury, those figures are set forth in red, is that correct?

A. They are.

Q. The other figures are in black?

A. That is correct.

Q. And what is the amount which you determined for 1944 as the difference between the amount reported by Mr. and Mrs. Remmer and the amount which you determined as correct income?

A. $8746.93.

Q. And in what direction does that difference lie? [2742]

A. In excess of the income that I determined.

Q. They reported more, in other words?

A. That is correct.

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(Testimony of Lawrence J. Semenza.)

Q. Will you give us the same explanation with respect to the year 1945?

A. The year 1945 the amount I determined was $3,150.55 more than reported in the returns.

Q. Will you give us the same explanation with respect to the year 1946?

A. 1946 the amount I have shown as income is $961.45 more than the returns.

Q. And will you tell us also the difference for the three years in amount?

A. The amount shown on the returns exceeded the amount I determined by $4,634.93.

Q. Now, on sheet 2, Mr. Semenza, you have set forth in considerable detail a number of items. Would you state, Mr. Semenza, what page 2 of Exhibit M-1 represents?

A. Page 2 reflects a list of assets and liabilities which I have been able to determine from my examination of the evidence in this case.

Q. So that we may perhaps clarify this a bit—and if I may be permitted, your Honor, to state it in the form of a leading question—page 1 represents your analysis of the income on the basis of the income and expenses shown by the evidence in [2743] the case, is that correct? A. That is correct.

Q. Page 2 represents, to the extent that you have been able to determine, the assets and liabilities attempting to proceed on the net worth method, is that correct? A. That is correct.

Q. Were you able, Mr. Semenza, to make a computation of income on the net worth basis?

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(Testimony of Lawrence J. Semenza.)

A. No, I was not.

Q. And would you state why?

A. Because the evidence in this case indicates that there was cash in safe deposit boxes and safe and the evidence does not indicate any amount.

Q. Would you state the meaning in an accounting sense of the term "net worth"?

A. Net worth is the difference between the assets and liabilities.

Q. Is it possible to determine the net worth of an individual if you are unable to determine the value of any of his assets? A. No.

Q. Have you, however, set forth, to the extent that values could be determined, the various assets and liabilities shown by the evidence in this case?

A. I have.

Q. And I call your attention particularly to the individual [2744] items on the exhibit. Let us refer first to item No. 1, designated "Bank of America, Tracy Branch." Where did you obtain the information that is set forth in your exhibit as to the balance in that account?

A. From exhibits presented by the Bank of America in evidence here.

Q. And those figures represent the balance of that account at the end of each year, 1943 to 1946, inclusive? A. That is correct.

Q. And secondly, with respect to Item 2, Bank of America, Grand Lake Branch, where did you obtain data for that?

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(Testimony of Lawrence J. Semenza.)

A. From exhibits admitted in evidence in this case.

Q. And I notice there is no amount entered in 1943 and 1944, can you explain that?

A. I found no exhibits for those years.

Q. In other words, the account came into existence during the year 1945? A. Evidently.

Q. And then in respect to the next item of United States government bonds, where did you obtain those figures?

A. That is from exhibit presented by the government and admitted in evidence.

Q. Would you state the source of the information as to the loan to Mrs. Harris?

A. It is in the testimony. [2745]

Q. Is that based on testimony of Mrs. Harris and various bank records? A. That is right.

Q. And what is the basis of the entry with respect to Item 5, loan to Marys Chaney?

A. Her testimony.

Q. And Marys Chaney is the same person whose married name is Marys Chaney Martin?

A. That is correct.

Q. I note you have entered at the end of 1943 the amount of $2500 and you have entered no amount for later years and were you aware of her testimony that during the year 1944 she borrowed $2500, which was delivered to her in the form of a check of Cal-Neva Corporation?

Mr. Thompson: Objected to as leading the witness. He can state what he bases his figures on, but

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(Testimony of Lawrence J. Semenza.)

I do not think counsel has to suggest it to him. It is leading.

Mr. Avakian: It is leading, your Honor.

The Court: See if you can reframe it.

Q. Will you state, Mr. Semenza, whether or not there is reflected in your exhibit anywhere the additional amount of $2500 which was loaned to Marys Chaney in 1944 by means of a check drawn on Cal-Neva corporate bank account?

A. In the schedule analysis to Cal-Neva, Inc., account, which is Schedule 6 of my analysis here, is $2500 included as a [2746] charge to Mr. Remmer for withdrawal from the business.

Q. In other words, you handled that in the same manner Mr. Weaver did; you entered it as a charge to Mr. Remmer's drawing account from Cal-Neva?

A. I did.

Q. That transaction, then, is reflected in what item of your exhibit? A. Item 21.

Q. Which sets forth the amount that Mr. Remmer owed to Cal-Neva at the end of each year, is that correct? A. That is correct.

Q. And upon what did you base the figures with respect to Item 6 which was due from Mr. Albert Villaudy?

A. From the records of Cal-Neva and the checks admitted in evidence here showing these payments.

Q. Now, with respect to Items 7, 8, 9, 10 and 11, which are designated at equity in the B. & R. Smoke Shoppe, Day-Night Cigar Store, 110 Eddy Street, Menlo Club and Transit Smoke Shop, respectively,

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(Testimony of Lawrence J. Semenza.)

can you tell us generally in explanation of all five items the manner in which you determined the equity of Mr. and Mrs. Remmer in those businesses, as shown in your exhibit?

A. Well, in Schedule that is filed, I have prepared a schedule No. 1, which shows the assets and liabilities and net worth of the B. & R. Smoke Shoppe, which shows Mr. Remmer's interest [2747] in that business at the end of the various years in question. In Schedule No. 2 I have shown the Day-Night Cigar Store and the capital accounts of the various partners of that enterprise and the interest of Mr. Remmer. In Schedule 3 I show the net worth and partners' capital account in 110 Eddy Street enterprise and from it I have taken Mr. Remmer's interests in that enterprise at the end of the various years, as shown on this summary sheet, which is page 2 of Exhibit M-1. In Schedule No. 4 I have shown the assets, liabilities and net worth of the Menlo Club at the end of 1945 and the end of 1946 and the various partners' capital accounts and from it I have taken the equity of Mr. Remmer, as reflected in the schedule page 2 of the Exhibit M-1. In Schedule No. 5 I have set forth the assets, liabilities and net worth of the Transit Smoke Shoppe December 31, 1946, and the partners' capital accounts at the end of the year and from that schedule I have taken the amount shown on page 2 as the equity in the Transit Smoke Shop of Mr. Remmer.

Q. Now, in making the analyses which are set forth in these various schedules that you mentioned,

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(Testimony of Lawrence J. Semenza.)

will you state to us whether you simply took the figures that were shown in the books or did you make your own accounting analyses of the entries in the books, together with the other evidence in the case relating to those matters?

A. In some cases I had to take my own.

Q. And will you explain what you mean by that, Mr. Semenza? [2748]

A. In the case of the Day-Night Cigar Store, the 110 Eddy Street, the records, the general ledger was not posted at the end of 1945. The books of the original entry, that is, the cash receipts record and the cash disbursements record and the journal entries, had been made, but they had not been posted to the general ledger accounts. Therefore, it was necessary for me to give effect to the posting of those entries to the general ledger, take a trial balance of the general ledger and determine the profit and loss for the year.

Q. In other words, you found the transactions entered in the daily records or cash records, but they had not been posted from those original entries into the ledger accounts?

A. At the end of 1945 they had not been.

Q. Did you then make the necessary accounting computations and adjustments to carry forward those entries into ledger accounts?

A. I did. I have set forth in schedule following each of the respective entries.

Q. And that is set forth in your exhibit in detail? A. That is correct.

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(Testimony of Lawrence J. Semenza.)

Q. Now, Mr. Semenza, will you state whether, in preparing these schedules, you accepted the computations of income shown in the partnership books and returns, or did you make your own analysis and determination of the net income of each of these partnerships, based on all of the evidence in this case?

A. I made my own for the years 1945 and 1946, where the [2749] records had not been posted.

Q. And in instances where you found that proper accounting called for making of an adjustment in determining the correct income, did you make those adjustments? A. I did.

Q. And have you likewise set the result of your adjustments and revisions in these supporting schedules down in Exhibit M-1? A. I have.

Q. Now, with respect to Item 12, "Equity in 21 Club and San Diego Social Club," will you state where you obtained the information and figures that are set forth on page 2 of your exhibit?

A. The exhibits admitted by Mr. Gould.

Q. Revenue Agent Gould?

A. That is correct.

Q. That is Exhibit 106, is it?

A. That is correct.

Q. That exhibit setting forth his analysis of some prior time of that particular business?

A. That's right.

Q. Mr. Semenza, as a preliminary matter to further questioning, could you explain in understandable terms the meaning of the terms "single entry

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(Testimony of Lawrence J. Semenza.)

bookkeeping" and "double entry bookkeeping"?

A. Well, a true single entry system of bookkeeping only records [2750] in the ledger accounts the transactions with customers or the transactions with creditors and drawings of the proprietor or proprietors. The single entry system does not reflect the assets and liabilities of the business nor the operating accounts, such as sales, purchases and expenses. In a double entry system of bookkeeping effect is given to reflecting the assets, liabilities, proprietor's capital account and the accounts affecting income and expenses. The single entry system requires making a statement, listing in the book all assets and liabilities and there is no proof in such listing that you have found all the assets and liabilities. In a double entry system, you are in position of showing that you have balanced out all transactions and have them and entered the assets and liabilities and net worth of the business.

Q. Can you state the types of entries that are made in a single entry system to reflect the business transactions? That is, can you give us a particular example and explain to us how the entries of that transaction would be made on a single entry system and how they would be made on a double entry system? Take a sale or something.

A. For example, in a single entry the record shows receipts from John Jones of $50.

Q. Would that be the only entry made?

A. That would be the only entry in the single entry system.

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(Testimony of Lawrence J. Semenza.)

Q. What additional entries would be made in the double entry [2751] system?

A. A double entry system would show the receipt of $50 and also show the source from which it was obtained.

Q. Is a separate ledger card maintained for John Jones?

A. In the double entry you have ledger card for cash and ledger card indicating the source of that income.

Q. And in respect to expenses such as in the nature of rent, what type of entry would be made in a single entry system and what type of entry in a double entry system?

A. In the single entry there would be a record paid for rent $100, for example, that is all that would appear in the cash book. In the double entry system it would show disbursement of $100. From that record a posting would be made to the cash account in the general ledger and rent account in the general ledger.

Q. Now, have you found in your accounting experience that some businesses use the single entry system and some use the double entry system?

A. Yes, they do.

Q. I take it, as a certified public accountant, you prefer the double entry system?

A. I recommend it highly.

Q. Is it possible to prepare a statement of profit and loss by a single entry system?

A. It is. [2752]

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(Testimony of Lawrence J. Semenza.)

Q. And have you found in your experience that many business men who use the single entry system prepare their statements of net income to the United States Treasury Department on the basis of their single entry systems?

A. Yes, they still prepare tax returns from that information.

Q. Does the information that is called for on the income tax returns of the Treasury Department, in the preparation of income tax returns, relate to information as to receipts and disbursements, or does it relate to information as to assets and liabilities?

Mr. Thompson: Objected to as calling for the witness' conclusion.

Mr. Avakian: I think it is a proper question to ask the witness because of the fact——

The Court: He may answer the question.

A. The tax return calls for sources of the income and the purpose for which the expenses were incurred.

Q. Do the tax returns forms then call for computation of income on the method of receipts and disbursements or call for computation of income on the basis of net worth?

Mr. Thompson: Objected to as already asked and answered.

The Court: You may answer the question.

A. Basis of receipts and disbursements.

Q. And in your practice as an accountant and in your practice before the Treasury Department in the representation of taxpayers, [2753] do you know

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(Testimony of Lawrence J. Semenza.)

of any requirement of the Treasury regulations or of the Internal Revenue Code for the maintenance by the taxpayer of information as to his assets and liabilities at any particular time? Do you understand my question?

A. Yes. The answer is there is a requirement made of adequate record in order to properly prepare the income return.

Q. Adequate record of receipts and disbursements, is that what you mean?

A. For an individual, yes.

Q. And in your examination of the books and records of the various enterprises which have been covered by the evidence in this case, have you determined whether the receipts and disbursements of these businesses, as shown by the evidence, were entered in the books of account and other records of the respective businesses?

Mr. Thompson: Objected to as calling for his conclusion, your Honor, regarding matters outside the evidence. All he can testify is that the records speak for themselves. The receipts and disbursements that were entered were entered, that is what it amounts to.

Mr. Avakian: Prhaps counsel did not understand my question. Perhaps I had better make it clear. May I restate it, your Honor?

The Court: Yes.

Q. In your examination of the evidence in this case and in [2754] your examination of the books and records of the various enterprises which have been introduced in evidence here, did you find that

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(Testimony of Lawrence J. Semenza.)

the income shown by the evidence in this case was entered in the books of account of the respective businesses? A. Yes, I did.

Q. I am going to call your attention particularly to certain books of account. First to Exhibit 127, which is entitled "Tiny's Restaurant 1946." That represents, does it not, a portion of the operation of the Menlo Club? A. It does.

Q. Now, would you state, Mr. Semenza, what that book contains with respect to the recordation of the receipts of that segment of the business?

A. It shows the income, five months and five days, from the operation of Tiny's Restaurant.

Q. And that is entered on the basis of entries each day? A. That is correct.

Q. As well as monthly summaries?

A. That is correct.

Q. And what did you find entered in that book in respect to the expenses of the business?

A. Under the section entitled "Expenses" I found payments covering labor, purchases of food and services rendered Tiny's Waffle Shop for light, power, telephone, normal operating supplies, advertising, and other miscellaneous expenses. [2755]

Q. Without going into detail, did you find the same type of information, both as to daily receipts and as to expenses, entered into the 1946 book with respect to the Menlo Bar operation of the Menlo Club? A. I did.

Q. And did you also find the same entries on daily basis of the receipts and disbursements relative to

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(Testimony of Lawrence J. Semenza.)

the card room portion of the Menlo Club business?

A. I did.

Q. And from those figures were you able to determine the net income of the Menlo Club for the year 1946? A. I was.

Q. And is that set forth in your Exhibit M-1?

A. It is.

Q. And will you state the amount which you determined as the net income of the Menlo Club for the year 1946? A. $100,637.26; page 14.

Q. And does that amount differ from the amount which was shown on the return of the Menlo Club which was filed for that year? A. It does.

Q. And in your exhibit you set forth the amount which you determined as the correct income for that year? A. I did.

Q. Then how did you arrive at Mr. and Mrs. Remmer's share of [2756] the Menlo Club income for the year 1946 as shown on page 1 of your Exhibit M-1?

A. I took 55 per cent of the net income for that year as being Mr. and Mrs. Remmer's share of the profit.

Q. And you said that the profit was 100 thousand odd dollars before applying the 55 per cent factor. Was there some reduction made on account of salaries paid out of that 100 thousand?

A. On page 14 should be for the year 1945. I have given you $100,637.26 as profit for 1946 and it was the profit in 1945. Page 15 shows profit for 1946.

Q. The figure you gave us is shown correctly in

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(Testimony of Lawrence J. Semenza.)

the exhibit, you simply stated the wrong year in reciting it? A. That is right.

Q. On page 15 you have set forth your computation of the net income of the Menlo Club for 1946 as what figure? A. $67,047.92.

Q. I call your attention to prosecution's Exhibit 91, which is the amended return of the Menlo Club for the year 1946, and I will ask you to state the amount of net income of the Menlo Club shown on that return and read again the amount which you computed as the correct figure for that year.

A. Exhibit 91, 1946 income tax return of Menlo Club, shows net income of $66,596.42. My computation shows a net profit of $67,047.92.

Q. In other words, your increase is slightly less than a [2757] thousand dollars?

A. That is correct.

Q. And then you took 55 per cent of the 67 thousand figure as Mr. and Mrs. Remmer's share and entered that on page 1 of your exhibit as their share of the income for 1946? A. That is correct.

Q. Now, in connection with the books and records of the various functions of the Menlo Club for the year 1946, in making your analysis of the net income of the Menlo Club for that year, did you also take into account the various checks and check stub books, to the extent that they have been introduced in evidence here by the prosecution? A. I did.

Q. And did you find any evidence in this case relative to the Menlo Club operation any receipts,

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(Testimony of Lawrence J. Semenza.)

cash register tapes, or similar supporting documents?

A. There were some poker sheets introduced in evidence here.

Q. That is in respect——

A. To the Club operation.

Q. You are referring to the poker sheets introduced as Exhibits 114, 114A and 114B?

A. Yes, sir.

Q. They were only for the last day and first day of each year? A. That is correct. [2758]

Q. Did you find in evidence any poker sheets for the remaining days of the year?

A. I do not recall.

Q. Would it have been proper accounting procedure for you to have attempted to verify the entries in the books of account by examining the daily poker sheets?

Mr. Thompson: Objected to as immaterial what proper accounting procedure would have been with regard to exhibits not in evidence.

Mr. Avakian: Your Honor, my point is this—Mr. Weaver testified they had all the poker sheets but only——

The Court: You are asking now——

Mr. Avakian: I am asking if, in determining whether these books are accurate, it would have been logical for him to verify entries against the daily poker sheets which Mr. Weaver said they had, and still have, but were not brought into court. In other words, it is the accuracy of the books here challenged.

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(Testimony of Lawrence J. Semenza.)

The Court: You may answer the question.

A. In order to make an audit, I would have had to have had them.

Q. When you obtained from Mr. Weaver on July 11, 1949, the various books and documents listed on Exhibit 70 which you mentioned a moment ago, did he make any statement to you as to whether or not he had in his possession at that time cash [2759] register tapes of some of the businesses involved in this case?

Mr. Thompson: Objected to as calling for hearsay.

The Court: Objection sustained.

Mr. Avakian: We would like to show verifying data which would show the correctness of the books is in the possession of the prosecution and they won't bring them in.

The Court: Objection sustained.

Mr. Avakian: Your Honor, it is important for us to show whether or not these books were accurate, because the prosecution charged they are inaccurate. Now, we would like to show that they have in their possession the data which would show the accuracy or inaccuracy and they have not produced the cash register tapes which would show the books of account are correct. Your Honor has permitted Mr. Weaver to say the books are inadequate, so why can't we show he has the books and refuses to produce the data?

The Court: I will let the question be answered.

(Question read.)

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(Testimony of Lawrence J. Semenza.)

A. It is my recollection that he indicated there was such information.

Q. You have never personally been able to examine any of that type of material?

A. I have not.

Mr. Thompson: Objected to as calling for conclusion. [2760] As a matter of fact, your Honor, the evidence shows he was turned loose in the room and given permission to examine anything in there and take with him what he wanted to take out of the room. That is Mr. Semenza's own testimony and now Mr. Avakian asks him if he wasn't able to examine other records.

The Court: Objection sustained.

Q. Did you at any time actually examine those other records which remained in Mr. Weaver's office after you took the documents listed on Exhibit 70?

A. I did not.

Q. And it is true, is it not, at the time you took those books and records, you took them not in connection with this case, but in connection with another case? A. That is true.

Q. And you took what you thought at that time was sufficient for the immediate purpose you had at that time?

Mr. Thompson: That calls for conclusion.

The Court: Objection sustained.

Q. Will you state whether in your examination of the books and records in evidence in this case, as to these various enterprises for the years 1944,

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(Testimony of Lawrence J. Semenza.)

1945 and 1946, the books and records disclosed the existence of partnerships?

Mr. Thompson: Objected to, that calls for conclusion, your Honor.

The Court: Well, he may answer. [2761]

Mr. Thompson: The records are the best evidence. They speak for themselves as to what the enterprises are.

The Court: He may answer.

A. The records indicate existence of partnerships.

Q. Do they show capital accounts for various partners? A. They do.

Q. And the names of the partners?

A. They do in all cases except the B. & R. Smoke Shoppe.

Q. In the case of the B. & R. Smoke Shoppe the only records are diaries of daily receipts?

A. That is correct.

Q. No books of account were maintained for the B. & R. Smoke Shoppe as far as you know?

A. None that I know of.

Q. Would you state on the basis of what testimony or other evidence you allocated the assets of the B. & R. Smoke Shoppe on a partnership basis in preparing Exhibit M-1?

Mr. Thompson: Objected to on the ground the question invades the province of the jury.

Mr. Avakian: I do not think so; I am asking him to state the evidence.

The Court: Let us have the question.

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(Testimony of Lawrence J. Semenza.)

(Question read.)

The Court: I think the question merely asks for the evidence. [2762]

Mr. Thompson: I do not believe so. He is not asking the witness for the basis of any particular figure in the schedule or exhibit, he is asking for recitation of the evidence upon which he bases a legal conclusion that the assets of the B. & R. Smoke Shoppe should be allocated on a certain belief. The fact that he did so allocate is all he can testify to, as I view the situation. He is not competent to review all the evidence in the case and state as to such an item of evidence he reached the conclusion that this is a real partnership.

Mr. Avakian: No, your Honor, all the prosecution's accountants have testified that particular items in their exhibits were based upon testimony of Mr. so and so or exhibit so and so and so on, and this is simply an explanation.

The Court: All right, why don't you direct this witness' attention to a particular item and ask the same.

Mr. Avakian: It was with respect to the B. & R. Smoke Shoppe. I will be glad to do it.

Q. I am directing my question now, Mr. Semenza, to page No. 4 of Exhibit 1, which is designated B. & R. Smoke Shoppe, and which contains at the bottom under the heading, "Partners' Capital Accounts," certain amounts paid Mr. Remmer, Mr. Kyne and Mr. Lando. In preparing page 4 and

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(Testimony of Lawrence J. Semenza.)

in carrying forward from page 4 to your summary sheets on pages 1 and 2 the data in respect to the B. & R. Smoke Shoppe, did you have in [2763] mind in part the partnership returns of income of the B. & R. Smoke Shoppe, designated prosecution's Exhibits 78 and 79 and defendant's Exhibit "O," which I now hand you here?

A. Yes, I did.

Q. And did you also have in mind the testimony of Mr. Lando and Mr. Kyne with respect to the B. & R. Smoke Shoppe business? A. I did.

Q. I will hand you prosecution's Exhibit 112, which is designated 110 Eddy, will you state preliminarily what kind of a book that is? What does it represent?

A. It represents general ledger for the 110 Eddy Street enterprise.

Q. And did you find, in your examination of the books and records of the 110 Eddy business, which have been introduced in evidence here, a record was maintained of the receipts and disbursements of that business? A. I did.

Q. And was that kept on the basis of a daily record? A. It was.

Q. And was there also a ledger maintained for that business, showing the assets and liability accounts? A. This is the ledger.

Q. You are referring to Exhibit——

A. 112. [2764]

Q. Would you state then did the 110 Eddy

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(Testimony of Lawrence J. Semenza.)

Street business keep single entry books or double entry books? A. Double entry.

Q. And have you found in this case any evidence of any income of the 110 Eddy business which was not entered in the books of account of that business during the three years involved in this indictment?

A. I have not.

Q. Now would you state what type of books, that is, single entry or double entry, were maintained by the Day-Night Cigar Store business?

A. Double entry.

Q. And I hand you prosecution's Exhibit 117, is that the ledger account of that business?

A. The general journal and general ledger of the Day-Night Cigar Store.

Q. And did the books of that business maintain a daily record of receipts and disbursements?

A. They did.

Q. And also a record of asset and liability accounts? A. That is right.

Q. And did you find from the evidence in this case any evidence of income of the Day-Night Cigar Store which was not entered in those books of account? A. I did not. [2765]

Q. Would you state what type of books were maintained by the Transit Smoke Shoppe, that is, single entry or double entry?

A. Double entry.

Q. And did that business maintain a record of daily receipts and disbursements? A. It did.

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(Testimony of Lawrence J. Semenza.)

Q. And likewise a record of asset and liability accounts?

A. A general ledger was not maintained for that business.

Q. In other words, the records were in existence but the posting had not been made?

A. They had not opened a general ledger.

Q. And did you find from the evidence in this case any evidence of income of the Transit Smoke Shop which was not entered in the books of account? A. I did not.

Q. In sheet 1 of defendant's Exhibit M-1 you have set forth certain amounts as either profit or loss, representing Mr. Remmer's share of the profit or loss, as the case may be, from the 21 Club and San Diego Social Club for the years 1944, 1945, and 1946? A. I have.

Q. Would you state where you obtained that information?

A. From the revenue agents' reports and examinations for those years.

Q. That is, those reports of Revenue Agent Gould received [2766] here in evidence?

A. They are.

Q. And you have set forth on page 1 of Exhibit M-1 the exact amounts which Revenue Agent Gould determined in his report as Mr. Remmer's share of the profit or loss of that business for each of the three years? A. I did.

Q. Now with respect to page 2 of Exhibit M-1, I call your attention to item No. 20, which is designated "Cash in Safe Deposit Boxes and Safes" and

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(Testimony of Lawrence J. Semenza.)

particularly to the question mark which you have entered in each of the columns. Can you explain why you entered a question mark there?

A. The evidence indicates, the witnesses indicate, that there was cash in safe deposit boxes and safes at all times during this period, yet none of them testified any amount. There were no records here that would indicate any amount in the boxes.

Q. Now is it necessary, in preparing financial statements of assets, liabilities and net worth, to set forth the value of each asset and each liability in order to arrive at a correct net worth figure?

A. It is.

Q. And were you able to arrive at a specific net worth figure from analysis of the evidence in this case? A. No, I was not. [2767]

Q. I note under the heading of "Total Assets," you have entered in each column a specific amount, followed by the words, "Plus cash." Will you explain what you mean by that?

A. The amount entered there is the sum of the figures included in that column and in addition to that the evidence indicates that there was cash in boxes, so that in addition to the amount shown you would have to add the cash, if you knew what it was.

Q. And that is true, is it, of the four year-ends shown on that page? A. That is true.

Q. Now I note at the bottom after listing and totaling liabilities, you have a figure of net worth for each December 31st, which in each instance is

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(Testimony of Lawrence J. Semenza.)

followed by the words "Plus cash." Would you explain what that means?

A. I take the difference between the assets shown and the liabilities and I arrive at the net worth, but that net worth does not include any item of cash, consequently, net worth figures should be increased by the amount of cash that was on hand at that date.

Q. In computing net income on the net worth method, is it necessary to determine, as one of the steps in the procedure, the increase in net worth from the beginning to the end of each year?

A. It is. [2768]

Q. Were you able to determine the increase in net worth of Mr. and Mrs. Remmer from the beginning to the end of each year in this case?

A. Only to the extent of subject to the addition in cash could that amount be determined.

Q. If the amount of cash at December 31st of each year was different in one year than it was in another year, would the difference in cash have to be taken into account in computing net income on the net worth method? A. It would.

Q. On page 3 was set forth certain figures entitled "Elmer and Helen Remmer changes in Net Worth 1944 to 1946, Inclusive." The first line is entitled "End of period." Would you state the meaning of that term and the figures that have been entered in connection with it for each year?

A. From page 2 schedule page, I take the net worth at the end of December, 1944, which is $146,-

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(Testimony of Lawrence J. Semenza.)

922.62, plus cash. I do likewise for the other two years.

Q. And then the next line is entitled "Beginning of Period." Will you explain what that means and the meaning of the figures that are entered opposite it?

A. The beginning of the period of 1944, would be the net worth at the end of 1943, and the beginning net worth of 1945, would be the net worth at the end of 1944, and the beginning net worth of 1946, would be the net worth at the end of [2769] 1945.

Q. And then the last column is entitled "Three years combined." Can you explain the words and meaning of the figures that are entered under that column for the end and beginning of the period?

A. The end of the period would be the net worth shown on page 2 at December 31, 1946, $228,042.45, plus cash, and the net worth at the beginning of the three-year period would be the net worth shown on page 2 at December 31, 1943, which is $119,539.83, plus cash.

Q. Now the last line of this page is entitled "Increase or Decrease" and contains figures which are followed in each instance by the designations, "Plus or Minus Change in Cash." Could you explain the meaning of those figures and words. Let us take as an illustration for that purpose, Mr. Semenza, the figure that you have in the last column as the total for three years combined.

A. The amount of net worth at the end of 1946,

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(Testimony of Lawrence J. Semenza.)

is $228,042.45, plus cash. The net worth at the beginning of the three-year period is the net worth of December 31, 1943, which is $119,539.83, plus cash. The difference between beginning and ending net worth is $108,502.62, plus or minus any change you would have in cash. There is indication that cash existed, therefore, the difference in net worth there must be increased or decreased by any change in cash between the two dates. [2770]

Q. Just for illustration purposes, will you explain to us how that would work. Let us assume it both ways. First, let us assume that from the end of 1943, to the end of 1946, the amount of cash increased by ten thousand dollars. What would then be the figure as increase in net worth instead of $108 thousand?

A. It would be $118,502.62.

Q. And let us assume the reverse, that from the end of 1943, to the end of 1946, the amount of cash decreased by ten thousand dollars, what then would you have in place of 108 thousand dollar figure?

A. $98,502.62.

Q. And it is your testimony that you can not determine just what the change in net worth was without having the amount of change in cash for the year? A. That is correct.

Q. On page 2 of the exhibit on line 29 you have the item, "J. B. Scarlett," with a question mark at the end of 1946, and with a footnote reference for that question mark, and also for the figure of total liabilities, reading as follows: "Liabilities

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(Testimony of Lawrence J. Semenza.)

would be increased and net worth decreased by any liability determined to be due Mr. Scarlett at December 31, 1946." Would you explain the meaning of that item?

Mr. Thompson: I would say it is self-explanatory, your Honor. [2771]

The Court: You may explain it.

A. There is evidence in the testimony of Woodburn, Sr., and Jr., that a liability might have existed.

Q. At December 31, 1946?

A. December 31, 1946. There was no evidence in the record that would indicate that it actually did.

Q. In other words, from the testimony that was received in evidence, you were unable to determine on the basis of that testimony whether or not that liability was in existence at the end of 1946?

A. That is correct.

Q. So you simply entered a question mark?

A. That is correct.

Q. And if it should be determined by the jury that there was a liability at that time, the amount of that liability would decrease the net worth computation shown in your exhibit?

A. That is correct.

The Court: We will take a recess now but I will ask counsel to remain.

(Jury and alternate jurors admonished and excused at 4:00 p.m.)

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(In the absence of the jury.)

The Court: The Court will enter an order in the record to the effect that the defendant be, and he is hereby ordered to be here tomorrow at 10:00 o'clock at the trial and at every subsequent session of the Court during this trial.

(Recess taken at 4:00 o'clock.) [2772]

Tuesday—February 12, 1952
10:20 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumed the witness stand on further

Direct Examination

By Mr. Avakian:

Q. Mr. Semenza, on page 1 of your Exhibit M-1, you have set forth as the gross income included in the individual income tax returns of Mr. and Mrs. Remmer for the year 1946, the amount of $37,-254.31. I call your attention to prosecution's Exhibits 5 and 6, which are the 1946 returns of Mr. and Mrs. Remmer, individually, and is that the amount shown on the face of the returns as the gross income of the two combined? A. Yes.

Q. And is that the source of the figure which you have entered on Sheet 1 of Exhibit M-1?

A. It is.

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(Testimony of Lawrence J. Semenza.)

Q. Now from your examination of Exhibits 5 and 6, does it appear to you that in the computation of that gross income figure, whoever prepared the return failed to subtract from that figure the losses shown on the return in respect to the B. & R. Smoke Shoppe and 21 Club and San Diego Social Club?

A. In reporting the gross income on the face of the return they did not give effect to the loss of the 21 Club and B. & R. Smoke Shoppe, but they did on page 3 of the return. [2773]

Q. In other words, they subtracted it after they arrived at the gross income and before arriving at the net income? A. That is correct.

Q. What would be the proper method of handling losses of those two types?

A. Those losses should have been deducted from the gross income on page 1.

Q. In either event the net income would be the same, would it not? A. That is correct.

Q. Now if you were to proceed further with Sheet 1 of Exhibit M-1, so as to compute not only the gross income which you have shown, but the net income with respect to the year 1946, would any adjustment be made on account of the manner in which those two losses were deducted on the returns involved? A. Yes.

Q. And what would be the amount of that adjustment?

A. The amount of the adjustment would be the sum of the losses of the two enterprises, the total of which is $6,236.45.

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(Testimony of Lawrence J. Semenza.)

Q. Now, Mr. Semenza, if you were asked to prepare income tax returns of Elmer and Helen Remmer for the years 1944, 1945, and 1946, on the basis of the testimony and exhibits in this case, can you state the amount of gross income which you would compute for the two of them combined in each of the three years?

A. 1944, $11,253.07; 1945, $74,958.82, and 1946, $38,215.76. [2774]

Q. Those are the amounts which are set forth on page 1 of your Exhibit M-1?

A. That is correct.

Q. And in your opinion, as an accountant, would that be the proper computation to make of the gross income for each of those years?

A. Based on the evidence here it would be proper.

Q. Now with respect to pages 18 to 21, inclusive, of Exhibit M-1, which set forth in detail the debits and credits in Elmer Remmer's account No. 10 in Cal-Neva, Inc., a corporation, that is based, is it not, on Exhibit 146, which was introduced in this case, the general ledger of Cal-Neva, Inc., with the adjustments that you have set forth in your Exhibit M-1? A. It is.

Q. And Cal-Neva, Inc., kept its books on the basis of the fiscal year ending April 30th of each year? A. That is correct.

Q. And were there a number of year-end entries made as of April 30th in the Cal-Neva books which related to transactions that actually occurred before

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(Testimony of Lawrence J. Semenza.)

the preceding December 31st? A. There were.

Q. And Mr. and Mrs. Remmer's tax returns were on the basis of the calendar year, were they not? A. That is correct.

Q. And have you adjusted the entries in Exhibit 146 so as to [2775] set forth the transactions as of the time that they actually occurred, rather than as of April 30th, the date of the entry in Cal-Neva Books? A. I have.

Q. Now with those adjustments you have made, will you state the status of the account at the end of 1943? A. $23,152.77.

Q. And what does the amount represent?

A. The amount due Cal-Neva, Inc., by Mr. Remmer.

Q. Were there various transactions of both a debit and credit nature during 1944?

A. There were.

Q. That is, Mr. Remmer made payments to Cal-Neva and Cal-Neva made payments to Mr. Remmer? A. That is correct.

Q. And what was the status of the account at the end of 1944?

A. The sum of $18,361.68 was owed to Cal-Neva by Mr. Remmer.

Q. In other words, during the year 1944, the net effect of the transactions between them was that Mr. Remmer paid back about $5,000 of the amount he owed at the end of 1943?

A. That is correct.

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(Testimony of Lawrence J. Semenza.)

Q. What was the status of the account at the end of 1945?

A. There was due Cal-Neva from Mr. Remmer the sum of $83,732.33.

Q. During the year 1945, were there likewise both debit and [2776] credit transactions shown in the account?

A. Actually there were only debit transactions. The one credit item shown on page 19 is to adjust one of the other debit entries.

Q. And the net effect of the transactions during 1945 then was that Mr. Remmer borrowed a net of approximately 65 thosuand dollars from Cal-Neva during that year? A. That is correct.

Q. Now, during the year 1946 was there any time when the account was in balance?

A. In June of 1946, Mr. Remmer paid up the amount which he owed Cal-Neva.

Q. In other words, the full amount of 83 thousand dollars, which he owed at the end of 1945, was paid back to Cal-Neva in June of 1946?

A. That is correct.

Q. At that time he owed Cal-Neva nothing, is that correct? A. That is right.

Q. Subsequently, during 1946 and prior to the end of the year, were there additional transactions in that account?

A. Yes, there were amounts paid for the account of Mr. Remmer, withdrawn by him, and also amounts put back into Cal-Neva by him.

Q. And specifically did he withdraw 50 thousand

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(Testimony of Lawrence J. Semenza.)

dollars for payment to Mr. Graham and another 50 thousand dollars for payment to Mr. McKay on September 24, 1946? [2777] A. He did.

Q. And then on September 28th did he deposit 50 thousand dollars in Cal-Neva as a credit to his account? A. He did.

Q. What was the balance of the account at the end of 1946?

A. $60,742.39 was owed to Cal-Neva by Mr. Remmer.

Q. In other words, after balancing the account in June he made another borrowing during the balance of the year of 60,000 odd dollars?

A. That is correct?

Q. Now, in 1947, were there further transactions in that account? A. There were.

Q. And both of a debit and a credit nature?

A. Yes.

Q. What was the balance at the end of 1947?

A. $21,742.39 was owed to Cal-Neva by Mr. Remmer.

Q. Does that mean then that the net effect of the transactions during 1947 was that Mr. Remmer paid back approximately 44 thousand dollars during 1947 of the balance he owed at the end of 1946?

A. That is correct.

Q. And did he make any further payments during 1948?

A. There were two payments in 1948.

Q. And payments by Mr. Remmer to Cal-Neva?

A. To Cal-Neva. [2778]

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(Testimony of Lawrence J. Semenza.)

Q. Had he borrowed any additional money from Cal-Neva in 1948?

A. Well, not up to April 30, 1948.

Q. That was the close of the fiscal year of the corporation? A. That is correct.

Q. And what was the final amount that he owed Cal-Neva at April 30, 1948? A. $10,742.39.

Q. And that is the last entry that is shown in Exhibit 146, is it not? A. That is correct.

Q. And you know, do you not, that shortly thereafter the Cal-Neva corporation was dissolved and the property was sold by Mr. Remmer?

A. Yes.

Mr. Avakian: No further questions.

Cross-Examination

By Mr. Thompson:

Mr. Thompson: Your Honor, I would like to place Exhibit 183 and defendant's Exhibit M-1, page 2, where the jury can see them and make a comparison.

The Court: Very well.

Mr. Thompson: I will hand Exhibit 183 to the witness. You have a copy of Exhibit M-1, do you not, Mr. Semenza? A. I have, Mr. Thompson.

Q. At the outset, Mr. Semenza, I believe you testified that [2779] you prepared page 2 of Exhibit M-1, which represents a list of assets and liabilities for Helen and Elmer Remmer at December 31, 1943;

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(Testimony of Lawrence J. Semenza.)

December 31, 1944; December 31, 1945, and December 31, 1946, is that correct?

A. That is correct.

Q. And that is the same character of information, is it not, as set forth on plaintiff's Exhibit 183?

A. Yes, it is list of assets of Elmer F. Remmer and Helen Remmer.

Q. And according to Mr. Weaver's testimony, those assets were valued and computed at each year-end here involved, that is, 1943, 1944, 1945 and 1946?

Mr. Avakian: Just a moment—I do not so understand the testimony. I believe it was Mr. Brady testified regarding Exhibit 183. The question assumes a fact contrary to the evidence.

Mr. Thompson: Perhaps I misquoted. It should have been Mr. Brady, is that correct?

A. I think it was.

Q. First, Mr. Semenza, let us take the items as to which there appears to be no disagreement. Your first item, Item 1, Bank of America, Tracy Branch, is the same item which is set forth as Item 17 on Exhibit 183, is it not?

A. That is correct. [2780]

Q. And the balances you show at each year-end in that bank account on Exhibit M-1 are the same as on Exhibit 183? A. That is correct.

Q. And you draw that information from the records of the Bank of America, Tracy Branch, which the government produced here in evidence, is that correct? A. I did.

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(Testimony of Lawrence J. Semenza.)

Q. Now, referring to your Item No. 2, Bank of America, Grand Lake Branch, Oakland, California, that is the same, is it not, as Item 20 on government's Exhibit 183? A. It is.

Q. And the year-end balances in that account for the years 1945 and 1946 are the same in Exhibit M-1 as in Exhibit 183? A. They are.

Q. And you also obtained that information from the records of the Bank of America, Grand Lake Branch, which the government produced in evidence? A. I did.

Q. Next item you have listed as Item 3 in Exhibit M-1 is headed "United States Government Bonds" and that is the same, is it not, as Item 1 on government's Exhibit 183? A. It is.

Q. And the year-end balances that you show as of the year 1946 listed on each exhibit are the same on Exhibit M-1 and the same on Exhibit 183? [2781]

A. They are.

Q. You obtained the information from which you prepared that item of your Exhibit M-1 from the Treasury Department records which the government produced here in evidence, did you not?

A. I did.

Q. And those are Exhibits 149 and 150, or do you have the record?

A. I do not have the record of that. I believe that is correct, however.

Q. Exhibits 150, and 150A. Now, Mr. Semenza, if you eliminated from this record, Exhibit 150 and Exhibit 150A, which is a record of the Treasury De-

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(Testimony of Lawrence J. Semenza.)

partment of the United States, what record did you find in other books and records here in evidence relating to the purchase and ownership of United States Government bonds by Elmer Remmer or Helen Remmer?

A. My recollection in the exhibit of 110 Eddy Street there is an entry charging Mr. Remmer with three thousand dollars withdrawn from that business for the purchase of bonds.

Q. I believe that is substantially correct. Would you like to have the book and verify that?

Mr. Avakian: I think that is correct.

A. I think it is correct.

Q. And with that one exception, is there any other record in evidence, other than the Treasury Department records, showing the purchase and ownership of government bonds by Elmer and [2782] Helen Remmer during the years in question?

A. With the exception of that 110 Eddy, I recall none.

Q. Now, the next item on Exhibit M-1, your Item No. 4, records an amount due from Hazel Harris, is that correct? A. That is correct.

Q. And that is the same as Item 13 on government's Exhibit 183? A. It is.

Q. And the year-end balances shown on Exhibit M-1 for that item at the end of 1945 and at the end of 1946 are the same as shown on government's Exhibit 183? A. They are.

Q. Do you recall now on what evidence or exhibits you based that entry in Exhibit M-1?

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(Testimony of Lawrence J. Semenza.)

A. It is my recollection that Mrs. Harris testified, and there are also checks evidencing various payments from Mrs. Harris to Mr. Remmer.

Q. I hand you Exhibit 28, Mr. Semenza, are those the checks regarding payments of a loan from Mr. Remmer to Hazel Harris to which you refer?

A. They are.

Q. And according to the testimony, what was the original amount of that loan?

A. I do not recall at this time; I think it was two thousand or $2500.

Q. I believe the record shows that Mrs. Harris testified it [2783] was $2500, as did her husband, Mr. Harris. The checks in Exhibit 28, regarding payments on that loan, total seven in number, do they not? A. They do.

Q. And according to the checks, what amounts were paid on the loan in the year 1945?

A. $750.

Q. In the event those were the only payments on the loan in the year 1945, the loan having been made in the year 1945, the year-end balance at December 31, 1945, should have been $1,750, should it not?

Mr. Avakian: Just a moment, your Honor, I object to that question as assuming facts contrary to the evidence, because there is other evidence in this case, consisting of the bank deposit slips in Mrs. Remmer's account in the Grand Lake Branch and of the bank ledger statements of Mrs. Harris' account, from which it appears, as both the govern-

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(Testimony of Lawrence J. Semenza.)

ment's exhibit and Mr. Semenza's exhibit show, the balance at the end of 1945, was $1,250. Now there is no evidence to support the assumption in Mr. Thompson's question that only $750 had been paid up to that date and there is no conflict between the two exhibits. Mr. Brady reached exactly the same conclusion as Mr. Semenza. As I stated, there are these other documents in evidence which would support that.

The Court: Let me have the question. [2784]

Mr. Thompson: I am entitled, I believe, to test Mr.——

The Court (Interceding): Wait a minute, Mr. Thompson. Let me have the question.

(Question read.)

The Court: Objection overruled.

A. My recollection also the testimony of Mrs. Harris was to the effect there were some other payments for which she did not have checks.

Q. Is it not true that Mrs. Harris testified that during the years 1945 and 1946 she made nine $250 payments, that she had lost or misplaced two of the checks and she did not know whether those two checks represented payments in 1945 or payments in 1946?

A. I know she testified that she had lost some checks during that period and I believe she also indicated that the amount due to Mr. Remmer was $1,250 at the end of 1945.

Q. In the event she did not so testify, that would

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(Testimony of Lawrence J. Semenza.)

not be the basis for your figures in the exhibit?

Mr. Avakian: Objected to as argumentative and speculative.

The Court: You may answer the question.

A. I would have to draw from the evidence in the record.

Q. Now in making the entries on your Item 4 in Exhibit M-1, which is the same as Item 13 in government's Exhibit 183, you relied upon the records and testimony of Hazel Harris, is that [2785] correct? A. I did.

Q. And in the event the testimony and records produced here in court by Hazel Harris should be eliminated, what entries did you find in defendant's books and records and in the books and records of enterprises in which he was interested, here in evidence, relating to a loan to Hazel Harris?

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial. There is no requirement anywhere that books and records of a business maintain records of private loans. There is no foundation laid to show that it is custom of business people to keep records of private loans not related to the business, and the question is argumentative.

The Court: Objection overruled. Answer the question. Do you understand the question?

A. I do. I found no records in any of the enterprises of any indication of a loan by Mr. Remmer to Mrs. Harris.

Q. Did you find any record in evidence here whatsoever of any loan to Mrs. Harris, other than

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(Testimony of Lawrence J. Semenza.)

the records and testimony of Mr. and Mrs. Harris and the government bank exhibits here produced in court? A. I can't recall anything.

Q. The next item on Exhibit M-1, Item 6, records an obligation due Mr. Remmer from Albert Villaudy, is that correct?

A. That is correct.

Q. And that is the same item as appears as No. 24 on government's [2786] Exhibit 183?

A. It is.

Q. And the entries for the year-ends 1943, 1944, 1945 and 1946 are the same in Exhibit M-1 and Exhibit 183? A. They are.

Q. Now we will refer to Item No. 12 on Exhibit M-1, which is stated as "Equity in 21 Club and San Diego Social Club." That is the same item combined as set forth as Items 18 and 19 in government's Exhibit 183, is it not?

A. That is correct

Q. And if you take Items 18 and 19 of government's Exhibit 183, where the interest in the 21 Club and San Diego Social Club has been separated and combine them, that is, add them together, do you not arrive at the same result that you have in entering them as one item, No. 12, in your Exhibit M-1? A. That is correct.

Q. And the year-end balances are the same for the years 1943, 1944, 1945 and 1946?

A. They are.

Q. Your next item, No. 13, on Exhibit M-1, is

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(Testimony of Lawrence J. Semenza.)

the same, is it not, as Item No. 9 on government's Exhibit 183? A. It is.

Q. And the amount shown as investment in Cal-Neva, Inc., capital stock, as of December 31, 1946, on Exhibit M-1 is the same as on Exhibit [2787] 183? A. That is correct.

Q. Your next item, No. 14, Mountain City Consolidated Copper Company stock on Exhibit M-1 is the same as Item 10 on Exhibit 183, is it not?

A. That is correct.

Q. And the balance at December 31, 1946, for that item, which is $2,400, is the same on government's Exhibit 183 and on your Exhibit M-1?

A. It is.

Q. Now the next item is the same, as I view your Item 16, Moraga Estates property, is not that the same item as set forth on Item 14 on government's Exhibit 183? A. It is.

Q. And the year-end balances as of the ends of the years 1943, 1944, 1945 and 1946 for the item, Moraga Estates property, are the same on Exhibit M-1 and Exhibit 183? A. They are.

Q. What is the source of the information from which you obtained the figures set forth as Moraga Estates property?

A. There were exhibits presented by the Title Company in Oakland or Alameda, chosing the purchase of this property, and the testimony of the man who presented it.

Q. And those are the escrow records produced

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(Testimony of Lawrence J. Semenza.)

by the Oakland Title & Insurance Company and Alameda East Bay Title Company?

A. I think that is the title. [2788]

Q. And if you eliminated those government exhibits relating to the Moraga Estates property from the record in this case, what record or entry do you find in other books and records here in evidence, showing the investment by Mr. and Mrs. Remmer, or either of them, in that property?

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial, whether investment for residential property are reflected in the records of a business enterprise or not.

The Court: Objection overruled. Answer the question.

A. I find nothing in the books of these enterprises indicated any investment property.

Q. Or in any other books, other than the government exhibit produced through the two title companies mentioned, is that correct?

A. Well, I know of no other books here of these enterprises.

Q. Your next item, which I believe is identical, is set forth as Item 17 on Exhibit M-1, Richmond Annex property. Is not that identical with Exhibit 183, Item 15? A. It is.

Q. And are not the year-end balances for that item, Richmond Annex property, for the year-ends 1943, 1944, 1945 and 1946, the same on Government's Exhibit 183 and on Exhibit M-1?

A. They are.

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(Testimony of Lawrence J. Semenza.)

Q. What is the source of the information from which you obtained the figures entered for the item, Richmond Annex property? [2789]

A. There are exhibits presented here by the title company, escrow sheets, and it is my recollection there was some evidence of money borrowed from the Bank of America to buy some of this property.

Q. The records of the Bank of America are Exhibit 40, are they not? That is the record of a loan made by Helen and Dorothy Remmer from the Bank of America?

A. I believe it is. It may possibly be on the Moraga Estates property, I don't recall.

Q. And the escrow records to which you refer relating to the Richmond Annex property, are the records produced as government's exhibits through the witness from Alameda East Bay Title Company and the Oakland Title Insurance Company?

A. I believe that was it, unless the Contra Costa Title Company. This was in Contra Costa County, so it may possibly have been another title company.

Q. There are two sets of title company escrow records in evidence, are there not?

A. That is right.

Q. And with the exception of those two sets of government exhibits, did you find any other record in any of the books, records, exhibits and papers in evidence here, relating to the investment in the Richmond Annex property?

Mr. Avakian: We object, as incompetent, ir-

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(Testimony of Lawrence J. Semenza.)

relevant and immaterial, for the reason previously stated and in addition, [2790] your Honor, for the reason that it affirmatively appears from the evidence that there are books and records of these enterprises not in evidence here but in the possession of the government, which might contain such information.

The Court: Objection overruled.

A. I know of no entries in the books and records in evidence here showing any investment in that property.

Q. Now your next item, Item 18, on Exhibit M-1, Moraga Highlands property, is the same, is it not, as Item 21 on government's Exhibit 183?

A. It is.

Q. And the year-end balances for that item at December 31, 1945 and December 31, 1946, are the same on Exhibit M-1 and government's Exhibit 183, are they not? A. They are.

Q. What was the source of the information from which you obtained the data which you have set forth opposite Item 18, Moraga Highlands property?

A. Exhibits of the title company showing the escrow on the particular purchase.

Q. And with the exception of those government exhibits did you find any evidence here in court, any other entry or record relating to the investment in Moraga Highlands property?

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial, whether any records of

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(Testimony of Lawrence J. Semenza.)

the purchase of residential [2791] property are maintained in the records of business enterprises, and also for the further reason it appears from the evidence the prosecution has in its possession other records which have not been produced in court.

The Court: Objection overruled.

A. I found no evidence in the records in evidence here of any purchase of Moraga Highlands property.

Q. Now the next item on Exhibit M-1 which appears to be the same as on Exhibit 183 is your Item 22, "Notes Payable to Bank of America on Moraga Estates," and is that item not the same as Item 28 on government's Exhibit 183? A. It is.

Q. And are not the year-end balances for the items, "Notes Payable to Bank of America on Moraga Estates" the same at December 31, 1943, and December 31, 1944, and the balance of the years on government's Exhibit 183 and your Exhibit M-1?

A. They are.

Q. What is the source of the information from which you made those entries on your Exhibit M-1?

A. Evidence belonging to the Bank of America.

Q. And you refer, do you not, to Exhibit 40? I hand you Exhibit 40, Mr. Semenza, which is the transcript of the account of Helen Remmer and Dorothy A. Remmer——

Mr. Avakian: If it will save time, we are willing to accept Mr. Thompson's designating—I do not think the number [2792] is important, it is the bank.

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(Testimony of Lawrence J. Semenza.)

Mr. Thompson: The name of the bank here apparently does not appear.

Q. The Oakland County office of the Bank of America, is that the exhibit on which you relied in setting up the item? A. It is.

Q. Your Item 22.

A. I believe the testimony of the bank representative ties to this particular exhibit, so it would be the Bank of America.

Q. And if you eliminated that exhibit, government's Exhibit 40, and the testimony of the bank official who produced it from the record, do you find any evidence here in court, any other record or entry, relating to the obligation of Mr. or Mrs. Remmer and Dorothy Remmer to the Bank of America?

Mr. Avakian: Just a moment—that is objected to, your Honor, as incompetent, irrelevant and immaterial as to whether a record of a private loan for residential property was maintained in the records of business enterprises. No foundation laid to show that there is any legal requirement that any record be maintained of any such private loans and the record affirmatively shows that there are other documents and records in possession of the prosecution which have not been presented in court.

The Court: Objection overruled.

A. I found none. [2793]

Q. Your next item on Exhibit M-1, Mr. Semenza, Item 23, entitled "Due Graham and McKay

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(Testimony of Lawrence J. Semenza.)

on Purchase of Cal-Neva Stock," is the same, is it not, as Item 29 on government's Exhibit 183?

A. It is.

Q. And the balance shown to be due on the loan at December 31, 1946, is the same on Exhibit M-1 and Exhibit 183? A. It is.

Q. The next item, Mr. Semenza, under "Liabilities," Item 24 on Exhibit M-1, due Ogden F. Monahan, is the same, is it not, as Item 30 in government's Exhibit 183? A. It is.

Q. And the entries on that item as of the year-ends 1943 and 1944 are the same on both exhibits, M-1 and 183? A. They are.

Q. On what evidence did you rely in setting up the information in Item 24, due Ogden F. Monahan?

A. There is a judgment, I think of the Superior Court of San Francisco County, in that amount, a photostatic copy of it, I believe, was in evidence here. Ogden Monahan testified, if I recall correctly, that the judgment was satisfied in 1945.

Q. There is also, is there not, a certified copy of the satisfaction of judgment as a government exhibit? A. That's correct.

Q. Now if you eliminated from the record in this case the certified copy of the judgment obtained by Mr. Ogden Monahan [2794] against Mr. Remmer, the certified copy of the satisfaction of that judgment, and the testimony of Ogden F. Monahan, do you find any other entry or record in the ex-

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(Testimony of Lawrence J. Semenza.)

hibits, records, books and documents here in evidence relating to that obligation?

Mr. Avakian: Objected to, your Honor.

The Court: You have covered the grounds in objections to similar questions. Have you any additional grounds?

Mr. Avakian: Yes, your Honor, in addition to the grounds made to similar questions, I would like to make this additional ground, that there is no difference between obligations of this kind and obligations for furniture or an automobile or meals or clothing or anything else. There is no requirement that any business man keep a record in his business record of those personal matters, which have no bearing on the computation of income. They do not enter into business expenses or receipts and the implication of these questions there would be something wrong with them is entirely improper and contrary to the law.

The Court: Objection overruled. That is practically the same ground as the other objections.

Mr. Avakian: Further elaboration of the two, your Honor.

Mr. Thompson: Would you like the question read, Mr. Semenza?

A. It is a question whether I found anything in the books and [2795] records evidencing that liability. I did not.

Q. I also refer, Mr. Semenza, to your Item 25 on Exhibit M-1, due to William J. Graham, showing an obligation at December 31, 1946, of ten thou-

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(Testimony of Lawrence J. Semenza.)

sand dollars. Is that not identical with Item 31 on government's Exhibit 183? A. It is.

Q. And upon what evidence and exhibits do you rely in support of that entry?

A. Mr. Graham's testimony.

Q. And he also produced a check, did he not?

A. He also produced a check, I believe, when he was recalled.

Q. And if you eliminated Mr. Graham's testimony and the check he produced from the record and exhibits and papers and documents in this case, do you find any other entry or record relating to that obligation?

Mr. Avakian: Objected to on the grounds previously stated in regard to all these private transactions. They are non-business in nature.

The Court: Objection overruled.

A. I found none.

Q. I believe, Mr. Semenza, that that covers the items on Exhibit M-1 in which you agree to the decimal point with the same entries made on government's Exhibit 183. Do you know of any others?

Mr. Avakian: Your Honor, if I may call attention to one [2796] other, Item 27 on Exhibit M-1 is the same as Item 33 on government's Exhibit 183, as of the year 1946, although it is different as of the year 1945.

Mr. Thompson: That makes a difference to me, Mr. Avakian.

Mr. Avakian: I didn't know whether you overlooked it or not.

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(Testimony of Lawrence J. Semenza.)

Mr. Thompson: Thank you.

A. I believe that is all, Mr. Thompson.

Q. Now let us investigate the differences between Exhibit M-1 and government's Exhibit 183. The first item I find is your Item No. 5, under the heading "Assets" on Exhibit M-1, due from Mayris Chaney $2,500 as of December 31, 1943. Is there any comparable entry on government's Exhibit 183?

A. There is not.

Q. Upon what testimony or evidence do you base the entry, Item No. 5, on Exhibit M-1?

A. The testimony of Mayris Chaney Martin.

Q. And that was to the effect that she had borrowed $2,500 in cash from Elmer Remmer in August or September of 1943 and had repaid none of it by December 31, 1943, is that correct?

A. That is correct.

Q. Do you know the source of the cash which Mr. Remmer loaned to Mayris Chaney at that time?

A. I do not.

Q. During the year 1943 Cal-Neva was operating, was it not? [2797]

A. I don't know whether it was or not. I was not here at the time.

Q. You do recall the testimony of Mayris Chaney that the $2,500 loan was made at Cal-Neva?

A. Yes, I do. It probably was operating that year.

Q. And is it not true that Mr. Elmer Remmer was the sole active manager of Cal-Neva, Inc., in

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(Testimony of Lawrence J. Semenza.)

its operations say during the years of 1940 to 1946?

Mr. Avakian: Objected to, your Honor, as being incompetent, irrelevant and immaterial, having no connection, no materiality and no relevancy to the particular subject of inquiry at this time, re the loan to Mayris Chaney.

The Court: Objection overruled.

A. I presume he was the general manager. I do not know in the years 1942 to 1945 because I was not here. There is evidence in 1946 that James Jeffress had quite a bit of authority, as he took up most matters with me regarding the operation and financial activities of the company.

Q. And did it not occur, in the operation of Cal-Neva Lodge, that Mr. Remmer would withdraw cash funds from the corporation, of which no record was made and which you had to charge back against him at the end of the year, in order to balance the books?

Mr. Avakian: Object to that as being speculative, calling for conclusion and opinion and hearsay of the witness, unless [2798] the question is limited to the years with which the witness had personal familiarity and I call attention to his testimony a moment ago that he did not have personal knowledge as the years he was in the navy, 1942 to 1945.

The Court: Objection overruled. You may answer the question.

A. Well, no evidence of any record of with-

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(Testimony of Lawrence J. Semenza.)

drawals were brought into our office, so we proceeded on the other basis in closing the records at the end of the fiscal years.

Q. And to what do you refer by other basis?

A. Of charging him with all cash that was unaccounted for during the season.

Q. I believe the next item as to which there is a difference between Exhibit M-1 and government's Exhibit 183, is Item No. 7 on Exhibit M-1, "Equity in B. & R. Smoke Shoppe." The same subject matter is dealt with, is it not, Mr. Semenza, in Item 2 on government's Exhibit 183? A. It is.

Q. And as Schedule 1, page 4 of Exhibit M-1, you have set up a statement of computing the net worth of the B. & R. Smoke Shoppe as you view the evidence, is that correct? A. I have.

Q. Mr. Semenza, I would like to hand you plaintiff's Exhibit 169. That represents, does it not, a statement of net worth of the B. & R. Smoke Shoppe prepared by a government [2799] accountant? A. It does.

Q. And it covers the same subject matter as page 4 of your Exhibit M-1? A. It does.

Q. Now the principal difference between page 4 of Exhibit M-1 and Exhibit 169 is the fact that the government, on Exhibit 169, included as a bank roll the sum of 15 thousand dollars at December 31, 1943, and December 31, 1944, and the sum of 20 thousand dollars as a bank roll at December 31, 1945, and December 31, 1946, whereas the only bank roll item that you included on page 4 of Exhibit

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(Testimony of Lawrence J. Semenza.)

M-1 is five thousand dollars at December 31, 1945, is that correct? A. That is correct.

Q. Is it your inference and conclusion, from the evidence, that the B. & R. Smoke Shoppe operated without any bank roll at the end of 1943 and end of 1944? A. Not necessarily.

Q. You have also, have you not, Mr. Semenza, in the statement for the B. & R. Smoke Shoppe, page 4 of Exhibit M-1, set us as an asset of the B. & R. Smoke Shoppe office improvements, fixtures and equipment in amount of $7,489.76 at December 31, 1945, and $8,600.20 at December 31, 1946?

A. I have.

Q. And you have set up as a liability of the B. & R. Smoke Shoppe to the Menlo Club the sum of $7,489,76 at the end of [2800] 1945 and the sum of $8,600.20 at the end of 1946? A. I have.

Q. These same identical items have been set up as the personal assets and personal liabilities of Elmer Remmer on government's Exhibit 183, the assets being shown under Item 22, 50-52 Mason Street Office, and the liabilities under Item 26, due to Menlo Club from Mason Street office, is that not correct? A. That is correct.

Q. And the identical amounts have been used in each exhibit, the only difference being that you have concluded that this furniture, office improvements, fixtures and equipment, were assets of the B. & R. Smoke Shoppe rather than personal assets of Elmer Remmer?

A. Well, from the testimony of Mr. Maundrell,

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(Testimony of Lawrence J. Semenza.)

the fact that the office was at 50-52 Mason, the improvements could have been even for the Menlo Club, if they considered it the Menlo Club office; then they wouldn't have been in the B. & R. Smoke Shoppe. It would appear from the testimony of Mr. Maundrell when he said it was for 50 Mason Street, possibly it would be an amount paid out for 50 Mason Street, and I assume 50 Mason is the B. & R. Smoke Shoppe.

Q. Well, at the time you reached the conclusion that the improvements to the office at 50-52 Mason Street and the fixtures and equipment in amount of approximately $7,500 in 1945 [2801] and an additional amount of some $1,100 in 1946, applied to the B. & R. Smoke Shoppe, did you have in mind Mr. Maundrell's testimony to the effect that that office was used not only for the B. & R. Smoke Shoppe, but for the Menlo Club, the 110 Eddy bar, the Day-Night Cigar Store and the 186 Club, and that it was operated in connection with a warehouse where considerable quantity of liquor was stored?

A. I did have it in mind.

Q. You had it in mind?

A. And I would have had to ask Mr. Maundrell how it should be handled, because it might have been allocated over all the enterprises.

Q. Mr. Semenza, at the time you reached the conclusion that the improvements, furniture and equipment in 50-52 Mason Street office was assets of the B. R. Smoke Shoppe, rather than the assets of Elmer Remmer personally, did you have in mind

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(Testimony of Lawrence J. Semenza.)

government's Exhibit 24 and that part of it which is a signature card for a bank account of the Crocker First National Bank, San Francisco, in the name of E. F. Remmer or A. F. Pritchett, and the notations on the back of the card: "Business, liquor warehouse, 52 Mason Street, joint business address; W. E. Kyne, introduction address A. F. Pritchett, 56 Mason Street S. E., deposit $700, opened by V. M. Alvord," did you have that in mind at the time you reached that conclusion? [2802]

A. Yes, I was aware of that. There are a number of factors here which might cause another accountant to allocate it to different places. There were a number of partners involved here also.

Q. As a matter of fact, there were different partners or associates for most of the enterprises here involved, is that correct?

A. That is correct.

Q. And at the time you reached that conclusion, Mr. Semenza, that these improvements to 50-52 Mason Street office and the furniture and equipment were the assets of the B. & R. Smoke Shoppe, did you have in mind plaintiff's Exhibit 123? I will read it to you and then show it to you: (Reads Exhibit 123,) A. Yes, I had it in mind.

Q. Mr. Semenza, the net result of the changes you made in your treatment of the B. & R. Smoke Shoppe on Exhibit M-1 as compared to the government's treatment on Exhibit 183, is that you reduced the net worth attributable to Elmer Remmer as shown on government's Exhibit 183 at December

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(Testimony of Lawrence J. Semenza.)

31 1943, from $18,413.38 to $1,706.69, as shown on Exhibit M-1, is that correct?

A. That is correct.

Q. And when you refer to the year 1944, you reduced the net worth from that business from $18,-231.47, as shown on government's [2803] Exhibit 183, to $1,817.61, as shown on Exhibit M-1?

Mr. Avakian: Objected to as statement contrary to the evidence, perhaps inadvertently. Mr. Thompson referred to a reduction in net worth of the business, whereas the figure that he read from Mr. Semenza's exhibit is not net worth of the business, but rather Mr. Remmer's 50 per cent equity in the business.

Mr. Thompson: I intended to state, your Honor, he reduced the amount of asset attributable to Mr. Remmer from the amount stated.

A. That is true.

Q. And with reference to the year-end 1945, your treatment has resulted in a reduction of the worth of the asset attributable to Mr. and Mrs. Remmer from $23,344.66 to $4,165.71?

A. That is true.

Q. And as of December 31, 1946, your treatment has resulted in a reduction of that asset from $23,-293.39 to $1,216.58? A. That is correct.

Q. Now with reference to the B. & R. Smoke Shoppe, Mr. Semenza, and the schedule you prepared on page 4 of Exhibit M-1, in allocating the net worth of the business among various people, you have assigned 50 per cent of the value of that

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(Testimony of Lawrence J. Semenza.)

business to Mr. Remmer, 25 per cent of the value of the business to Mr. Kyne and 25 per cent of the value of the business to Mr. Lando, is that [2804] correct? A. That is correct.

Q. And you have set forth partners' capital accounts at the bottom of page 4? A. Yes.

Q. Have you included in the capital account for Elmer F. Remmer any amount for the investment he made in purchasing the business?

A. I gave effect to this in this manner, Mr. Thompson—it was the testimony of Mr. Lando and Mr. Kyne that Mr. Remmer was to have his investment returned to him before they were to draw from the business. From examination of the 1942 and 1943 returns of the B. & R. Smoke Shoppe, it appeared sufficient profit had been made to return Mr. Remmer's investment to him. Therefore, I concluded that he had received his original investment back and that Mr. Lando also testified to the fact that they settled their markers between them at the end of the year, and I concluded that at that time they withdrew everything from the business but their bank roll.

Q. How much did they leave in for the bank roll?

A. I was unable to determine from the testimony any amount.

Q. Well, as a matter of fact, Mr. Semenza, were you able to determine from the testimony that Mr. Remmer had actually withdrawn any specific

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(Testimony of Lawrence J. Semenza.)

amount at any time from the B. & R. Smoke Shoppe?

A. No, I was not able to determine a specific amount. [2805]

Q. You merely assumed that because the income tax return showed that the business earned a certain amount of money during the years 1942 and 1943 that that money was actually withdrawn by Mr. Remmer rather than by Mr. Lando or Mr. Kyne?

Mr. Avakian: Objected to as asked and answered and argumentative.

The Court: Objection overruled.

A. Mr. Lando indicated that Mr. Remmer was to have his investment back before they were to draw anything and I then took the position that they would have proceeded on that basis. They may have proceeded on another basis, I don't know.

Q. As a matter of fact, there are no books or records here available to show what basis they proceeded on? A. There are none.

Q. And are there any books or records here in evidence which set up partners' capital accounts for the B. & R. Smoke Shoppe?

A. There are not.

Mr. Avakian: Objected to for the reason that the evidence factually shows that the prosecution has not produced all the books and records in its possession.

The Court: Objection overruled. You may answer the question. [2806]

A. I have already answered.

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The Court: The answer will stand. We will take our recess now.

(Jury and alternate jurors admonished and recess taken at 11:45 a.m.)

February 12, 1952—2:00 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand on further

Cross-Examination

By Mr. Thompson:

Q. Mr. Semenza, I would like to hand you government's Exhibits 111, 111A, 111B and 111C, which are daily reminders of the B. & R. Smoke Shoppe, and also government's Exhibit 157, which is a transcript taken from a daily reminder for the B. & R. Smoke Shoppe for the year 1944 which has been lost. Are those the records upon which you relied in setting up the income and expenses of the B. & R. Smoke Shoppe for the years in question?

A. Yes, sir, and the tax returns for the year 1946.

Q. Would you like that return also? Is Exhibit 59 the return you have in mind? A. Yes, sir.

Q. Now, Mr. Semenza, the B. & R. Smoke Shoppe books which you have before you, 111 series of exhibits and Exhibit 157, [2807] are the only

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(Testimony of Lawrence J. Semenza.)

books or records of the B. & R. Smoke Shoppe as such which are available in evidence, is that correct? A. They are.

Q. And those records consist, do they not, of the single entry each day, either win or lose?

A. That is correct, except for the last year, I believe, for 1946, they show the gross play pay-out, net win or lose.

Q. From that record, Mr. Semenza, can you properly, as an accountant, in accordance with good accounting practice, determine the net income of the B. & R. Smoke Shoppe for the years in question?

A. If the income shown in 1944 is correctly recorded, you could.

Q. That is the only year as to which you have any question?

A. There is no record for 1945 so I am not in a position to make any statement as to it.

Q. Is it possible from those records, Mr. Semenza, to determine the gross receipts of the B. & R. Smoke Shoppe?

A. Only in those instances where they have reflected them in the records. However, if the net win or loss was correct, it wouldn't make any difference.

Q. If it is correct? A. That's right.

Q. And is there any way you, as an accountant, bearing in mind the testimony of Mr. Kyne that all disbursements were made out [2808] of the funds on hand before the net figures were recorded, is there any way you can determine whether such

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(Testimony of Lawrence J. Semenza.)

disbursements were deductible expenses or otherwise? A. There wouldn't be.

Q. And there is no way from the records that you have before you? A. No.

Q. Also bearing in mind, Mr. Semenza, the testimony of Mr. Lando, to the effect, and also I believe Mr. Kyne, that he, Mr. Kyne and Mr. Remmer withdrew money from time to time from the funds on hand and deposited markers, and not having any of the markers available, is it possible to determine how much, if anything, each of those persons withdrew? A. No, it is not.

Q. Now on your Exhibit M-1, page 4, you set up some accounts which you designate "Partners' Capital Accounts," and we have reference to the fact that you have not shown in Mr. Remmer's capital account a credit for his original investment in the B. & R. Smoke Shoppe.

Mr. Avakian: Objected to as an incorrect statement of his testimony. He testified in computing the capital accounts he gave credit for the original investment and made adjustments with respect to it, as he fully explained this morning. The question assumes a factual premise contrary to the witness' testimony this morning. [2809]

The Court: Let me have the question.

(Question read.)

The Court: The question is a little difficult.

Mr. Thompson: I will reframe it.

Q. In your schedule designated "Partners'

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(Testimony of Lawrence J. Semenza.)

Capital Accounts," to which I refer, Mr. Semenza, have you credited Mr. Remmer with his original investment in the B. & R. Smoke Shoppe?

A. I took it in consideration in arriving at this partners' capital account.

Q. And you explained, I believe, the way you took it into consideration is that you assumed that he had been repaid the amount of his capital investment in the years' operations preceding December 31, 1943, is that correct?

A. Based on the testimony of Mr. Kyne and Mr. Lando that Mr. Remmer was to receive his investment back first and that they settled up on the markers at the end of each year, I gave effect to the fact that Mr. Remmer was probably paid back for his original investment.

Q. In view of Mr. Kyne's and Mr. Lando's testimony, is it not a fact that Mr. Remmer originally invested ten thousand dollars in the B. & R. Smoke Shoppe, consisting of a payment of $2,500 for the business itself and a contribution of $7,500 for the bank roll? A. That is correct.

Q. And is there any record whatsoever in the records here in [2810] court showing that Mr. Remmer had at any time been repaid that investment?

Mr. Avakian: Objected to, first of all the matter has been covered both before the noon recess and since, and secondly, it is immaterial, because every witness on the stand has testified that the amount of drawings of a partner is immaterial in determining the amount of the partnership profit on

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(Testimony of Lawrence J. Semenza.)

which he pays taxes. It is the share of profit and not the amount of drawing that determines the tax, so aside from the fact that it has been fully covered, we make the objection it is immaterial.

The Court: Objection overruled.

(Question read.)

A. I think that is immaterial.

Mr. Thompson: That is not responsive.

The Court: Will you answer the question, please?

A. No, there is not.

Q. And in the event Mr. Remmer had not been repaid his original capital investment of ten thousand dollars, it would be proper accounting practice, would it not, Mr. Semenza, to include that ten thousand dollars as a credit in his capital account?

A. That is correct.

Q. And if that should be included as a credit in his capital account, the entry that you have on your Exhibit M-1 under [2811] 7, "Equity in B. & R. Smoke Shoppe at December 31, 1943," for example would be $11,706.69 instead of $1,706.69?

A. You are assuming also that there must be an increase in the assets in order to offset that.

Q. In the event that there are no books and records showing what the assets are and no books and records showing that the amount of the original investment, which has been proved, has been withdrawn, it would be proper, would it not, to conclude that that asset remained?

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: Objected to as incomprehensive. I can't understand how there can be any asset there if the books did not show any asset. I don't know what counsel is driving at, but it seems apparent to me you can't set up an asset value of a partner if you assume in the question that the books show no asset.

Mr. Thompson: I refer to the books in evidence, your Honor.

The Court: Well, objection is overruled. Answer the question.

A. Well, I can't set up an asset unless I saw evidence of it.

Q. There are assets which you have shown as of December 31, 1943, for the B. & R. Smoke Shoppe of $3,413.38, are there not? A. There are.

Q. And in making that computation you have not included any bank roll whatsoever? [2812]

A. That is correct.

Q. So at least to the extent of $3,413.38, on your own figures, there are sufficient assets available, or were, as of December 31, 1943, to offset a portion of any such capital investment that may have been established? A. That is true.

Q. Mr. Semenza, on item No. 8, page 2 of Exhibit M-1, you have set up as an asset of Mr. Remmer's an equity in the Day-Night Cigar Store, is that correct? A. That's correct.

Q. And you have supported that by several schedules, designated schedule 2 and contained on pages 5, 6, 7 and 8 of Exhibit M-1?

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(Testimony of Lawrence J. Semenza.)

A. That is correct.

Q. I wish to hand you, Mr. Semenza, Exhibit 164. I also hand you Exhibit 183, which is the replica of the chart marked Exhibit 183. Do you recognize Exhibit 164, Mr. Semenza, as the breakdown made by Agent Morgan in support of the government's computation of Mr. Remmer's net worth in the Day-Night Cigar Store, as set forth as Item 7 on government's Exhibit 183?

A. I do.

Q. Now the first place where you differ from Revenue Agent Morgan in your computation of the net worth of the Day-Night Cigar Store, relates to the item of Accounts Receivable, 186 [2813] Club, does it not, for the years 1943 and 1944?

A. It does.

Q. And do you find that on your balance sheet, page 5 on Exhibit M-1 for the Day-Night Cigar Store for the year ending December 31, 1943, you show that there was no account receivable to the Day-Night Cigar Store from the 186 Club.

A. That is correct, because in 1945 the amount due from the 186 Club was charged to Mr. Remmer's drawing account, so on page 6 the Day-Night Cigar Store I show that amount charged to the 186 Club as a drawing of Mr. Remmer's. Page 6 of Exhibit M-1, schedule No. 2.

Q. What is that amount, Mr. Semenza?

A. $4,878.58, which is the amount shown on Exhibit 164.

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(Testimony of Lawrence J. Semenza.)

Q. Is that taken from Exhibit 119, the ledger account of the Day-Night Cigar Store?

A. Yes, it is.

Q. Do you find in Exhibit 119 a record of accounts receivable? A. I do.

Q. What page is that on? Are the pages numbered?

A. They are not numbered. Under the heading "Assets," it is about the 9th or 10th account of the section "Assets."

Q. Does that ledger account, accounts receivable, show a balance due the 186 Club?

A. It does.

Q. As of December 31, 1943? [2814]

A. That is right.

Q. In what amount? A. $4,878.58.

Q. Now also in reference to the year ending December 31, 1944, your page 5, schedule No. 2 of Exhibit M-1, which is the breakdown of the Day-Night Cigar Store, shows no account receivable from the 186 Club, is that correct?

A. It shows that amount due from the 186 Club.

Q. For the year ending December 31, 1944?

A. Yes.

Q. I show you statement——

A. Oh, I beg your pardon—no, it does not.

Q. And Exhibit 164, which is the statement prepared by Revenue Agent Morgan, does show an amount of $9,538.04 as an account receivable at that time, is that correct? A. It does.

Q. And do you find such an entry in the ledger

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(Testimony of Lawrence J. Semenza.)

account, Exhibit 119, as an account receivable?

A. Yes, I do.

Q. With further reference, Mr. Semenza, to page 5 of Exhibit M-1, under the heading "Equipment," you have shown a value at each year end for the years 1943, 1944, 1945 and 1946 of $10,400 for equipment of the Day-Night Cigar Store, is that correct? A. That is correct. [2815]

Q. And from what record in evidence did you obtain that figure as to each of those year ends?

A. Exhibit 117 and the next exhibit for the Day-Night—it may be 118, the records for the year 1946.

Q. I hand you Exhibit 117B, Mr. Semenza, is that the record you have in mind?

A. I think so. The last page in the book, "Furniture, Fixtures, Equipment and Buildings," under date January 1, 1946, debit $10,400, balance $10,400.

Q. And is there any inventory or equipment figure under date as of December 31, 1946?

A. There is not.

Q. And is it not a fact that the tax returns filed for the Day-Night Cigar Store for the year 1946 showed an inventory at the end of that year of $2,100?

Mr. Avakian: I am not sure that is correct, your Honor. My recollection is that it shows equipment of $2,100 rather than inventory.

Mr. Thompson: I refer to equipment; I am sorry.

A. That is correct. However, there is no indication in the records that there has been any change

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(Testimony of Lawrence J. Semenza.)

in the furniture and fixture account in the year 1946.

Q. Because there was no indication in the record, you carried the figure through for a full year period, is that correct?

A. Yes, you would. [2816]

Q. Now, Mr. Semenza, I do not know whether you have all the books before you that you need, but if you need more say so—I want to refer now to page 6 of your Exhibit M-1, which relates to the Day-Night Cigar Store and is headed, "Partners' Capital Accounts," and I direct your attention to the account of Elmer Remmer as set forth on that exhibit, balance December 31, 1943, $15,705.00. How was that figure arrived at?

A. That was taken from general ledger of the Day-Night, Exhibit 117.

Q. Do you have that?

A. It is entitled, "M. E. Kyne Investment Account."

Q. In making the computation of Mr. Remmer's capital account, Mr. Semenza, did you have in mind the testimony of Mr. Silverman and Mr. Kyne to the effect that Mr. Remmer had paid $16,000 for the 186 Club and Day-Night Cigar Store and $6,067 for the inventory, furniture and fixtures of the Day-Night Cigar Store?

Mr. Avakian: That is objected to as assuming facts contrary to the evidence, because the testimony of Mr. Kyne was that the $16,000 was provided not by Mr. Remmer, but by Mr. Kopstake

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(Testimony of Lawrence J. Semenza.)

and Mr. Nealis and subsequently reimbursed to Mr. Kopstake and Mr. Nealis out of the profits of the business, and it was only $6,000 paid for the inventory of the Day-Night Cigar Store that was put up by Mr. Remmer.

Mr. Thompson: I believe that is correct statement of [2817] the testimony, your Honor. What I had in mind with reference to the Day-Night Cigar Store was the opening credit entry of $10,400 on ledger sheet 1943, as shown on Exhibit 117, and the testimony the witness has referred to, to the effect that $6,067 was paid for equipment and merchandise of the Day-Night Cigar Store, is that correct? A. That is correct.

Q. And by reference to the books and records of the Day-Night Cigar Store can you account for the difference in that opening credit of $10,400 as related to the testimony of what the business and inventory of the Day-Night Cigar Store actually cost?

A. Well, I used the records, 117, the journal and the cash receipts for its return. The first journal entry is December 1943, setting up $10,400.

Q. Is there any supporting information for that journal entry? A. No, there is not.

Q. Again referring to page 6 of your Exhibit M-1 and the capital accounts there set up, will you state what capital accounts are shown in the books and records of the Day-Night Cigar Store?

A. Wm. E. Kyne Investment account; Wm. E.

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(Testimony of Lawrence J. Semenza.)

Kyne personal account, Sylvan Lando and E. Remmer.

Q. I note that you have placed a footnote on page 6 of Exhibit [2818] M-1 as follows: "In view of Kyne's testimony that Remmer provided the capital, the Wm. E. Kyne Investment Account has been included in the Remmer capital account." Is that the way you treated it?

A. That is correct.

Q. Now without the aid of the testimony of Mr. William Kyne, the government witness, and solely by reference to the books and records of the Day-Night Cigar Store, would you be able to determine the true ownership of the credits set forth in the Wm. E. Kyne Investment account?

Mr. Avakian: Objected to as assuming facts contrary to the evidence, as inviting speculation, and on the ground there is no foundation laid, particularly in view of the common knowledge we all have that accounting procedure calls for making inquiry of the individual connected with the business in analyzing the records, so it would be completely immaterial unless Mr. Thompson could first establish as a foundation that it would be proper accounting procedure to ignore the testimony of the partners.

The Court: Objection overruled.

A. I would have to have additional information, which is not in evidence here, as all the records relating to these transactions are not in evidence.

Q. Well then I believe your testimony is you

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(Testimony of Lawrence J. Semenza.)

found no records in evidence to determine to your satisfaction the [2819] income of the Day-Night Cigar Store?

A. To my satisfaction from the evidence here in the case.

Q. I am referring to the books and records of the Day-Night Cigar Store.

A. Well, these are not complete, Mr. Thompson. All the records are not in evidence here in this court.

Q. And your computation was made solely from the records that are in evidence?

A. The records and the evidence here.

Q. And you testified, I believe, that in your opinion the books and records maintained by the Day-Night Cigar Store are sufficient and satisfactory, is that correct?

A. Along with the testimony of the witnesses.

Q. Without the assistance of the testimony of the witnesses are they satisfactory?

Mr. Avakian: For what purpose? The question is so general. For determining the income of the business?

The Court: Let us see if the witness understands the question.

Q. Do you understand?

A. Are you asking me sufficient to determine capital accounts of the partners?

Q. I am asking you whether the books and records in evidence, upon which you relied, without the aid of the testimony of any witnesses, are suffi-

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(Testimony of Lawrence J. Semenza.)

cient to enable you to make up the [2820] computations which you made up in Exhibit M-1?

A. I could make up a statement of profit and loss for those years from the records.

Q. Could you make up a balance sheet for the years?

A. Yes, except for the capital accounts.

Q. And with reference to the capital accounts, you could not make up such a balance sheet?

A. I could not allocate between the partners if the testimony was missing.

Q. And you would not know, would you, Mr. Semenza, that the entries in the Wm. E. Kyne Investment account should be attributed to Mr. E. Remmer, who also had a capital account in those books?

A. Well, that applies to any account in these books. If you don't have additional information of the records in the business.

Q. The additional information upon which you rely, Mr. Semenza, in determining that the Wm. E. Kyne Investment account should be included in the Remmer capital account, is the testimony of Mr. Kyne, is it not, and not a record?

A. That is correct.

Q. Now in addition, in making the Day-Night Cigar Store computation, you made up profit and loss statements, is that correct?

A. I did. [2821]

Q. For what years?

A. For the year '45 and the year '46.

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(Testimony of Lawrence J. Semenza.)

Q. And you did not make a profit and loss statement and include it in Exhibit M-1 for the year 1944? A. I did not.

Q. Why not?

A. Because the records had already been closed and profit for that year had been reflected in the books.

Q. For the years 1945 and 1946 the entries had not been made in the books and you had to post the books in order to make up a profit and loss statement?

A. I had to post the general ledger accounts.

Q. Are any of the 186 Club operations included in the schedules you have compiled for the Day-Night Cigar Store?

A. They show amounts advanced to and from the 186 Club in the balance sheet of December 31, 1945, and '46.

Q. With that exception none of the other operations of the 186 Club are included in your Day-Night Cigar Store computation?

A. From the records here I hadn't determined that.

Q. Your Item 9 in Exhibit M-1 is identified as "Equity in 110 Eddy Street," is that correct?

A. That is correct.

Q. And that refers to the same investment as Item 5 of government's Exhibit 183? [2822]

A. That is correct.

Q. The differences betwen your computation and that made by the government agent is quite in-

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(Testimony of Lawrence J. Semenza.)

significant as to that business, is that true?

A. I don't understand.

Q. The differences between your computation and the computation made by the government agent, Mr. Harkness, are quite insignificant as to that business, so far as net worth of the business itself for the years in question are concerned?

A. The only difference is I treated it as a partnership and the revenue agents had taken all the net worth as belonging to Mr. Remmer.

Mr. Thompson: May I have the question?

(Question read.)

A. That is correct.

Q. In connection with the 110 Eddy Club, Mr. Semenza, you rely upon the books and records of the 110 Eddy Club for your computation?

A. I did, and the testimony in this case.

Q. I hand you Exhibit 112, I believe is the book record of the 110 Eddy Club. Are capital accounts set up in that book, Exhibit 112?

A. Yes, they are.

Q. In whose names?

A. Kyne, Cavani, Turner, Remmer, Kyne [2823] Trustee.

Q. And in your computation of the net worth of 110 Eddy Street enterprise, as shown on page 10 of your Exhibit M-1, you have included the Wm. Kyne Trustee account as part of Mr. Remmer's capital account, is that correct?

A. That is correct.

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(Testimony of Lawrence J. Semenza.)

Q. By reference solely to the books and records of the 110 Eddy Street enterprise, are you able to determine that the Wm. Kyne Trustee account was actually Mr. Remmer's account and should have been included in his capital account?

Mr. Avakian: Objected to as contrary to the evidence, which contains testimony of the witness regarding it and calls for speculation and no foundation is laid to show that the procedure suggested in the question would be proper accounting procedure.

The Court: Objection overruled. Answer the question.

A. It is necessary for me to use Mr. Kyne's testimony along with the records for me to draw that conclusion.

Q. The schedule you have set up entitled "Partners' Capital Accounts" commences with a balance as of December 31, 1943, does it not?

A. That is correct.

Q. And as of that date have you set up any account for Mr. Arthur Pratt? A. I have not.

Q. And at the time you set up the schedule No. 3 on page 10 [2824] of Exhibit M-1, did you have in mind the testimony of Mr. Arthur Pratt, regarding his investment in the 110 Eddy Street enterprise, and his testimony to the effect that in the spring of 1944 he received approximately $6,800 for his investment and the testimony of Mr. Kyne that Mr. Remmer had paid Mr. Pratt for his investment?

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: Objected to as a misstatement of the evidence. Mr. Pratt's testimony was in March of 1944 he received the sum, I believe, of $4,400; approximately that amount, and that he was given credit in the amount of $2,000 that he owed Mr. Remmer on account of money previously advanced to him, that the only amount of money that changed hands in 1944 was the figure of four thousand odd dollars; I believe it is 48 hundred.

Mr. Thompson: The total amount, as I recall, was $6,800. I believe Mr. Avakian is correct in what he says, part of it is represented by loan which Mr. Remmer had previously made.

A. I was aware of Mr. Pratt's testimony and the records indicate $3,400 was paid out of this business to Mr. Pratt.

Q. On what date?

The Court: We will take a recess for 15 minutes.

(Jury and alternate jurors admonished and recess taken at 3:00 o'clock.)

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3:15 P.M.

(Defendant present with counsel.) [2825]

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand on further

Cross-Examination

By Mr. Thompson:

(Last question read.)

A. March 1, 1944.

Q. How was that payment, in what form? Does it show? A. Check.

Q. On what account?

A. I don't know, I would have to have——

Q. That is record of 110 bank account, you have to have it?

A. No, not record of 110 bank account, but it is general ledger. I would have to have disbursements ledger. It is probably Exhibit 112. There are two books under 112.

Q. I hand you Exhibit 112.

A. Check No. 532 under date of March 1, 1944, $3400.

Q. And how was that charged on the books of 110 Eddy Street?

A. It was charged to Arthur R. Pratt.

Q. How was it credited?

A. It was credited to cash in that entry.

Q. And is there any entry in the book which

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(Testimony of Lawrence J. Semenza.)

indicates whether it was just a payment of money out of the business or whether it was charged against the account of any individual person?

A. Well, ultimately it was charged to the account of Arthur R. Pratt, closed in profit and loss and following that it was [2826] closed into the Kyne Investment Account.

Q. And the Kyne Investment Account is the one that you have included in Mr. Elmer Remmer's capital account? A. That is correct.

Q. Is there any record in the books of 110 Eddy Street showing that Mr. Arthur R. Pratt, as of December 31, 1943, was a partner in that enterprise? A. No.

Q. And in your schedules setting up the capital accounts on pages 9 and 10 of Exhibit M-1, you did not include Arthur R. Pratt as a partner in the enterprise, is that correct?

A. I did indirectly by concluding, in view of the fact that payment of Arthur Pratt was charged to the Wm. E. Kyne account that the receipt of $3400 for Mr. Pratt was probably included in that Kyne Investment Account. Mr. Pratt testified to the fact that he had paid that to Mr. Remmer at the time.

Q. At the time you failed to designate Mr. Arthur R. Pratt as a partner as of December 31, 1943, did you have in mind the evidence that Mr. Pratt and Mr. Remmer were the only persons who had made any investment in that business?

Mr. Avakian: That is an incorrect statement of

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(Testimony of Lawrence J. Semenza.)

Mr. Semenza's testimony. Mr. Semenza testified he indirectly included Mr. Pratt's capital account by reason of the facts he explained and in making an incorrect statement of his [2827] testimony that Mr. Thompson just assumed in his question——

Q. In your designation of capital accounts on Exhibit M-1, pages 9 and 10, did you name Mr. Arthur Pratt as a partner at any point?

A. No, I did not name him, but I gave effect to his being in partnership through the Elmer F. Remmer account.

Q. In determining who were partners in the enterprise during the year 1943 and at the end of 1943, did you have in mind plaintiff's Exhibit 80, which is the partnership return of income for 1943, for the 110 Eddy Street and Schedule J thereon, showing names and addresses of each partner, W. E. Kyne, San Francisco, with the figure $6,850.49, and Arthur R. Pratt, Portland, Oregon, $3,425.24, and other partners named thereon?

A. I did in this way—Mr. Kyne further testified that anything in which he was interested, Mr. Remmer also had a half-interest. Consequently, in allocating the 1943 profit, I allocated one-third to Mr. Kyne and two-thirds to the Remmer account, giving effect to one-third being for Mr. Pratt.

Q. On the bottom of page 9 of Exhibit M-1, you have set up account for 110 Eddy Street, "Capital Accounts per books" and at the top of page 10 an account, "Capital Accounts as Adjusted." What adjustments were made by you in those accounts?

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(Testimony of Lawrence J. Semenza.)

A. Just following "Capital Accounts as Adjusted" is analysis of the partners' capital accounts from December 31, 1943, thru [2828] December 31, 1946. It was necessary to allocate the 1942 profit and the 1943 profit, as the records had not allocated it at the end of 1943. So that the distribution of 1942 profit as shown and the distribution of 1943 profit as shown, I arrived at the balance after adjustments December 31, 1943, of $3877.79 to Kyne, $3121.74 for Cavani, $910.51 for Turner, and $28,956.18 for Mr. Remmer. I follow with the drawings of partners during 1944, and any capital contributions made by the partners in 1944 are credited and the profit of 1944 is allocated to the partners and I arrive at the balances in the partners' account of December 31, 1944, and show them in recap up above under "Capital Accounts as Adjusted December 31, 1944." Then I show the drawings during 1945 and distribution of 1945 profits and arrive at the balance of December 31, 1945, and show the balance of the various partners' accounts in the schedule above at December 31, 1945. Then from balance of December 31, 1945, I deducted 1946 drawings of partners and the 1946 losses, arriving at the capital accounts of December 31, 1946, as shown in the group in "Capital Accounts as Adjusted December 31, 1946."

Q. And the capital account you show for Mr. Remmer as of December 31, 1946, is $24,820.33?

A. That is correct.

Q. Now, during the calendar years 1943, 1944,

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(Testimony of Lawrence J. Semenza.)

1945 and 1946, in making your net worth computation, Exhibit M-1, page 2, [2829] which is the large chart, and determining Mr. Remmer's interest in 110 Eddy Street, you have considered the following partners, have you not: William E. Kyne, Frank Cavani, Turner and Elmer F. Remmer?

A. I have also given effect to Mr. Pratt.

Mr. Thompson: Yes, I understand from what you previously testified as to that.

Q. Those are the four persons you have considered partners in making your computations?

Mr. Avakian: Five, your Honor.

A. Five with Mr. Pratt.

The Court: What is the question now, four or five?

Mr. Thompson: Five; he includes Mr. Pratt.

Q. Mr. Pratt, according to your computations, Mr. Semenza, was in the picture only during the first few months of 1944, is that correct, and 1943?

A. 1943, according to Mr. Pratt's testimony.

Q. Up until March of 1944?

A. That is correct.

Q. After that he was out and all of his investment was attributed to Mr. Remmer?

A. That is correct.

Q. Now, in considering those four persons as partners, did you give effect to Government's Exhibit 153, which is headed, "Statement of William E. Kyne"? (Reads exhibit.) [2830]

A. I was aware of that statement.

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(Testimony of Lawrence J. Semenza.)

Q. You were aware of the statement?

A. I was.

Q. Were you also aware, Mr. Semenza, of the testimony of Mr. Frank Cavani, to the effect that he was to pay $16,000 for a one-fourth interest in 110 Eddy Street, and that that payment to Mr. Remmer was to be made out of his share of the profits?

Mr. Avakian: I think perhaps that is inadvertently misstated. I believe his testimony was 15 thousand dollars, but my objection is not based on that point, but rather on the point it is an incomplete and therefore misleading recital of Mr. Cavani's testimony. Mr. Cavani also testified that he was a partner and was to use his partnership share of the profits to pay for his interest in the assets of the business.

Mr. Thompson: I do not believe any one is bound by his characterization of what he calls himself in the business, your Honor.

The Court: You can take the matter up on redirect.

Mr. Avakian: I think it is improper cross-examination and an incorrect recital of the testimony.

The Court: Objection overruled.

A. I do not think that has any bearing——

The Court: Your statement is correct, but I do not take it as an erroneous statement of the testimony. [2831]

Mr. Avakian: I believe that is the only testimony Mr. Cavani gave on that, your Honor.

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(Testimony of Lawrence J. Semenza.)

The Court: Proceed.

A. I do not think that has bearing on Mr. Cavani's capital account here.

Q. Did you hear the testimony? A. I did.

Q. And in setting up Mr. Elmer F. Remmer's capital account in 110 Eddy Street, have you given any effect to that testimony?

A. No; no reason to.

Q. You understand, in view of Mr. Cavani's testimony, he could not, without Mr. Remmer's consent, withdraw any money from the 110 Eddy Street partnership?

Mr. Avakian: Just a moment—that is objected to as calling for legal interpretation of the testimony of another witness, based on opinion and conclusion of the witness, not a matter of accounting but a matter of law.

The Court: Let me have the question.

(Question read.)

The Court: Objection overruled. You may answer the question.

A. Even though partners had an agreement to that effect, they still might withdraw money. Mr. Cavani did have funds which he withdrew [2832] here.

Q. But with the exception of one withdrawal of $1500 during those four years, the others were all for taxes, were they not, income taxes?

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial, what the purpose was. The

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(Testimony of Lawrence J. Semenza.)

important thing is money was withdrawn. It doesn't matter what Mr. Cavani used it for.

The Court: Objection overruled.

A. The records indicate outside the $1500 that he withdrew it for the specific purpose of paying income taxes.

Q. And at the time the sum of $1500 was withdrawn by Mr. Cavani, as shown by the books, does it not also appear that at the same time Mr. Turner withdrew $1500 and Mr. Remmer withdrew $3,000?

A. I don't recall. I recall that each of them drew—that Mr. Turner did draw $1,500 and Mr. Remmer drew $3,000. It may have been the same year and at the same time.

Q. I mean approximately the same time?

A. I believe so.

Q. And if the partnership agreement was that Mr. Cavani and Mr. Turner were to leave their share of the profits in 110 Eddy until Mr. Remmer had been paid the agreed-upon price for the interest in the business, would it not be proper accounting practice to show that that money credited to Mr. Cavani's partnership account was not subject to withdrawal by him? [2833]

Mr. Avakian: I don't understand the question at all.

The Court: Maybe the witness does.

Mr. Avakian: Yes, but I am entitled to understand it so I can state my objection. It is incomprehensive to me. It appears to me to call for a legal

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(Testimony of Lawrence J. Semenza.)

conclusion but it is so confusing I can't understand it.

The Court: Read the question.

(Question read.)

A. I don't see any reason why it should be.

Q. Under that sort of an agreement, Mr. Semenza, would it be a proper accounting practice, in determining the net worth of Mr. Remmer at the time, to show the $16,000 to be an account receivable to him from Mr. Cavani?

A. I do not think so.

Q. In other words, you just don't pay any attention to the $16,000, as an accountant?

A. That's right.

Q. You also, Mr. Semenza, as part of your Exhibit M-1, have set up schedule No. 4, relating to the Menlo Club, is that correct? A. Yes, sir.

Q. And that schedule No. 4 and the information derived therefrom, is set up as Item No. 10 on Exhibit M-1, the large chart, and the same character of information is set up as Item 6 on Government's Exhibit 183, is that correct?

A. That is correct. [2834]

Q. I hand you Exhibit 165, Mr. Semenza. Exhibit 165 is the breakdown statement made by the agent Weaver, is it not, relating to the Menlo Club?

A. It is.

Q. And so far as the assets of the Menlo Club are concerned, both as to the year ends 1945 and

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1946, your statement and Mr. Weaver's statement agree, is that correct? A. They do.

Q. You have, however, as a liability of the Menlo Club for the year ending December 31, 1945, set up an item of $26,464.18, which was not included as a liability by Mr. Weaver in his statement, Exhibit 165? A. That is correct.

Q. And you have noted that item of $26,464.18 as a liability for checks issued in January, 1946, which were entered in December, 1945, disbursements record? A. That is correct.

Q. In so entering the item of $2,464.18, have you considered the Menlo Club to be on a cash or accrual basis?

A. I considered it to be on an accrual basis, based on the records maintained.

Q. And is it your understanding that under the Internal Revenue Code and regulations in effect at that time, it was up to the taxpayer to elect whether he should report on a cash or accrual basis? [2835]

A. It was.

Q. I draw your attention, Mr. Semenza, to Government's Exhibit 89, designated "Partnership Return of Income 1945 Menlo Club," signed Elmer F. Remmer, and to the question on the last sheet of the return, Question No. 4: "Check whether this return was prepared on cash or accrual basis." Will you state what was checked?

A. The return shows cash basis.

Q. Also in connection with the Menlo Club liabilities as shown on your Schedule No. 4, page 12 of your Exhibit M-1 for the year ending December 31,

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(Testimony of Lawrence Semenza.)

1946, you have included a liability as $17,264.58 for checks issued in January, 1947, which were entered in December, 1946, disbursement record, is that correct? A. That is correct.

Q. And that liability was not included as a liability in the statement of the Menlo Club prepared by Mr. Weaver, which is Exhibit 165?

A. It was not. My reason for including it in there was the fact that the services and purchases were included in the income tax returns for 1946 and 1945, indicating that they wanted to be on an accrual basis.

Q. I would like to direct your attention, Mr. Semenza, to plaintiff's Exhibit 90, designated "Partnership Return of Income 1946 Menlo Club," and to the question section at the [2836] bottom of the third page of the printed form return and the question No. 5: "Check whether this return was prepared on cash or accrual basis." Will you state which is checked?

A. The return shows cash basis. However, the information is prepared on the accrual basis. It is true it has been prepared on the accrual basis.

Q. Do you have a general ledger of the Menlo Club for the year 1945? A. I do not.

Q. And do you have an account set up in the books and records of the Menlo Club here in evidence showing accounts payable in the amount you have set forth on your Exhibit No. M-1, page 13, in amount of $26,464.18 for the year ending December

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(Testimony of Lawrence Semenza.)

31, 1945, and in the amount $17,264.58 at December 31, 1946?

A. Cash disbursements record discloses these items listed in December. Checks issued in January, and you would have to give effect to that in preparing these statements.

Mr. Thompson: I would like to have the answer stricken and request the witness to answer the question.

Mr. Avakian: I think it is responsive.

(Question and answer read.)

The Court: The question may go out. Listen to the question.

(Question read.)

The Court: Answer yes or no. [2837]

A. No.

Mr. Golden: May he explain?

The Court: He did not ask to explain.

Mr. Golden: I am asking for him. He is a defense witness.

The Court: Very well. There is nothing before the Court.

Mr. Golden: May the witness explain his answer?

The Court: If he wants to, but he didn't ask to.

Mr. Golden: May we ask him if he wishes to?

The Court: You can do that when you have him on redirect examination if you want to.

Q. Also in the Menlo Club statement, Mr.

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(Testimony of Lawrence Semenza.)

Semenza, you have made some adjustments for depreciation on your depreciation schedule which differ slightly from those set forth by Mr. Weaver in Exhibit 165? A. I have.

Q. In addition, in connection with your computations with relation to the Menlo Club, you have set up accounts designated "Partners Capital Accounts" on page 13 and have made computations reconciling the cash disbursements by the Menlo Club for the years 1945 and 1946, is that correct?

A. I did.

Q. On page 14 of Schedule No. 4 of Exhibit M-1, which is headed "Computation of Revised Net Income and Determination of Cash Withdrawn from Business, year ending December 31, [2838] 1945," you show, do you not, that during that year Mr. Remmer withdrew cash to the amount of $120,127.31, is that correct? A. I do.

Q. I show you Exhibit 125, ledger entitled "Menlo Club," and Exhibit 129, entitled "Menlo Bar 1946." Are those the records that you had in mind in making that determination?

A. What determination?

Q. That Mr. Remmer withdrew cash from the Menlo Club business amounting to $120,127.31 during the year 1945?

A. I think that is Exhibits 127, 128 and 126, probably.

Q. I will hand you Exhibits 127, 126 and 128.

A. I relied on these exhibits and the testimony of Mr. Kyne, to the effect that the funds from the

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(Testimony of Lawrence Semenza.)

club operation went to the safe. Consequently, in determining what happened to the cash, all the information is in the records to determine what cash was handled through the Menlo Club, and his testimony that cash went to the box and came out of the box, I drew my conclusion that Mr. Remmer must have drawn the cash out if it went into the box and it was not all returned to the business, so the sum of $120,127.31 is the amount of unaccounted-for cash, as shown by the information in the exhibits.

Q. You testified on direct examination, I believe, Mr. Semenza, that it was proper accounting practice to set up in a capital account for any alleged partner the amount of his [2839] capital investment in the enterprise, plus the amount of his distributive share of the profits for each year, is that correct?

Mr. Avakian: Objected to as not a correct statement of the evidence because his testimony was that that procedure should be done with respect to partners. He did not use the word "alleged" partners; that is in Mr. Thompson's question, but not in Mr. Semenza's testimony.

The Court: Let me have the question.

(Question read.)

The Court: That probably is right.

Mr. Thompson: For any partner in the enterprise, that is all right. I don't mind taking out "alleged."

A. In a partnership you credit the partner with his investment in the partnership and with his share of the profits yearly, less any drawings during

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(Testimony of Lawrence Semenza.)

the year, or any additional amounts of investment of subsequent years, after the original.

Q. There is, is there not, in the Menlo Club records, a ledger sheet as to capital account of Elmer Remmer? A. There is.

Q. And will you turn to it, please, and state what amounts of withdrawals from the Menlo Club are recorded on that capital account for the year 1945?

A. One thousand dollars is shown here. However, that might not include all the amounts that he withdrew during the year. [2840]

Q. Your answer is, I understand, that one thousand dollars is recorded as a withdrawal for 1945 on Mr. Remmer's account?

A. That is correct.

Q. For the year 1946, you made a computation, setting forth on page 15 of Exhibit M-1, the amount of cash withdrawn by Mr. Remmer from the Menlo Club for the year 1946, and arrive at a withdrawal of $17,382.56, is that correct?

A. That is correct.

Q. Will you turn to Mr. Remmer's capital account in the Menlo Club books and state the amount of withdrawals made by Mr. Remmer during the year 1946, as shown by the books by that capital account?

A. There are a large number of them; three or four thousand dollars.

The Court: Well, we will take our recess now.

(Jury and alternate jurors admonished and recess taken at 4:00 o'clock.) [2841]

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Wednesday, February 13, 1952—10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumed the witness stand on further

Cross-Examination

By Mr. Thompson:

Q. Mr. Semenza, you have before you the Menlo Club books and records, Exhibits 125 to 129, inclusive? A. I have.

Q. And also defendant's Exhibit M-1, the statement you prepared? A. I have.

Q. And Government's Exhibits 165 and 183?

A. I have, Mr. Thompson.

Q. Now, in preparing your schedules for the Menlo Club, which consists of several pages, designated schedule No. 4 in Exhibit M-1, you have included in those schedules, have you not, the operations not only of the Menlo Club itself, but also of Tiny's Restaurant and the Menlo Bar?

Mr. Avakian: Objected to as assuming facts contrary to the evidence. The uncontradicted evidence is that the Menlo Club was one enterprise, one partnership, containing a card room, and bar and restaurant.

The Court: Counsel is merely inquiring of the witness if the schedules included—— [2842]

Mr. Avakian: He said "did you not," which is a

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(Testimony of Lawrence Semenza.)

purported recital of evidence and it is contrary to the uncontradicted evidence it is one enterprise, one partnership, all three companies contained in one unit.

The Court: Objection overruled.

(Question read.)

A. Yes, because the Menlo Club, according to my understanding, embraced the restaurant, bar and club room and the term "Menlo Club" is the term used for that partnership.

Q. Well, Mr. Weaver did the same thing in preparing his schedule 165, did he not?

A. He did, Mr. Thompson.

Q. As I recall, at the recess yesterday afternoon, we were referring to page 14 of schedule No. 4, Exhibit M-1, in which you had made a computation of cash withdrawn from the business, is that correct? A. Yes.

Q. The first item on that schedule, Mr. Semenza, reads: "Gross Income per Return and Amended Return Filed, $266,164.50." Is the information that you have set forth therein supported by the books and records of the Menlo Club which you have before you? A. Yes, they are.

Q. And that amount of gross income was entered in the ledgers themselves? [2843]

A. For the year——

Q. That is for the year 1945.

A. For the year 1945, as I recall the testimony from the club operation, the records of the club

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(Testimony of Lawrence Semenza.)

portion had been lost and they used a figure based on the 1944 operation of the predecessor proprietor.

Q. By the records which have been lost of the Menlo Club, you refer to the poker sheets of the card room operation, is that correct? A. I do.

Q. And so the only source you had available for that figure of $266,164.50 was the Menlo Club partnership return of income for 1945, and the amended return? A. That is correct.

Q. Now the next item is "Expenses per Return as Amended, Excluding Depreciation and Amortization, $141,182.14." What is the source of that figure?

A. That is from the tax return and from the exhibits.

Q. And is that figure supported by the books and records of the Menlo Club?

A. To the extent that the restaurant operation and the bar operation are recorded in these records.

Q. Are the club room operations for the year 1945 recorded in those records?

A. They are not. [2844]

Q. And the same estimate of expenses for the club room operation was made for the year 1945 in connection with expenses that was made in connection with gross income?

A. That is my understanding of the testimony.

Q. Your next item on that schedule is "Advance as Adjusted, $5,951.53," is that taken from the books and records of the Menlo Club, Exhibits 125 to 129?

A. That is taken from my schedule page 13, "Reserve Depreciation."

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(Testimony of Lawrence Semenza.)

Q. And what is the source of the information from which you compiled the schedule "Reserve for Depreciation," page 13 of Exhibit M-1?

A. The records here and Mr. Maundrell's testimony.

Q. Were the books and records themselves sufficient to support that figure of $5,951.53 without the assistance of Mr. Maundrell's testimony?

A. Oh, they may possibly have been.

Q. The next item is "Amortization of Leasehold, $6,666.67," what is the source of that figure on page 14 of Exhibit M-1?

A. Well, that is based on ten-year period of amortization, the same basis as Mr. Weaver used for the Menlo Club.

Q. Then you show a net income for the year as revised, $112,364.16, that is just a mathematical computation, is it not?

A. That is the difference between gross income and the expenses. [2845]

Q. And you deduct from that salaries of partners, $11,726.90, to what salaries do you refer?

A. There are salaries listed on the return that have been paid to the active partners in the businesses.

Q. And by active partners to whom do you refer, by name, do you recall?

A. Nelson and Maundrell, Ditto, Fricker, and Turner, I believe all had salaries.

Q. And are those salaries for the year 1945, re-

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(Testimony of Lawrence Semenza.)

corded on the ledger accounts, books and records of the Menlo Club for that year?

A. It is my recollection they were.

Q. Now, you arrived at a net income to be allocated to partners, so designated, on page 14, $100,637.26 for the year 1945, is that correct?

A. Yes, sir.

Q. And you then made a computation of cash to be accounted for at December 31, 1945?

A. Yes, sir.

Q. And you first add back certain non-cash items included in your computation of net income as follows: depreciation, $5,951.53; amortization of leasehold, $6,666.67; deduction in inventory between May 1, 1945, and December 31, 1945, $5,860.73; checks issued in January, 1946, recorded as December, 1945, disbursements paid, not shown as outstanding at December 31, 1945, [2846] $26,464.18. You have a total of non-cash items of $44,943.11, and adding that to the net profit you have computed, you arrive at a figure of $145,580.37, is that correct?

A. That is correct.

Q. Now that figure, according to your computations, represents the amount of cash from the operations of the Menlo Club during the year 1945, which should be accounted for in the books and records of the Menlo Club, is that correct?

A. That is correct.

Q. Now you have found a record of the disbursement of a certain portion of that cash and have ac-

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(Testimony of Lawrence J. Semenza.)

counted for it from the books and records of the club? A. I have.

Q. And those items are as follows: petit cash office, $800; bank roll, $10,000; advance to 50 Mason Street, $7,489.76; deposit Pacific Gas & Electric Company, $1,030; deposit on lease, $4,000; Neon sign, $500; equipment, $920; balance in Crocker National Bank, $713.30; giving a total of $25,453.06, is that correct? A. That is correct.

Q. Now, with the exception of the petit cash fund of $800 and the bank roll of $10,000, those items of cash are accounted for by withdrawals by check from the account maintained at the Crocker National Bank in the name of Harold H. Maundrell, is that correct? [2847]

A. Petit cash fund and bank roll are evidenced by that, is that what you say?

Q. No, I say, with the exception of petit account and bank roll, the other items are evidenced by withdrawals by check from the bank account in the Crocker National Bank maintained in the name of Mr. Maundrell?

A. That is right, except for the balance in the Crocker National Bank, which is evidenced——

Q. By the bank statement itself?

A. That is correct.

Q. From the books and records of the Menlo Club, those items are the only items of cash withdrawal which you could account for, is that correct?

A. No, there are some other items indicated as drawn by Mr. Remmer.

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(Testimony of Lawrence Semenza.)

Q. What are those items?

A. Twenty-five thousand dollars account Remmer, August 8, 1945.

Q. What is that item?

A. Payment to Gene Schriber, $25,000.

Q. And did you mistakenly fail to include that in this schedule 4, page 14? A. No, I did not.

Q. Why did you not include it?

A. Because, I was determining the amount that Mr. Remmer withdrew from the business. There is $120,127.31 would be included [2848] in that figure.

Q. And so you do have a record of one payment by the Menlo Club for the account of Mr. Remmer of $25,000, is that correct?

A. Yes, sir, and I also have another one, November 26, check No. 1555, to Matte Silverman, $6,000, charged to Mr. Remmer. I have another one here on the same date, No. 1570, the St. Francis Hotel for $12.97.

Q. That is in 1945?

A. Yes, Mr. Thompson. Those payments, along with the testimony of the witness that cash went to Mr. Remmer's box, I charged him with the cash unaccountable, which included these items for which there were records.

Q. The total items for which there were records, as you have recited them, is $31,012.97, is that correct? A. That is correct.

Q. So if you add that to the figure of $25,453.06, which you included in your record of cash accounted for by the books on page 14 of Exhibit M-1, we

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(Testimony of Lawrence Semenza.)

can determine the actual amount of cash expenditures accounted for by the books of the Menlo Club in 1945, is that correct? A. That is correct.

Q. Have you made that computation?

A. It should be 57 thousand dollars, approximately.

Q. Would $56,466.03 be correct?

A. Yes. [2849]

Q. So out of a total of $145,580.37 cash which the books show to have been available in the operations of the Menlo Club for the year 1945, the books themselves account for expenditure of only $56,466.03, is that correct?

Mr. Avakian: Just a moment—that is objected to, your Honor, as immaterial and as misleading in inference, because the testimony of every accountant in this case, including government accountants, is that in the taxation of partnership income the disbursements to the proprietors are immaterial. Net income of the partnership is computed not on the basis of withdrawals of the partners, but on the basis of receipts and expenses of the partnership and that the payment that is taxed to the partner is the percentage share of the profits and the amount he withdraws is immaterial, but simply is reflected in his capital account as being the remaining balance of his investment, so the question is immaterial, that being the uncontradicted testimony of the government accountants as well as Mr. Semenza.

The Court: Objection overruled. Answer the question.

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(Testimony of Lawrence Semenza.)

(Question read.)

A. That is correct. However, I have accounted for all the cash.

Q. And you have accounted for that cash by assigning to Mr. Remmer the withdrawal of all unaccounted-for cash?

A. I have, because the other partners, there was no testimony [2850] from them that they withdrew any more from the Menlo Club than what is shown in their particular accounts and the testimony also indicates that case went into Mr. Remmer's box, so he must be accountable for the difference.

Q. Isn't it true, Mr. Semenza, that the testimony shows that cash from the Menlo Club was kept either in the Menlo Club safe or in the safe at 50-52 Mason Street?

A. That is correct. If it went to 50 Mason Street, it went into Mr. Remmer's box, according to the testimony as I recall it.

Q. Because that was Mr. Remmer's office, is that correct? A. That is right.

Q. That is his personal office? That was not the Menlo Club office?

A. Well, I don't know about that either, because there is indication that the Menlo office was at 50 Mason. The testimony shows that Mr. Remmer had a box in the safe.

Q. And the testimony also shows, does it not, that various of the enterprises had boxes in the safe? A. That is correct.

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(Testimony of Lawrence Semenza.)

Q. Now as far as you know, that unaccounted for cash is still in the safe, either at the Menlo Club or at 50 Mason Street? A. As far as I know.

Mr. Avakian: Objected to as speculative, calling for opinion and conclusion of the witness and so far as it relates [2851] to where that money is now in 1952, would be immaterial and incompetent.

The Court: Objection overruled. Answer the question.

A. Unless I counted the funds in the box, I would not know where it was.

Q. Do you or do you not know whether or not that cash is still in the box?

Mr. Avakian: Objected to as asked and answered.

The Court: Objection overruled.

A. I wouldn't know where it was.

Q. And do you or do you not know whether that cash still remains as an asset of the Menlo Club or as an asset of Mr. Elmer Remmer?

A. I have not examined any records subsequent to this year or to the evidence here in the case, so I wouldn't know.

Q. Well, do you know or do you not know whether it remained as an asset there of the Menlo Club or of Mr. Elmer Remmer at December 31, 1945? A. Not that I know of.

Q. You do not know, is that correct?

A. No.

Q. And that cash, so far as you know, still may have remained as an asset of the Menlo Club or Mr.

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(Testimony of Lawrence Semenza.)

Elmer Remmer at December 31, 1946, is that correct?

Mr. Avakian: Objected—asked and answered at least three [2852] times, is repetitious. The witness has already said he doesn't know and the repeated asking of questions is improper and apparently simply for the purpose of trying to create some sort of inference through asking of the question.

The Court: Objection overruled. You may answer.

A. From the evidence here there is no indication that there was any cash in existence December 31, 1945, and that is why I charged it to Mr. Remmer as a drawing and have given no effect to it as an asset of his or of the Menlo Club.

Q. There is no record of whether or not cash was or was not in existence, is that what you mean?

A. There is evidence that some cash was in existence and there is no record of the amount.

Q. There isn't any record of how, when, or for what purpose any of that cash was disbursed?

A. Not that I know of.

Q. So the effect of your computation is that for the year 1945, you have assigned to Mr. Remmer, as a withdrawal from the Menlo Club, the sum of $63,661.28, which is not accounted for in the books and records of the Menlo Club, is that correct?

A. That is correct. However, that has no effect on the income of the Menlo Club for the year.

Q. In your computation of Mr. Remmer's capital

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(Testimony of Lawrence Semenza.)

account on page 13 of Exhibit M-1, you have entered the following items for the year 1945: Investment in assets acquired May 1, 1945, [2853] $175,000; net profit for 1945 as revised, $40,254.90; withdrawals in 1945, $120,127.31; balance December 31, 1945, $95,127.59, is that correct?

A. That is correct.

Q. And it is that figure of $95,127.59 which you have transferred to page 2 of Exhibit M-1, which is the duplicate of the large chart before the jury under Item 10, December 31, 1945, $95,127.59?

A. That is correct, Mr. Thompson.

Q. Mr. Semenza, if you add back to Mr. Remmer's capital account the sum of $63,661.28, which you assume was withdrawn by him from the Menlo Club in 1945, what is the figure at which you arrive as his net worth in the Menlo Club at the end of that year?

A. Approximately 158 thousand dollars. I have done the same as Mr. Weaver except I have allocated the withdrawals and the profits for the year among the partners of the Menlo Club.

Mr. Thompson: I would like to ask the latter part be stricken. All I asked the witness to do is to make his computations.

The Court: It may go out.

Mr. Avakian: Your Honor, may we be heard?

The Court: No.

Mr. Avakian: We may not be heard, your Honor?

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(Testimony of Lawrence Semenza.)

The Court: No, it is clearly not [2854] responsive.

Q. And your answer is that if you should add back into the capital account of Mr. Remmer, as of December 31, 1945, the sums of money which you have assumed were withdrawn by him, his capital interest in the Menlo Club as of that date would have been approximately $160,000?

Mr. Avakian: That is objected to as the very same question just asked and answered.

The Court: Objection overruled.

A. It would be that sum. However, I would have to likewise add an asset of equal amount to my balance sheet.

Q. That's right; and that would be on the basis that the Menlo Club records and tax returns indicate that that amount of money had been acquired by the Menlo Club during the year 1945, and that there is no record of its disbursement?

A. That would be on the basis of the assumption that the cash is still present.

Q. And as I understand you, there is no record it is not still present?

A. There is no evidence that it is not present in the Menlo Club.

Q. Itself?

A. And I wouldn't know whether it was present any place else.

Q. The Menlo Club, during the year 1945, maintained a bank account, did it not, in the Crocker

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(Testimony of Lawrence Semenza.)

National Bank in the name of Harold H. [2855] Maundrell? A. It did.

Q. And that was used for the operations of the Menlo Club, bar and restaurant and card room?

A. To some extent.

Q. Was it used exclusively for those operations?

A. I wouldn't know.

Q. Do you know whether or not all the cash receipts of the Menlo Club were deposited in that bank account?

A. I do not believe they were.

Q. You have made a similar computation and reconciliation of cash withdrawn for the year 1946, is that correct, and that is set forth on page 15 of your Menlo Club exhibit, schedule No. 4?

A. That is correct.

Q. Your first item is "Gross Income Per Return and Amended Return, $369,781.85." What is the source of that figure?

A. The source of that figure is the records of the Menlo Club for the year 1946, and the tax return.

Q. And do the records of the Menlo Club for the year 1946 and the tax return for the year 1946, agree as to the gross income received in the operations during that year?

A. They do, as far as I was able to determine.

Q. And that was by reference to the ledgers that you have before you?

A. That is correct. [2856]

Q. The next item is "Expenses Per Return,

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(Testimony of Lawrence J. Semenza.)

Excluding Depreciation and Amortization, $274,-225.28." What is the source of that figure?

A. The records of the Menlo Club and tax return.

Q. And the records of the club and tax return agree as to that figure? A. That is right.

Q. And the total of those expenses, $274,225.28, were actually recorded in the books and records of the Menlo Club for 1946?

A. As far as I was able to determine.

Q. You did make an effort, as an accountant, to determine that? A. I did.

Q. Your next item is "Less Items of Repairs and Replacements Considered to be Capital Items rather than Expenses, $2350.16." Is that item also taken from the books and records of the Menlo Club?

A. It was taken from testimony here of Mr. Maundrell and represents items capitalized shown in the balance sheet of the Menlo Club as capital improvement.

Q. You capitalized those items yourself in your own computation, is that correct?

A. Well, Mr. Weaver finds, and I had no difference of opinion with him on that, so I likewise did the same. [2857]

Q. You say you had no difference of opinion?

A. That's right.

Q. Were they capitalized on the books and records of the Menlo Club?

A. No, my examination indicated that they had

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(Testimony of Lawrence Semenza.)

been taken as expenses. If I had had additional information, I might have taken a different position and included them in expenses.

Q. Now you have arrived at a net income, after deduction of partners' salaries, for the year 1946, of $67,047.92? A. That is correct.

Q. And you could not make a computation of cash to be accounted for at December 31, 1946?

A. That is correct.

Q. And in the same way as you did for 1945, you added back certain non-cash items and arrived at a total of $103,500.31 of cash to be accounted for in the operations of the Menlo Club for the year 1946? A. That is correct.

Q. You then account for certain of those items of cash as follows: Advance for 50 Mason Street, $1,110.44; differences between inventories January 1, 1946, and December 31, 1946, $3,201.32; increase in balance on deposit in Crocker National Bank during the year, $1,956.06; improvements and replacements capitalized in 1946, $2,355.16; deposit in Bank of America December 31, 1946, $15,265.54. Then under the designation [2858] of "Partners' Drawings," you have the following items: Ditto, $4,490.57; Nelson, $3,378.29; Maundrell, $3,997.80; Turner, $2,130.33; Fricker, $3,599.56; Kyne, $16,-005.50. You include donations of $2160, increase in bank roll of $3.00; checks paid in 1946 entered in 1945, $26,464.18; then you arrive at a total of $86,-117.75, is that correct? A. That is correct.

Q. And that is the total amount of cash expendi-

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(Testimony of Lawrence Semenza.)

tures accounted for by the books and records of the Menlo Club for the year 1946?

A. Well, that is the total amount of the 103 thousand that is accounted for.

Q. The 103 thousand is the amount of cash that they had available to spend that year, according to your computation?

A. Not necessarily. That is after payment of the operating expenses, purchase of food and so on.

Q. Now with reference to the partners' drawings which you have set forth for Mr. Ditto, Mr. Nelson, Mr. Maundrell, Mr. Turner, and Mr. Fricker, are they recorded in accounts designated as capital accounts for those persons? A. They are.

Q. And what do those withdrawals represent according to the books and records of the Menlo Club?

A. According to the books and records they represent federal income tax and California income tax. [2859]

Q. They all represent federal income and California income tax payments on behalf of those persons, is that not true? A. That is correct.

Q. And those payments, according to those books and records, were made not by check payable to the individual person himself, but by check payable to the respective collector, is that correct?

Mr. Avakian: Objected to as incompetent, irrelevant and immaterial; as long as they were paid for the accounts of Mr. Ditto, Mr. Maundrell, and so on, it doesn't matter how the check was issued payable. It was for their benefit.

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(Testimony of Lawrence Semenza.)

The Court: Objection overruled. You may answer the question.

A. I don't know without looking it up.

Q. Will you check it, please?

A. There was reference here in the ledger accounts to certain checks dated that date, but I do not seem to locate them here at the moment.

Q. May I ask you this, Mr. Semenza—don't the entries in the ledger accounts indicate that the checks were made payable directly to the respective tax collector?

A. They do, but that is not an indication that it was so.

Mr. Avakian: Your Honor, if it will save time, we would be willing to stipulate that the checks that are involved in this instance—— [2860]

The Court (Interceding): Take this up with counsel privately.

Mr. Golden: Well, never mind if he doesn't want to.

The Court: Take it up with counsel privately.

Mr. Golden: Forget it.

Mr. Avakian: Your Honor, counsel is willing to have me suggest this stipulation, in the interest of time, that the checks about which he is now questioning the witness were issued payable to the Franchise Tax Commissioner of the State of California and to the Collector of Internal Revenue in payment of taxes due to those respective payees of the respective governments by the various partners indicated in the accounts as Mr. Ditto, Mr. Nelson,

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(Testimony of Lawrence J. Semenza.)

Mr. Maundrell, Mr. Turner and Mr. Fricker, in payment of their income tax obligations, as shown by their returns filed with those respective governments. In making that stipulation, we do not want it understood that we think the matter is material one way or the other.

The Court: If you make a stipulation, make it.

Mr. Avakian: We stipulate to the fact.

Mr. Thompson: We will stipulate if he will eliminate the word "partner" from the stipulation and set forth the names of the persons.

Mr. Avakian: It is his own question.

The Court: Never mind with the stipulation. Go along [2861] with the trial.

A. The amounts are probably taken from the check books here in evidence, probably Exhibit 133. These books don't seem to show it, that period of time. I don't find the particular check number in the records.

Q. You don't find the particular check number in the record?

A. No, there is evidently another check book.

Q. Mr. Semenza, would you, during the recess, check on that please, and we will pass it.

A. If the records are here.

Q. That is what I anticipate, that you will look at the available records here. A. Yes.

Q. Now will you take the ledger account of the Menlo Club for the year 1946, Mr. Semenza, and turn to the capital account designated in the name

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(Testimony of Lawrence J. Semenza.)

of Willie Kyne, or W. E. Kyne? A. Yes, sir.

Q. And according to the entries in that record, what withdrawals or charges were made against that account during the years 1945 and 1946?

A. None.

Q. I note on your Exhibit M-1, page 15, under the heading, "Partners Drawings, Kyne," you have included an item, $16,005.50, is that recorded on the books and records of the Menlo Club? [2862]

A. Yes.

Q. Where? A. Check in exhibit here.

Q. Mr. Semenza, I hand you government's Exhibit 120, check drawn on the Day and Night Office, Bank of America, dated December 2, 1946, payable to the order of Wm. E. Kyne, in amount of $16,005.50, made by the Menlo Club by Wm. E. Kyne, and with notation on it "Loan for Transit." Is that the check to which you refer?

A. It is. The testimony of Mr. Kyne that he withdrew the money.

Q. Is that particular check entered anywhere on the books and records of the Menlo Club?

A. No, it is not.

Q. Is there any indication in the books and records of the Menlo Club that that club maintained a bank account in the Day and Night office of the Bank of America?

Mr. Avakian: Just a moment—that is objected to, your Honor, because of the scope of the question. The question is not limited to the books and records

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(Testimony of Lawrence J. Semenza.)

produced in evidence by the government, but asks apparently as to all books and records and there is testimony the government has other books and records which have not been produced here. I object to the question as going outside the scope of the evidence, unless counsel limits—— [2863]

Mr. Thompson: I will withdraw the question.

Q. Is there any indication in the ledger accounts, journals, of the Menlo Club here in evidence, that that club maintained a bank account in the Day and Night Office of the Bank of America?

A. There are bank statements here.

Q. Are they recorded in the ledger accounts and journals of the Menlo Club?

A. Regardless of whether they are, they must be taken into consideration.

Mr. Thompson: May the answer be stricken?

The Court: It may go out. Listen to the question and answer it.

A. No, they are not.

Q. I agree they must be taken into consideration. I was just asking whether they appear in the ledger accounts and books of the Menlo Club?

A. That is correct.

Q. So you have taken into consideration that check for $16,005.50 and as entered on your computation as withdrawal by Mr. Kyne during 1946; is that correct?

A. I have. I could have done it one other way, by showing it as a loan to Mr. Kyne, which would have increased the assets $16,005.50 and showed a

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(Testimony of Lawrence J. Semenza.)

greater capital account for Mr. Kyne, but the net result would be the same as the way I [2864] have it.

Q. And according to your computation on page 15 of Schedule M-1, the books and records account for the disbursements after operating expenses of $86,117.75 out of $103,500.31 for the Menlo Club for the year 1946? A. That is correct.

Q. And so you have entered an entry, "Withdrawn by Remmer, $17,382.56"; is that correct?

A. That is correct.

Q. And what did the books and records of the Menlo Club show as to amount actually withdrawn by Mr. Remmer during 1946?

A. Some three thousand dollars—four thousand dollars approximately.

Q. And those withdrawals are recorded on an account under the heading Elmer Remmer?

A. They are.

Q. So that left you with $17,382.56 less $4,000, or a balance of $13,382.56 which was not accounted for as disbursements? A. That is correct.

Q. So you have assigned that as a withdrawal by Mr. Remmer? A. That is correct.

Q. If that money at December 31, 1946, remained in the Menlo Club safe, it would be proper to add it as an additional asset of the Menlo Club, would it not?

A. If that money, or any larger or smaller amount, was there, [2865] I would give it effect, if I knew what it was.

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(Testimony of Lawrence J. Semenza.)

Q. So if you should charge that money out as a withdrawal by Mr. Remmer and he still had it on hand at December 31, 1946, it should be added back into his capital account with the Menlo Club, as you have computed it; is that correct?

A. If I knew there was any cash, I should take it into consideration.

Q. And are there any records here available showing that that sum of $13,382.56 was actually expended? A. None that I know of.

Q. In Mr. Remmer's capital account for the year 1946 you have a balance of $113,433.39, after deducting as a withdrawal the sum of $13,382.56, which is not accounted for in the books?

A. That is correct.

Q. And if you should add back into Mr. Remmer's capital account that sum of $13,382.56, his capital account would have been $126,815.95; is that true? A. 126 thousand some odd dollars.

Q. Also if you should add to that the sum of $63,661.28 cash which you have assigned to Mr. Remmer and were unable to account for in the year 1945, if you should also add that back into his capital account at December 31, 1946, his capital account would have been some 190 thousand odd dollars; is that correct?

A. It would, provided I assume that no other partners took it or that the money was there. [2866]

The Court: We will take a recess at this time.

(Jury and alternate jurors admonished and five-minute recess taken at 11:00 o'clock.)

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11:10 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand on further

Cross-Examination

By Mr. Thompson:

Q. In failing to include, Mr. Semenza, you have assumed it was spent without any record being present of the expenditure; is that correct?

A. Well, I assumed that Mr. Remmer took it.

Q. And that he spent it?

A. He did anything he wanted with it.

Q. And if it should be included as Mr. Remmer's asset on your net worth computation, rather than asset of the Menlo Club, the result would have been the same?

A. If it existed, it would be included under his personal statement.

Q. Now during the recess did you have an opportunity to check on the withdrawals you entered?

A. I had the opportunity, but there are a few things I have not found in the evidence of the checks being here. I have only examined a few of the Menlo Club so far.

Q. Did you refer to the bank record account of the Menlo Club? [2867]

A. That is what I saw.

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(Testimony of Lawrence J. Semenza.)

Q. I do not mean cancelled checks and statement; I mean bank record in the ledger.

A. I did, but I couldn't find those checks.

Q. They were not entered? A. No.

Q. Mr. Semenza, I show you plaintiff's Exhibit 113, which is an agreement between Mr. Elmer Remmer and Mr. Willie Kyne, and in making your net worth computation in this case, did you have that agreement in mind? A. I did.

Q. Did you note, Mr. Semenza, that that agreement purports to be an agreement between Mr. Elmer F. Remmer, first party, and Mr. Wm. E. Kyne, second party, relating to the acquisition by Mr. Kyne of a 15 per cent interest in the Menlo Club? A. That is correct.

Q. I note that in your Menlo Club schedules contained in Exhibit M-1, page 13, you have set forth a capital account for Mr. Kyne as a partner for the year 1945; is that correct?

A. That is correct.

Q. When you placed that construction upon the evidence in this case, did you have in mind that the agreement between Mr. Remmer and Mr. Kyne, plaintiff's Exhibit 113, is dated November 4, 1946?

A. I did. [2868]

Q. Did you also have in mind that from February, 1945, until June, 1946, Mr. Kyne was in the United States army? A. I did.

Q. Did you also have in mind that this agreement, dated November 4, 1946, speaks in the present tense, where it recites: "It is the desire of first

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(Testimony of Lawrence J. Semenza.)

party to sell, assign and convey to second party a 15 per cent interest in and to said Social room business and in and to said restaurant business"?

Mr. Avakian: We object to that as an incomplete recital of the document on that point because it also recites it is effective as of May 1st of 1945. The incomplete recital is unfair to the witness and an improper representation of what the document contains.

Mr. Thompson: I will read the whole document if you desire. I intend to get to that.

The Court: The objection is overruled. You may proceed.

Q. Did you have that in mind? A. I did.

Q. Did you also have in mind that this agreement, dated November 4, 1946, also speaks in the present tense where it says: "Said party is desirous of acquiring a 15 per cent interest in and to said social room business and in and to said restaurant business"? A. I did.

Q. You also had in mind the provision of this agreement as [2869] follows: "Effective as of May 1, 1945, first party hereby does assign, transfer, set over and convey to William E. Kyne, second party herein, a 15 per cent working interest in and to the profits derived from the operation of the aforesaid social room and restaurant business as aforesaid"?

A. I did.

Q. Mr. Semenza, if this agreement was entered into on the 4th day of November, 1946, and not earlier than that date, would it have been possible

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(Testimony of Lawrence J. Semenza.)

to make an entry in the books and records of the Menlo Club in the year 1945, or at any time prior to November 4, 1946, showing that Mr. Kyne had a distributive share of that enterprise?

Mr. Avakian: Objected to, your Honor, as assuming facts contrary to the evidence, because the testimony is that this, and similar Menlo documents, were simply a reduction to writing of oral agreements that were previously in existence.

The Court: Objection overruled. Answer the question.

A. Yes, on the basis of their oral agreements and testimony in this case, and the fact that the tax returns were filed for the year 1945 evidencing that fact.

Q. Did you have in mind the provision of Exhibit 113 as follows: "It is understood and agreed between the parties hereto that said working interest does not represent an actual interest in and to assets of said business or in and to the leasehold in said premises, that is to say, all monies [2870] credited to the account of second party, pursuant to said working interest, shall be applied on account of second party's payment for an actual interest in and to said social club business and restaurant business"?

A. I did, because it is the usual practice in partnerships of a similar nature.

Q. Did you further have in mind this provision of the agreement: "It is further understood and agreed between the parties hereto that an actual

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(Testimony of Lawrence J. Semenza.)

interest in and to said business and other assets shall not be acquired by second party (meaning Mr. Kyne) until first party (Mr. Remmer) has been fully reimbursed in the sum of $175,000"?

A. I did.

Q. And according to your examination of the books and records of the Menlo Club as of December 31, 1946, had Mr. Remmer withdrawn from said business the sum of $175,000? A. Not quite.

Q. According to your computation, the amount withdrawn by him at December 31st was——

A. Approximately 138 thousand dollars.

Q. Approximately 138 thousand? A. Yes.

Q. The next item you have entered on Exhibit M-1, page 2, is Item 11, "Equity in Transit Smoke Shop." A. Yes, sir. [2871]

Q. And you have entered that as $15,966.57; is that correct? A. That is correct.

Q. And that is the same transaction which is entered as Item 7 on government's Exhibit 183, showing a net worth at the end of 1946 of $32,-621.46? A. That is correct.

Q. I wish to direct your attention to plaintiff's Exhibit 98, Mr. Semenza; are you familiar with that? Did you have that in mind in making your computation with reference to the Transit Smoke Shop? A. I did.

Q. Did you have in mind the recital in that agreement which is an agreement dated November 21, between Gordon Partee, Elmer Remmer and Wm. E. Kyne, to the effect that second parties, that

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(Testimony of Lawrence J. Semenza.)

is, Mr. Kyne and Mr. Remmer, had contributed $32,011.01 toward the assets of the partnership?

A. I did.

Q. Did you also have in mind the testimony of Mr. Kyne, to the effect that he had received, out of the Menlo Club bank account in the Day and Night Branch of the Bank of America, a check in the sum of 16,005 dollars and some odd cents?

A. I did.

Q. And that is the same check which was shown you a few minutes ago? A. It is. [2872]

Q. Did you have in mind the notation on that check, "Loan for Transit"; is that correct?

A. That is correct.

Q. Did you also have in mind Mr. Kyne's testimony that he cashed that check and placed it in a safe deposit box and used it for the other businesses?

Mr. Avakian: Objected to as an incomplete and misleading recital of Mr. Kyne's testimony, because on that same matter he also said that that represented his one-half contribution of the 32 thousand dollars investment in the Transit Smoke Shop. That was a part of his testimony on that point, your Honor.

The Court: Objection will be overruled.

A. I did have that in mind from his testimony, and I concluded he was paying Mr. Remmer back for his half share.

Q. And did you have in mind that, accepting your view of the evidence, the other business for

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(Testimony of Lawrence J. Semenza.)

which that money was used could have consisted of the B. & R. Smoke Shoppe, having, according to your view of the evidence, three interested persons, Mr. Kyne, Mr. Remmer, and Mr. Lando, the 110 Eddy Street, having, according to your view of the evidence, four partners, Mr. Kyne, Mr. Remmer, Mr. Cavani and Mr. Turner, the Day-Night Cigar Store, having, according to your view of the evidence, three partners, Mr. Remmer, Mr. Kyne and Mr. Lando; the 186 Club, having, according to your view of the evidence, several [2873] interested parties, including Mr. Remmer, Mr. Kyne, Mr. Casselini, Mr. Busterna, and others?

Mr. Avakian: Object to the question as assuming facts contrary to the evidence and calling for speculation of the witness, and with respect to the statements contrary to the evidence, first of all it assumes and states that Mr. Semenza took some view with respect to the 186 Club that is contrary to the evidence, because nowhere in Mr. Semenza's testimony did he express any views with respect to the 186 Club in any respect; secondly, it assumes facts which have not been testified to here by any witness with respect to the use of this money for these various enterprises which Mr. Thompson has mentioned.

The Court: Objection overruled. You may answer the question.

A. I have testified to nothing on the 186 Club. Mr. Remmer could have used the money for the enterprises you stated; he could also have loaned

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(Testimony of Lawrence J. Semenza.)

it to Cal-Neva. He could have done many things with it.

Q. Is there any record here in evidence of what disposition that money was made? A. No.

Q. And is there any evidence that you know of here in the record, other than Mr. Kyne's statement, that it was used for the various businesses? [2874]

A. No.

Q. Now with regard to your Item 21, "Due Cal-Neva, Inc.," on Exhibit M-1, that same subject matter is treated as Item 27, the second item under the heading "Liabilities," on government's Exhibit 183, is it not? A. That is correct.

Q. And with respect to the balance owing by Mr. Remmer to Cal-Neva, Inc., as of December 31, 1943, your schedule, Exhibit M-1, and the government's Exhibit 183 are the same?

A. That is correct.

Q. That is the sum of $23,152.77?

A. Yes, sir.

Q. Your schedule and government's Exhibit 183 are also the same as to the year-end 1944, that is, the sum of $18,361.68? A. That is correct.

Q. And your schedule and government's Exhibit 183 are the same as to the year-end 1946, that is, the sum of $60,742.39? A. That is correct.

Q. The only difference between your computation and government's Exhibit 183 occurs in the year 1945? A. That is correct.

Q. And there is a difference between your figure and that set forth in Exhibit 183 of $2,500?

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(Testimony of Lawrence J. Semenza.)

A. That is correct.

Q. That figure of $2,500 is represented by a loan made by [2875] Cal-Neva to Mayris Chaney, as she testified to, in 1944; is that so?

A. That is correct.

Q. And according to her testimony it was repaid by December 31, 1945? A. Yes.

Q. Is that your recollection?

A. Yes, sir; and I also verified that by the closing entries for Cal-Neva for the fiscal year April 30, 1946, that it occurred during the season of '45; that is, repayment was made during the season of '45.

Q. And so you made an adjustment of increasing the amount of Mr. Remmer's obligation to Cal-Neva for the year 1945 by the sum of $2,500?

A. Yes, sir.

Q. Will you refer to the Cal-Neva records, please, and read the entries showing that that money was repaid in 1945?

A. Dated April 30, 1946, charge E. Remmer with cash received from Mayris Chaney $2,500 as payment of his loan to the company and to write off uncollectable loans.

Q. Now does that entry show that repayment was made in 1945? A. Not necessarily.

Q. And at the time Mr. Weaver made up his schedule, the only evidence before him upon which he could base a net worth computation was the Cal-Neva record? [2876]

Mr. Avakian: That is objected to, your Honor,

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(Testimony of Lawrence J. Semenza.)

as calling for speculation, opinion and conclusion of Mr. Semenza as to what was before Mr. Weaver. Only Mr. Weaver would know that.

Mr. Thompson: I will withdraw the question.

Q. Mr. Semenza, do you know of any other record in evidence in this case, relating to the Mayris Chaney loan, which was in evidence at the close of the government's case, other than the entry in the Cal-Neva record which you have before you?

A. I know of none.

Q. And the Cal-Neva are records which the accounting firm of Semenza & Kottinger have kept; is that correct?

A. That is correct. Mr. Weaver made the assumption at other fiscal year-ends that entry occurred in the calendar year, but he did not in that case.

Q. Now under your designation "Liabilities" on your Schedule M-1, you have included item 28, due to William Remmer? A. Yes, sir.

Q. And no similar item appears on the government's Exhibit 183; is that correct?

A. That is correct.

Q. And the effect of including the obligation to Mr. William Remmer at each of the year-ends in question is to reduce the net worth of each year-end of Elmer Remmer?

A. That is correct. [2877]

Q. Upon what evidence or record did you base the entry December 31, 1943, to William Remmer, $358.15?

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(Testimony of Lawrence J. Semenza.)

A. The exhibit presented by Mr. William Remmer, of which photostatic copies have been made.

Q. That is plaintiff's No. 186?

A. Yes, sir.

Q. That constitutes a photostat of a record of the firm of Remmer & Jordan?

A. That is my understanding.

Q. What does that show?

A. It shows a running account with Mr. Remmer starting in 1942 through November 15, '46.

Q. What does that account show as to what occurred with the balance due at the year-end December 31, 1942?

A. There is an entry December 31, journal 74, marked bad debt $234.36, was credited to the account, leaving a balance of $2.59.

Q. And as an accountant, what does that entry indicate to you?

A. I assume they considered it uncollectible to that extent.

Q. And that was December 31, 1942?

A. That is correct.

Q. Now what does the balance show at December 31, 1943? A. A balance of $358.15.

Q. And that is the amount entered on your Schedule M-1? A. That is correct. [2878]

Q. And in considering that an outstanding liability of Elmer Remmer, did you also take into consideration Mr. William Remmer's testimony that he had not been paid? A. That is correct.

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(Testimony of Lawrence J. Semenza.)

Q. What is the balance shown on that record at December 31, 1944? A. $559.66.

Q. The figure you have entered on Exhibit M-1 is $1,028.06. Will you explain how you arrived at that?

A. To the balance here I have added these two items—on August 25 of 1944 a credit in the sum of $448.40 was credited to the account and there was noted charge to W. D. Remmer, and on December 31 there is another charge to William D. Remmer, $20, credited to the account. In view of the fact William Remmer's testimony indicated that he had paid some of these amounts, I added the $559.66 to the $468.40 to arrive at $1,028.06.

Q. Now I would like to direct your attention to Item 19 of Exhibit M-1, where for the year ending December 31, 1944, under the head "Autos," you show the sum of $468.46. What does that represent?

A. That represents a charge made July 31, 1944, to Elmer Remmer for a notation, 1936 Dodge, $468.40. Mr. William Remmer testified that there was a Dodge pick-up that he purchased.

Q. And did you have Mr. William Remmer's testimony in mind that according to his recollection the title to that Dodge [2879] pick-up had been transferred to Cal-Neva, Inc.?

Mr. Avakian: Mr. William Remmer's testimony was——

The Court: Are you going to object?

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(Testimony of Lawrence J. Semenza.)

Mr. Avakian: I object on the ground it is contrary to the evidence. He said he thought——

The Court: Let me have the question.

(Question read.)

The Court: Answer the question.

A. I did.

The Court: We will take our recess now.

(Jury and alternate jurors admonished and noon recess taken at 11:45 a.m.)

Afternoon Session

February 13, 1952—1:30 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand on further

Cross-Examination

By Mr. Thompson:

Q. Mr. Semenza, in connection with the item $468.40 under the heading "Autos," Item 19 on your Exhibit M-1, under the column December 31, 1944, you testified, I believe, that that represents an automobile which Mr. William Remmer testified was purchased by Elmer Remmer from Remmer & Jordan? A. Yes, sir.

Q. And on what date? [2880]

A. July 31, 1944.

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(Testimony of Lawrence J. Semenza.)

Q. Will you refer to the Cal-Neva ledger under check No. 7225, a check dated June 12, 1946, and tell us what that check was for?

A. June 12, 1944, check No. 7225, was issued to Remmer & Jordan, $470.58. It is charged to auto and truck expense.

Mr. Avakian: Your Honor, may we have again the date of that check?

The Court: Yes.

A. June 12th.

Mr. Avakian: I thought he said 1944.

A. I beg your pardon—what is the check number?

Mr. Thompson: It is check dated June 12, 1946, No. 7225.

A. June 12, 1946, Remmer & Jordan, $470.58.

Q. Mr. Semenza, I show you plaintiff's Exhibit 188 for identification. Do you recognize that as a photostat of the check, the entry of which you have just read from the Cal-Neva ledger?

A. Photostat of check No. 7225, yes, what I just read.

Mr. Thompson: I offer in evidence as plaintiff's Exhibit 188.

Mr. Avakian: Your Honor, we have no objection to the use of the photostat, but insofar as the materiality of the offer is concerned, we object to it on the ground it is incompetent, irrelevant and immaterial, has not been connected in any [2881] way with any transactions in this case, has not been connected in any way with the defendant. If your

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(Testimony of Lawrence J. Semenza.)

Honor will look at the check, you will see that the date of it is two years later than the date of the transaction that William Remmer testified to and concerning which Mr. Semenza is being questioned. The transaction was in 1944, the check is dated June 12, 1946. The amounts are different, the parties are different; namely, William Remmer referred to a transaction he had with Elmer Remmer in 1944. This check refers to a transaction in a different amount in June of 1946 between Cal-Neva, Inc., and Remmer & Jordan. If you will look at Exhibit 186, which is the ledger cards of Remmer & Jordan for the Elmer Remmer account, your Honor will see that there is no transaction on that account that relates to the check that has been offered as Exhibit 188, so that we do not see how it can possibly be connected with anything in this case.

Mr. Thompson: If the Court please, as I recall the testimony of Mr. William Remmer, it was his recollection that the truck in question had been transferred, the title to it, to Cal-Neva, Inc. The record that he has produced purports to be a record of Remmer & Jordan account with Helen and Elmer Remmer, and this check, indicating a payment by Cal-Neva, Inc., to Remmer & Jordan on an account for substantially the same amount as the cost of the truck, which was transferred by title to Cal-Neva by Remmer & Jordan, is sufficient [2882] connection, it seems to me, to render it admissible in evidence. The weight to be given to it is another

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(Testimony of Lawrence J. Semenza.)

thing. It is the authenticity of the records of Remmer & Jordan.

Mr. Avakian: The records of Cal-Neva Mr. Semenza just read do not even show it was for the purchase of the vehicle, just shows it was for auto expense, $470. That expense might be overhaul of a motor, we don't know. When Mr. William Remmer was here the prosecution had this photostat, it is taken from their files, he might have thrown some light, perhaps he could have connected it, we don't know, but on the present state of the record, a check dated two years after the transaction shown in Elmer Remmer's personal account, has no connection. The amount is different, there is no showing it is for the same item, it is for a different entity; I don't see how we can possibly know, on the present state of the record, without further explanation from Remmer & Jordan, whether these are the same items or not.

Mr. Thompson: The Court will recall when Mr. William Remmer was here he did not have with him his ledger record and that was produced later.

Mr. Avakian: The record also shows, your Honor, that this particular transaction between Remmer & Jordan and Elmer Remmer, as shown on the ledger card, was inquired into by the government more than a year ago when they questioned William Remmer and asked him about that Dodge truck. The record will [2883] show that they had Mr. William Remmer up here twice during the trial, that he had the ledger cards here with him

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(Testimony of Lawrence J. Semenza.)

when he came up to be interviewed by the government and they had this photostat available and in the courthouse when Mr. William Remmer was here on the stand. I do not think the prosecution is in the position to say that they were taken by surprise on this matter, because more than a year ago they examined the ledger cards, they have now been put in evidence, they examined William Remmer on this particular matter, they talked to him twice during the trial, and they have had photostat of the check all this time. Now we certainly do not want to be in the position of objecting to anything material, but we do not feel, particularly in the absence of anything in the nature of surprise, things that are not shown to be material, are not shown to be connected, should be received in evidence.

The Court: The exhibit will be admitted in evidence.

Q. Mr. Semenza, do the Cal-Neva records themselves contain any further information relating to that transaction?

A. The only information here is it is charged to auto and truck expense for that year.

Q. Now you have carried that same item of $468.40 over to December 31, 1945, as part of Item 19 on Exhibit M-1; is that correct?

A. That is correct, Mr. Thompson.

Q. And then you have entered a figure for automobiles of [2884] $2,185.31 at December 31, 1946; is that correct?

A. That is correct, Mr. Thompson.

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(Testimony of Lawrence J. Semenza.)

Q. And how is that figure computed?

A. The difference between $468.40 and $2,185.31 is an amount stated in Mr. William Remmer's testimony as the Pontiac car.

Q. Now in the liability section of your Exhibit M-1, page 2, under Item 28 due to William Remmer at December 31, 1946, you have entered the figure $9,592.88; is that correct?

A. That is correct, Mr. Thompson.

Q. How is that figure computed?

A. In Mr. Remmer's testimony he stated that at the end of '46 it was his recollection that the amount owed by his brother had increased eight to ten thousand dollars, so to the amount shown in the ledger cards here I added eight thousand dollars, bringing it up to $9,592.88.

Q. In including the item of $8,000 at December 31, 1946, as being due to William Remmer from Elmer Remmer at that time, you base that, you say, upon the testimony of William Remmer?

A. That is right.

Q. And did you take into consideration the following testimony of Mr. Remmer, as contained in government's Exhibit 184——

Mr. Avakian: Just a moment — 184 is not in evidence. It is marked for identification only. I believe Mr. Thompson was looking at the clerk's stamp that said 184 was for identification. [2885]

Mr. Thompson: That is correct, it is 184 for identification.

Mr. Avakian: Then we object, your Honor, to

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(Testimony of Lawrence J. Semenza.)

any question which relates to a document which is not in evidence. Your Honor will recall that a portion of that statement was by stipulation read into the record, and insofar as it is incorporated in the record, we have no objection. The record should be used rather than any portion of the statement which was not in evidence.

Mr. Thompson: To facilitate the examination, I intended to read from the statement, but if you want to furnish me with a transcript, I have no objection.

Mr. Avakian: We will be glad to make our copy of the transcript available, Mr. Thompson, calling his attention to that portion which was read into the record. I believe it begins at page 2583 and continues for several pages, on both cross and direct examination.

Mr. Thompson: I will read the following testimony of William Remmer to you, Mr. Semenza, as it appears in the transcript, starting with page 2583: (Reads from transcript, page 2583, line 21, through page 2585, line 20).

Q. Do you recall that? A. Yes, sir.

Mr. Avakian: May we have an objection and have the answer stricken for the purpose of objecting? He answered as I [2886] was about to make my objection.

The Court: Yes.

Mr. Avakian: Our objection is the reading of the testimony is incomplete on that particular point, because Mr. Remmer also testified that at

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(Testimony of Lawrence J. Semenza.)

the end of 1946 Elmer Remmer owed him between eight and ten thousand dollars and for 1943 it was approximately $300, and in reading of only a portion of the testimony on that point is improper, leaves a misleading impression with the jury, and is not fair to the witness.

Mr. Thompson: I do not consider that to be a proper objection.

The Court: The motion is denied and the answer will stand. The objection is overruled and the answer will stand.

Q. Mr. Semenza, in connection with the William Remmer transaction, do you recall Mr. William Remmer's testimony that Mr. Elmer Remmer also had other automobiles? A. Yes, sir.

Q. And what effect, if any, did you give to that testimony in computing the net worth of Mr. Elmer Remmer?

A. None, because I had no information from which I could determine what he had.

Q. Referring to your Item No. 27 under "Liabilities," due to Gene Schriber at December 31, 1945, $125,000, and at December 31, 1946, $75,000, that is the same subject matter as is set [2887] forth in Item 33 on government's Exhibit 183; is that correct? A. It is.

Q. There is a difference, however, in that in government's Exhibit 183 the amount of the liability at December 31, 1945, is set forth as $100,000, while in Exhibit M-1 it is set forth at $125,000; is that correct? A. That is correct, Mr. Thompson.

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(Testimony of Lawrence J. Semenza.)

Q. I would like to show you government's Exhibit 140, which is a ledger sheet entitled "Furniture, Fixtures, Equipment and Buildings." On that Exhibit 140 what is the amount shown to be due to Gene Schriber as of December 31, 1945?

A. $100,000.

Q. Have you at any time seen the original of Exhibit 140, which is a photostat of a ledger sheet?

A. Not to my recollection. I have refreshed my memory by referring to memorandums regarding the Menlo Club records and we have no indication that that particular ledger sheet was in the record at the time that we got them.

Q. Is it not true that at the time that the photostat of the ledger was shown to Mr. Maundrell and identified by him when he was testifying as a witness in this case you, at a recess, remarked to me, and also to Mr. Campbell, that you had a recollection of seeing the original of that photostat?

A. I said I might have seen it. [2888]

Q. Is it not true that you said that you had seen it, according to your best recollection?

A. According to my best recollection, I said that I might have seen it.

Q. Now in making your net worth computation as set forth on Exhibit M-1, you have entered as net worth certain figures with the notation "plus cash"; is that correct? A. That is correct.

Q. And it is true, is it not, that any amount of cash that may have been on hand at the end of the year-ends in question would increase Mr. Remmer's

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(Testimony of Lawrence J. Semenza.)

net worth at that time? A. That is true.

Q. In your chart designating the list of assets and liabilities, to the extent shown by the evidence, you have not attempted to compute an understatement or overstatement of income on the net worth basis, have you?

A. I have not on that exhibit, no.

Q. Is it not true that in making a computation of the understatement or overstatement of income on the net worth basis, it is proper to add to the net worth as shown by the evidence at each year-end the amount of federal or state income taxes paid by the taxpayer during that year?

Mr. Avakian: Objected to as calling for opinion and conclusion of the witness on a matter of law and as containing an erroneous statement of the law. You do not add the expenses [2889] to the net worth by the net worth method. You first determine the increase in net worth and then add it to the increase, not to the net worth.

Q. It is proper, is it not, Mr. Semenza——

The Court (Interceding): Do you withdraw this question?

Mr. Thompson: Yes, your Honor.

Q. ——to add federal income taxes to the increase in net worth in computing the amount of income? A. That is correct.

Q. And it is also proper to add the amount of non-deductible personal expenses of the taxpayer during the year? A. That is correct.

Mr. Thompson: I would like to bring out, your

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(Testimony of Lawrence J. Semenza.)

Honor, so the jury can see it, chart marked Exhibit M-1, page 1.

Q. According to your computation, Mr. Semenza, for the year 1945, as shown on Exhibit M-1, page 1, Mr. Remmer received income in the amount of approximately $75,000 during that year; is that correct? A. That is correct.

Q. And according to your net worth computation Mr. Remmer, during that same year, suffered a reduction in his net worth of approximately $70,000?

Mr. Avakian: Just a moment. We object to that, your Honor, as showing a statement contrary to Mr. Semenza's testimony. His testimony was first that he couldn't compute the net [2890] worth because the amount of cash was uncertain; secondly, the chart itself shows change in net worth as 70 odd thousand dollars plus or minus change in cash, and that is the very vital thing that is omitted from what Mr. Thompson states in his question Mr. Semenza testified, so the question assumes testimony on the part of Mr. Semenza contrary to his testimony.

The Court: Let me have the question.

(Question read.)

The Court: You may answer the question.

A. He suffered the reduction of $70,339.21 plus or minus change in cash.

Q. And he had an income during that year, according to your computation, of approximately $75,000? A. That is correct?

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(Testimony of Lawrence J. Semenza.)

Q. As a result of your computations, there remains approximately 145 thousand dollars during the year 1945 which is not accounted for by any books, records or evidence here in Court; is that correct?

A. It may be more or less, depending on change in cash.

Q. But the cash is not accounted for by any book or record, is it? A. No, it isn't.

Q. So the total sum of 140 thousand dollars is not accounted for, according to your computation?

A. That is correct. [2891]

Mr. Thompson: We have no further cross-examination, your Honor.

Redirect Examination

By Mr. Avakian:

Q. Do you have Exhibit M-1 before you, Mr. Semenza? A. I have.

Q. And you also have Exhibit 169, which is Mr. Weaver's exhibit in regard to the B. & R. Smoke Shoppe? A. No, I do not.

(Hands witness exhibits.)

Q. On page 4 of Exhibit M-1, you have set forth no amount as bank roll of the B. & R. Smoke Shoppe at the end of 1943, 1944 or 1946, and I believe you stated that the reason was that you found no evidence in the record of any amount of bank roll on hand on those dates. Now if you will assume that the bank roll of the B. & R. Smoke Shoppe at

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(Testimony of Lawrence J. Semenza.)

the end of 1943, whatever the amount may have been, was the same as the amount of the bank roll at the end of 1946, would it have made any difference in the computation of income on the net worth method, as contrasted with putting in no amount as bank roll on those years?

A. No, it would not.

Q. In other words, in computing income on the net worth method, the significant thing is the change in the amount of the asset from the beginning to the end of the period? A. That is right.

Mr. Campbell: Objected to as not proper redirect examination. [2892]

The Court: The answer may stand.

Q. Now you were questioned at considerable length on cross-examination as to whether the books and records of the various business enterprises, which are in evidence here, contain any reference to a personal loan made by Mr. Remmer to Mayris Chaney, a personal loan made by Mr. Remmer to Hazel Harris and her husband, to some residential property purchased by Mrs. Remmer and her sister-in-law, and to the amount owed to the Bank of America as a loan with respect to the purchase of a piece of residential property, and I believe in each instance you stated that the records of the business enterprises in evidence here did not contain a reference to those transactions. I want to ask you this, Mr. Semenza, in computation of the net income of a business, does it make any difference whatsoever whether the owners of the business

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(Testimony of Lawrence J. Semenza.)

made personal loans to personal friends, with respect to any portion of their money?

A. Not as far as the business is concerned.

Q. And does it make any difference in the income of that business whether the records of the business show the amount of a personal loan owed to the bank with respect to residential property?

A. No.

Q. Is it customary, based on your experience as an accountant, to show in the records of a business any personal [2893] financial transactions which an owner of the business may have with personal friends?

A. It is very unusual. In some instances there is reference to it.

Q. But it is very unusual? A. It is.

Q. In computing the net income of the Menlo Club, of the Day-Night Cigar Store, of the 110 Eddy Street, or of any other of the enterprises shown in this evidence, and in analyzing the receipts and disbursements of those businesses, for the purpose of determining the net income, would it make any difference whatsoever to you, as an accountant, how much money Mr. Remmer, as an individual, had loaned out to Hazel Harris or Mayris Chaney or had borrowed from the Bank of America? A. No.

Q. In computing the net income of a business, does it make any difference at all, from an accounting point of view, whether the owner or owners of the business keep in their business records a record

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(Testimony of Lawrence J. Semenza.)

of any of their personal transactions, such as the purchase of clothing, the buying of lunches, or anything else of a personal nature?

A. It isn't necessary.

Q. Does it have any bearing on determining the net income of that business?

A. It does not. [2894]

Q. And is it customary for business men to enter in their business records records of transactions of that type?

A. Well, it is unusual, I would say.

Q. Now I believe you stated that in your judgment the proper method of computing the net income of Elmer and Helen Remmer, from the evidence in this case, is in the manner and with the result set forth on page 1 of your Exhibit M-1?

Mr. Thompson: Objected to as leading and attempted recitation of the witness' previous testimony.

Mr. Avakian: I hadn't come to the question yet, simply calling attention to the—as to which the question is directed.

The Court: I think it is leading.

Mr. Avakian: I have not asked the question yet. How can it be leading if you don't know what it is?

The Court: Why not ask it?

Mr. Avakian: I was going to; I was interrupted.

Q. My question, Mr. Semenza, is this—in computing the net income of Helen and Elmer Remmer, as shown on page 1 of Exhibit M-1, did you use the

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(Testimony of Lawrence J. Semenza.)

net worth method or did you use receipts and disbursements method?

A. I used the receipts and disbursements method.

Q. And in using the receipts and disbursements method, is it or is it not necessary to have a record of the assets of the business in existence at any particular time?

A. It is not necessary. [2895]

Q. It is possible, then, to compute income without that information? A. That is correct.

Q. And is the receipts and disbursements method, rather than the net worth method, the method which is customarily used by accountants in computing the income of businesses?

Mr. Thompson: Objected to as not redirect—already asked and answered on direct.

The Court: Objection sustained. It is not proper redirect examination.

Mr. Avakian: Well, I would like to explain why it is proper, because it was gone into on cross.

The Court: I have ruled it is not proper.

Mr. Avakian: Well, may I have the courtesy of explaining to your Honor my position?

The Court: No.

Q. In your cross-examination you were questioned as to whether or not the books and records of these various enterprises, to the extent that they have been introduced in evidence here, contained a record of the assets of these various businesses at the end of the particular years. In computing the income of a business on receipts and disbursements

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(Testimony of Lawrence J. Semenza.)

method, is it necessary to have such records?

A. No, it is not.

Q. And do the books and records of the Menlo Club, to the [2896] extent that they have been introduced in evidence here, contain the information necessary for you, as an accountant, to compute the income of the Menlo Club on the basis of receipts and disbursements method? A. They do.

Q. Is that also true of the Day-Night Cigar Store? A. That is correct.

Q. And is that also true of 110 Eddy Street?

A. It is.

Q. Is that also true of the Transit Smoke Shop?

A. It is.

Q. And assuming that the entries of the net wins and losses in the books of the B. & R. Smoke Shoppe are correct entries, are those entries sufficient to enable you to determine the net income of the B. & R. Smoke Shoppe?

A. They would be.

Q. Do you have Exhibit 164 before you? Would you refer to page 5 of your Exhibit M-1, balance sheet Day-Night Cigar Store, and particularly to the item of equipment in amount of $10,400 shown in that identical amount at the end of each year, 1943, 1944, 1945, and 1946? A. Yes, sir.

Q. On cross-examination you testified that—that the date of the last entry in the Day-Night books showing that amount of equipment was January 1, 1946, and your attention was directed [2897] to the fact that the 1946 tax return of the Day-Night

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(Testimony of Lawrence J. Semenza.)

Cigar Store showed an amount of equipment of $2,100 at the end of 1946. Now, Mr. Semenza, if for December 31, 1946, instead of using the equipment figure of $10,400, you had used the $2,100 figure shown on the tax return, would that have increased or decreased the net worth of the Day-Night Cigar Store on December 31, 1946?

A. It would decrease it.

Q. And in computing income on the net worth method, does the decrease of the net worth at the end of the period have the effect of decreasing or increasing the income?

A. It has the effect of decreasing it.

Q. So that by using the higher figure of $10,400 that you did use, the effect of it, in comparison with $2,100 item mentioned by Mr. Thompson, was to increase the closing net worth and to increase any income computed on the net worth method?

A. That is correct.

Q. So that had you used the lower figure, in other words, your results would have been more favorable to the defendant than the results from the figure you did use?

Mr. Thompson: Objected to—calls for conclusion.

Mr. Avakian: It is a summarization.

Mr. Thompson: We object to counsel summarizing.

Mr. Campbell: It is leading, also.

The Court: Objection sustained. [2898]

Q. You also testified, in connection with your

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(Testimony of Lawrence J. Semenza.)

computations of the income of the Day-Night Cigar Store, that in making the computations of income which are set forth on pages 7 and 8 of Exhibit M-1, you made certain postings in the general ledger. Will you state from what source you made those postings?

A. From the cash book, cash receipts and disbusements record, of the Day-Night Cigar Store.

Q. And were the entries of receipts and disbursements from which you made the posting contained in the books themselves?

A. They were.

Q. And were you able, from the entries in the books themselves, to get the necessary information to make the posting to the general ledger?

A. I was.

Q. And in your business as an accountant, Mr. Semenza, do you frequently find that bookkeepers keeping the books of a business, fall behind in postings to the general ledger from cash receipts and disbursements record?

Mr. Thompson: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Avakian: It is very material because inadequacy contention is being made in connection with the charge of fraud.

The Court: He may answer.

A. It is very unusual in our practice to have complete postings. [2899]

Q. That is very unusual, you say?

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(Testimony of Lawrence J. Semenza.)

A. It is.

Q. Now you also stated that in preparing Exhibit M-1, in some instances it was necessary for you to refer to the testimony in conjunction with the entries in the records, in order to make proper computations. Is it customary or not customary, in your business as an accountant, to have to make inquiries of bookkeepers and other persons connected with the business, regarding the transactions reflected in the books, in order to complete your accounting analysis?

Mr. Thompson: Objected to as irrelevant and immaterial. And the question is also too general as to type of inquiry.

Mr. Avakian: It is the same point, your Honor, as to the adequacy of the records.

The Court: Objection is sustained.

Mr. Avakian: Your Honor, could I be heard on that?

The Court: No.

Mr. Avakian: Your Honor has permitted the prosecution witness to say the records are inadequate——

The Court (Interceding): The ruling will stand.

Mr. Avakian: Well, your Honor, I am forced then to make an offer of proof in order to make our offer of proof in connection——

The Court: Very well.

Mr. Avakian: I would like to make it in [2900] conjunction with the next recess, so as to avoid any unnecessary inconvenience to the jury.

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(Testimony of Lawrence J. Semenza.)

The Court: All right.

Mr. Avakian: I request whenever your Honor suggests at the close of the next recess.

The Court: You call my attention and whenever you want to make your offer of proof, I will ask the jury to leave the court room.

Q. Mr. Semenza, in connection with the books and records and returns of the Menlo Club, you have testified on cross-examination that the records of the Menlo Club were maintained on the accrual basis of accounting rather than on the cash receipts and disbursements basis, and you were asked whether it was your understanding that, under the code and the regulations it was up to the taxpayer to elect whether to be on the cash or accrual basis. What is your understanding in that respect?

A. It is my understanding that the taxpayer must report on the basis on which he maintains his records. If he maintains them on the accrual basis, he reports on the accrual basis; if he maintains them on the cash basis, he reports on the cash basis.

Q. And on what basis were the Menlo Club books maintained? A. The accrual basis.

Q. Have you examined Mr. Weaver's exhibit with respect to the [2901] Menlo Club, which I believe is Exhibit 165? A. I have.

Q. Was that exhibit prepared on the cash basis or the accrual basis?

A. It was prepared on the cash basis.

Q. And did it omit liabilities which on the accrual method should properly have been included?

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(Testimony of Lawrence J. Semenza.)

A. It did.

Q. What was the amount of liabilities omitted from Mr. Weaver's exhibit at the end of each of the years 1945 and 1946?

A. At the end of 1945 it is $26,464.18; the end of 1946 it is $17,264.58.

Q. Now you were also asked whether the records of the Menlo Club contained a record of accounts payable and you were directed to answer that question yes or no and your answer was no. Do you have any further explanation to offer in connection with that answer?

A. I have. Included in cash disbursements record I was able to determine the accounts payable, which I have previously stated amounts, $26,464.18 and $17,264.50. Regardless of whether they were shown in the accounts payable, if I find them there I gave consideration to them in my statement.

Q. Let me see if I get this right. Was there a ledger card designated accounts payable in existence? A. There was not. [2902]

Q. But was there the information contained in the books themselves showing the existence and the amount of the accounts payable?

A. There was.

Q. And that is what you used; is that right?

A. I did.

Q. Now in connection with Mr. Remmer's equity in the Menlo Club, as set forth both on page 2 and on page 13 of your Exhibit M-1 your attention was called to the capital account of Elmer Remmer

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(Testimony of Lawrence J. Semenza.)

shown in the ledger of the Menlo Club. Do you have that ledger before you?

A. No, I do not.

Q. I will hand you prosecution's Exhibit 125, the Menlo Club ledger, and call your attention particularly to the page designated "Partner's Account, Elmer F. Remmer," and I will ask you whether the amount of Mr. Remmer's capital account, as shown on that page for the end of the year 1945, was lower or higher than the amount shown in your Exhibit M-1 as his capital account for that date? A. What date is that?

Q. The end of 1945. A. It is lower.

Q. And at the end of 1946 is the amount of Mr. Remmer's capital account, as shown in the book, lower or higher than the amount which you set forth in Exhibit M-1 as his capital account for the end of 1946? [2903]

A. It is lower in Exhibit 125.

Q. If you had used the capital account shown in the book for the end of 1946 instead of the figure which you used in Exhibit M-1 for that same date, by how much would Mr. Remmer's 1946 net worth be reduced?

Mr. Campbell: I suggest that is argumentative, leading and incompetent. Necessarily if you change the figure he would have to change on his chart.

Mr. Avakian: Your Honor, we are entitled to show what the difference would be. It carries inferences created by cross-examination.

The Court: You may answer.

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(Testimony of Lawrence J. Semenza.)

A. The balance shown by the book December 31, 1946, is $39,508.60, which does not include his share of the profits for the year 1946. If I used that figure, it would result in reduction of approximately $74,000.

Q. And was his share of the 1946 profit credited to him during the following year?

A. It was, in the amount of $45,923.11. If I add that amount to the balance shown in the records at December 31, 1946, his capital account would be approximately $85,400. If I subtracted from the capital account in my report, page 13, Exhibit 125 would be approximately $25,000 less than the balance I show.

Q. As a result of your making your own accounting analysis and determination of Mr. Remmer's capital account, rather than [2904] using the amount shown in the book, did you increase or decrease Mr. Remmer's net worth at the end of 1946?

Mr. Campbell: Objected to as argumentative, assuming facts not in evidence. The witness cannot increase or decrease. He can state what figures he found, but I suggest this question is argumentative, if the Court please.

The Court: Let me have the question.

(Question read.)

The Court: You may answer the question.

A. I increased it.

Q. And in computation of net income on the net worth method, does an increase in a closing net

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(Testimony of Lawrence J. Semenza.)

worth result in an increase or decrease of income computed on the net worth method?

A. Results in a decrease.

Q. I do not know if you understood the question. Would you like to have it read?

Mr. Campbell: I object—the witness did not indicate he misunderstood.

The Court: Let him read it and see.

(Question read.)

A. Over the period it would result in an increase.

Q. By making your own analysis then, instead of using the figure in the book, did you reach a result which was favorable or unfavorable to the defendant in this case?

Mr. Campbell: That is objected to—— [2905]

The Court: Objection sustained.

Q. In connection with page 12 of Exhibit M-1, which is your analysis of the assets, liabilities and net worth of the Menlo Club, you were questioned on cross-examination regarding the item of improvements and replacements in 1946, which you stated were entered on the books as repairs and replacements but which you capitalized. First of all, let me ask you this, Mr. Semenza, on that item—what is the effect of capitalizing those items instead of treating them as repairs and replacements on income that is computed for that year?

A. It increases the income for the year.

Q. And will you state whether or not you have found it customary in your business as a certified

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(Testimony of Lawrence J. Semenza.)

public accountant, that business men frequently deduct as a repair and replacement items which you, as an accountant, consider to be capital items?

A. I have found it very usual.

Q. In connection with your computation, as set forth on pages 14 and 15 of Exhibit M-1 of the amount of cash which you determined and concluded was drawn by Mr. Remmer in each of those two years, 1945 and 1946, your attention was called, on cross-examination, to certain exhibits and testimony. In making that analysis, did you also have in mind the testimony of the various witnesses and the partnership agreements introduced in evidence here, to the effect that Mr. Remmer was to draw out his $175,000 investment in the Menlo Club before the other [2906] partners drew out their share of the profits? A. I did.

Q. And was that one of the reasons why you concluded that cash that was not otherwise disbursed should be charged to Mr. Remmer as drawing?

Mr. Campbell: Objected to as incompetent in that form.

The Court: It seems to me it is leading.

Mr. Avakian: Well, very well, it is leading, but I thought it would save time. Is the objection sustained, your Honor?

The Court: Yes.

Q. What effect did you give, Mr. Semenza, in testimony relating to that item?

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(Testimony of Lawrence J. Semenza.)

Mr. Campbell: I think that is incompetent, if the Court please.

The Court: I think so. Objection sustained.

Q. Now you were also questioned on cross-examination regarding provision in Mr. Kyne's partnership agreement, that is, 15 per cent share of the profits was to be credited to his capital account and that he was not to become an owner of 15 per cent of the assets of the business until Mr. Remmer had withdrawn his 175 thousand dollar investment, and your answer, as I recall it, was that you gave effect to that provision and that this was usual in similar partnerships. Could you explain that further, Mr. Semenza? [2907]

A. It is usual in partnerships—I mean, I have found it in many partnerships—where one partner did not have the funds to supply the business as his share of the investment and the other partner in the enterprise would put up all the funds to begin with and the party not having the funds to invest to begin with allowed his earnings to accumulate until there was sufficient accumulation to cover his share of the investment.

Q. And what have you found in your experience in that type of partnership with respect to the drawings of the partner who supplied the initial investment?

Mr. Campbell: Objected to as incompetent.

The Court: Objection sustained.

Mr. Avakian: Your Honor, that is very important and we think we should be heard on it. May we be heard on it?

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(Testimony of Lawrence J. Semenza.)

The Court: No, the ruling will stand.

Mr. Avakian: Well, I beg leave of the Court to hear me, your Honor, because it is being charged here the partnerships are fraudulent because of that point. Now if it is customary in partnerships of this kind to do just as was done here, that has bearing on the issue whether these are fraudulent partnerships.

Mr. Thompson: I object to counsel making up the government's argument. I think if he wants to argue points of law he should, but not make up the arguments of the government. [2908]

The Court: We will not hear any argument here. Let us proceed with the case.

Mr. Avakian: Your Honor is denying me permission to present my position?

The Court: Yes.

Mr. Avakian: Very well.

Q. I call your attention, Mr. Semenza, to Exhibits 146 and 188. Are they still before you?

A. They are not.

Mr. Thompson: May I suggest we take our afternoon recess?

The Court: Very well.

(Jury and alternate jurors admonished and recess taken at 2:45 p.m.)

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3:00 P.M.

(Defendant present with counsel.)

(In the absence of the jury.)

RE: ACCOUNTING ANALYSIS

Febr. 13, 1952. Notebook No. 344 PP 57-63.)

The Court: Mr. Avakian, do you care to make an offer?

Mr. Avakian: I would like to make an offer of proof in respect to two points to which objections were sustained.

First, I would like to offer to prove that in making accounting analyses of the books and records of business enterprises it is usually necessary and customary for the accountant to make inquiry of the bookkeepers or other individuals familiar with the transactions and the bookkeeping entries, in order to determine the proper accounting treatment to be made of the entries and transactions.

That is my first offer of proof and perhaps your Honor would like to rule on that before I make the second.

The Court: What is your objection to that, Mr. Campbell or Mr. Thompson?

Mr. Thompson: We object that the offer of proof to be incompetent and immaterial in this case. Mr. Semenza has testified that his accounting analyses has been based upon the books and records in evidence and the testimony of witnesses and the rule of whether or in other instances where people are available to make inquiry of, he may make in-

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quiry to determine the meaning of various entries, has nothing to do with this case.

The Court: What is your point?

Mr. Avakian: My point is in cross-examination questions were asked as to whether it was possible for Mr. Semenza to reach certain accounting conclusions on the basis of entries in the books and records alone, without recourse to the testimony of witnesses, and the implication of that, particularly in view of the fact that the prosecution's witnesses claim that the records were inadequate, and particularly in view of the rule of law that records must be shown to be inadequate before net worth method can be used, it is important, on the question of the adequacy of the records, to show that necessity to defer to the testimony of witnesses in interpreting any entries of the books, is not unusual, but rather is customary.

The Court: I will let you make that showing.

Mr. Campbell: Wouldn't this open the question of inquiry made of the principle here. The very general broad question, if it is proper to make inquiries of the bookkeepers and others, then the question would be if he had done so in reaching certain of these conclusions. Certainly then we would be entitled to know whom, which would include the principle in this case.

Mr. Avakian: Mr. Campbell misunderstands my point completely. Mr. Semenza has testified that he based his analysis on the books and records of this case and also on the testimony of witnesses in this case. The implication of the cross-examination

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questions and of the testimony of the prosecution witnesses is that the books and records which are here in evidence are inadequate because Mr. Semenza had to refer to something besides books and records, namely, the testimony of witnesses who testified, in order to reach his conclusions, and I want to negative any implication that his resort to the testimony of witnesses who testified shows the inadequacy of the books, by showing that it is customary in accounting practice in analyzing any set of books to make inquiries and not to limit themselves to the entries themselves, but to make inquiries of bookkeepers, such as the bookkeeper who testified here and whose testimony he relied on.

The Court: The question is whether or not the books were inadequate.

Mr. Avakian: That is the issue.

The Court: Can you ask him that?

Mr. Avakian: I wanted to make a direct point of his recourse to testimony of the witnesses.

The Court: You could ask him that question, if that is the question.

Mr. Campbell: I do not believe that is the question, because he does not say in making your analysis did you refer to the books and testimony in evidence here. He says, is it the customary practice, or the usual practice among bookkkeepers or among accountants, is it the usual practice to make inquiries of bookkeepers and others familiar with the transactions, which takes in a large field outside of the record of this case and I believe it opens up the question of whether it is the usual and

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customary practice to make inquiry of the principle by whom he is engaged and the nature of the information he obtained.

The Court: Well, that being so, if that is the answer to the offer and if there is a question in the case as to whether or not these books are adequate, I think he could inquire of his witness, his expert witness, as to whether or not, in his opinion, they were adequate.

Mr. Campbell: I agree, your Honor.

The Court: I think that would cover the point, rather than have this general question propounded and answered.

Mr. Avakian: If your Honor will permit me to ask the question you have just indicated, I would like to ask that question, but in addition I would also like to ask the question covered by the offer of proof.

The Court: I will permit the question just suggested, but will deny the offer of proof.

Mr. Avakian: Thank you, your Honor.

The second offer of proof is this point—we offer to prove that in a situation of partnerships, where one of the partners provides the initial investment and the other partners put in their share by accumulation in their capital accounts of their share of the profits, it is customary for the investing partner to draw more than his share of the profits until the capital accounts of the partners have been adjusted in proportion with their respective partnerships and percentages in the profits.

The Court: What is your objection to that?

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Mr. Campbell: That is objected to as incompetent and immaterial here, what is customary. Here we are interested in ultimate facts of this particular case and not as to comparing it to customs. The question, of course, would by implication include a great many factors, including a contractual relationship amongst partners in the customary partnership which he refers to. Here we have certain specific purported agreements, we have a vast mass of evidence which has been considered specifically by this witness, and I do not believe it is material to the determination of the issues here as to what may be customary in certain types of partnerships.

The Court: Couldn't that situation be met by basing your question upon the exact agreements in evidence here?

Mr. Avakian: Your Honor, there is no question as to the agreements, as to the fact that Mr. Remmer put up the investment, and as to the fact that the partners built up equities through credits to their capital interests, and as to the fact Mr. Remmer withdrew more than his share of the profits.

The implications arose by questions which the prosecution attorneys have asked of numerous witnesses as to the fact that the partners were building up their equities, did not withdraw their full share, and as to the fact, as shown by the evidence, that Mr. Remmer did, in many instances, withdraw more than his share of the profits. The implication is that because of that fact there is something fraudulent in these partnerships. Now in determining whether that indicated fraud, it is proper to

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have before the jury information as to whether exactly that situation is customary in the business world, because in trying to decide whether to infer fraud or not, the jury should have before it the question of whether what was done here was different or unusual in comparison with the regular treatment in the business world of this type of partnership situation. That is why we think this is very material, your Honor.

Mr. Campbell: It seems to me we are going into a very large field of opinion evidence on the part of this witness, which could not be compressed into a simple question by any means to make a comparable situation, and it is a matter also, it seems to me, that should be for argument to the jury and not attempted presentation of this man.

Mr. Avakian: How can you ask what was done here is the same thing as done in the business world unless you can consider it in the record.

The Court: Isn't it obvious if the agreements here show investment of a certain man and other parties are to acquire interests from the profits, wouldn't it be obvious, in the matter of observation from the agreement itself, that a partner who made an initial investment would be entitled to take out all or any part of the original investment at any time that the business would permit?

Mr. Avakian: Well, your Honor, that seems obvious to me, but I wondered whether there was some vagueness because I don't understand why we should have been here two and a half months if that is obvious, because it is becoming apparent this en-

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tire case is boiling down to the question as to whether the partnerships are frauds and the only attack we can see is that Mr. Remmer, who put up the investment, drew more heavily on his percentage and the other partners drew less than their percentage and permitted the difference to accumulate. I assume from the fact we have been here so long that the prosecution does not agree with your Honor's views.

Mr. Campbell: We do not feel we could argue the case at this time. I disagree with counsel at every turn of what he states the evidence here to show. However, I think the matter here is before the Court not offer of proof, but of asking a question, the question being whether or not in partnerships, where one partner furnishes the capital, it is customary for that partner to draw more than the other partner did, and I submit it is an incompetent question and immaterial to our inquiry and not a subject of expert accounting testimony.

Mr. Avakian: I think it is certainly within the scope of experience of an accountant. He has testified he has great familiarity with just this type of partnership situation.

The Court: I will permit the question.

Mr. Avakian: Thank you, your Honor.

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3:15 P.M.

(Defendant present in court.)

(Presence of the jury and alternate jurors stipulated.)

MR. SEMENZA

resumes the witness stand on further

Redirect Examination

By Mr. Avakian:

Q. Mr. Semenza, based upon your experience as a certified public accountant, and based upon your examination of the books and records of the various enterprises, to the extent that [2909] they have been introduced in evidence here, would you state whether or not those books and records are adequate for the determination of the net income of those enterprises? A. They are.

Q. Now, Mr. Semenza, directing your attention to the situation in which one partner puts up the investment for a partnership business and the partner or partners agree to pay for their share of the investment by permitting their share of the profits to accumulate in their capital accounts, and they further agree that the partner who has put up the investment shall withdraw his investment before the other partners draw, would you state what you have found to be customary, in your accounting practice, with respect to the drawings of the partner who made the initial investment?

Mr. Campbell: I did not understand that to be

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(Testimony of Lawrence J. Semenza.)

the question: I thought there was to be a specific question as to whether or not in such case the partner putting up the capital would then withdraw more than the others.

Mr. Avakian: I am trying to avoid a leading question. I will ask him the way counsel suggests.

Q. Do you recall the factual situation I outlined in my question? A. Yes.

Q. I will not repeat that then. Is it customary in that type of situation, Mr. Semenza, for the partner who puts up the [2910] investment to withdraw his investment before the other partners make their withdrawals? A. Yes.

Mr. Avakian: No further questions.

Mr. Thompson: We have no further questions of Mr. Semenza, your Honor.

The Court: Mr. Semenza, you may be excused now.

Mr. Gillen: May it please the Court, the defense rests its case.

Rebuttal Testimony

ROBERT W. MORGAN

having been previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. Mr. Morgan, I believe you identified yourself as a certified public accountant and presently engaged as a revenue agent, is that correct?

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(Testimony of Robert W. Morgan.)

A. I did.

Q. And you further identified yourself as having taken part in the investigations in this particular case? A. That is right.

Q. Now, Mr. Morgan, will you answer this yes or no—did you, on or about the 8th day of April, 1948, have occasion to go to the law offices of Woodburn, Thatcher and Forman? A. I did. [2911]

Q. And who, if any one, was present with you on that occasion?

A. There was Revenue Agents Weaver and Harkness.

Q. By Revenue Agent Weaver, do you mean Special Agent Weaver?

A. Yes, sir, and a stenographer from the office of the Collector of Internal Revenue at Reno, Nevada.

Q. Did you know her name at that time?

A. I did at that time. I have since forgotten it.

Q. You do not recall her name at this time?

A. No, sir.

Q. Was any one else with you on that occasion; that is to say, that went with you to the offices of Woodburn, Thatcher and Forman?

A. No, sir.

Q. Will you state whether or not your going there on that occasion was by reason of a prior appointment? A. That is correct.

Q. And do you recall at that time, to the best of your recollection, what time of day it was that you went to that office?

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(Testimony of Robert W. Morgan.)

A. I wouldn't state definitely, but I believe it was in the early afternoon.

Q. What is your recollection as to the time originally set for your appointment there on that date?

A. My recollection is that the previous day I called Mr. Woodburn to arrange a time——

Q. Don't relate the conversation, but details had been [2912] arranged the previous day?

A. Correct.

Q. And with whom?

A. With Mr. Woodburn.

Q. Do you know which Mr. Woodburn? I believe the evidence shows more than one Woodburn.

A. I was not aware that there were two individuals at the time.

Q. And as a result of your conversation with Mr. Woodburn, was the appointment originally fixed? A. That is correct.

Q. And for what hour, if you recall?

A. As I recall, he first suggested we meet at approximately 10 o'clock in the morning.

Q. Did you have a subsequent conversation with any one, whereby the time of the appointment was changed? A. That is correct.

Q. With whom, if you recall?

A. As I recall, Mr. Woodburn called me later in the day, I believe at my hotel, and suggested a delay of a few hours.

Q. At any rate, the following day you and Mr. Weaver and Mr. Harkness and this young lady

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(Testimony of Robert W. Morgan.)

went to those offices? A. That is correct.

Q. Prior to going there, who was your appointment with, as you understood? [2913]

Mr. Avakian: Is this calling for hearsay?

Mr. Campbell: Well, I will strike that.

Q. You say you arrived at the office early in the afternoon. Whom did you see there?

A. We were ushered into the office of Mr. Thatcher.

Q. To what Mr. Thatcher do you refer?

A. We call him Jack Thatcher, John P. Thatcher, I believe is his name.

Q. Who was ushered in there—you say "we" were.

A. Well, the revenue agents I have mentioned, together with the young lady from the Collector's office, and we proceeded to Mr. Thatcher's office.

Q. Relate just what occurred there?

A. Mr. Thatcher, as I recall, asked us first why we were there and we told him it was——

Q. Pardon me—well, just go right ahead.

A. I told Mr. Thatcher——

Mr. Gillen: I think it would be hearsay to relate what was said there.

Mr. Campbell: I started to stop him, I anticipated there might be such an objection.

Q. Will you state, Mr. Morgan, whether or not you have ever met the defendant, Elmer Remmer?

A. I met him at that conference, yes, sir.

Q. By that conference, are you referring to the

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(Testimony of Robert W. Morgan.)

same occasion [2914] to which you have been testifying here? A. That is correct.

Q. Were you present here in the court room when Mr. Thatcher testified? A. No, sir.

Q. Was Mr. Remmer in the room, if you recall, when you entered Mr. Thatcher's office, or whatever office it was there that you said Special Agent Weaver and Revenue Agent Harkness and the young lady entered?

A. You say was Mr. Remmer there?

Q. At the time you entered the room?

A. No, sir, he was not.

Q. How soon after you entered the room on that day did you see him?

A. We had a discussion——

Q. You can't state what was said.

A. No, I am just trying to refer to the time. I judge maybe 15 or 20 minutes. We had a preliminary discussion.

Q. Then what occurred?

A. Then Mr. Thatcher called Mr. Remmer into the room and he introduced all of us present to him.

Q. Had you yourself ever met Mr. Remmer prior to that occasion? A. No, sir.

Q. And were you introduced to him on that occasion? A. That is correct. [2915]

Q. What occurred after Mr. Remmer came into the room, if you know?

A. To the best of my recollection that was approximately the end of the interview.

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(Testimony of Robert W. Morgan.)

Q. Was anything said or anything done at that time?

A. Mr. Thatcher announced that he did not wish to have Mr. Remmer interviewed by the agents and he gave each of us a typewritten statement.

Q. Was that in Mr. Remmer's presence, do you recall?

A. I can not recall whether that statement was given to us prior to the time Mr. Remmer entered the room or following.

Q. I show you Exhibit G-1 and ask you if you have ever seen this, or a duplicate copy of this, Mr. Morgan?

A. Yes, sir, this is copy of the statement that Mr. Thatcher gave to us.

Q. On that occasion? A. On that occasion.

Q. Now had you ever seen Mr. Remmer prior to that occasion? A. No, sir.

Q. Had you ever met him or been introduced to him prior to that occasion? A. I had not.

Q. Do you recall whether the young lady from the Collector's office, that you refer to as having gone there with you, was in the room throughout the interview? [2916]

A. To the best of my recollection she was.

Q. Now in connection with that interview, who was in charge of the group of agents, Mr. Morgan?

A. Mr. Weaver.

Q. As Special Agent in charge of the investigation? A. That is correct.

Mr. Campbell: You may cross-examine.

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Mr. Gillen: No cross-examination of Mr. Morgan.

(Witness excused.)

LYNN HARKNESS

having been previously sworn, testified as follows:

Direct Examination

By Mr. Campbell:

Q. You have previously been sworn here, Mr. Harkness? A. Yes, sir.

Q. And identified yourself as an agent of the Bureau of Internal Revenue? A. Yes, sir.

Q. And engaged in the conduct of the investigation of this case? A. That's right.

Q. You have heard the testimony of Mr. Morgan who immediately preceded you to the stand?

A. I did.

Q. And will you state whether or not you were present on the occasion on or about April 8, 1948, referred to? [2917] A. I was.

Q. And will you state whether or not your recollection of the events coincides with his, or if not, will you state in what particulars it does not?

A. It coincides.

Q. Are there any particulars in which it does not coincide? A. I do not recall any.

Q. Now with relation to the young lady who was present, do you recall her name?

A. No, I do not recall her name.

Q. Have you since learned her name?

A. Yes.

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(Testimony of Lynn Harkness.)

Q. What is it?

A. Her name is—I forget the last name—I believe Helen Springer.

Q. And she was or is employed in what office?

A. Collector of Internal Revenue office in Reno.

Q. Were you present in court when Mr. Thatcher testified? A. I was.

Q. Was that the same Mr. Thatcher that you saw on the occasion of that visit? A. It was.

Q. Had you ever met Mr. Remmer prior to that visit? A. No, sir.

Q. That was the first time you were ever introduced to him? [2918] A. Yes.

Q. And you recognize him as the same man who is on trial here? A. Yes.

Q. In relation to the young lady who was with you on that occasion, do you recall how long she was present, or if she remained throughout the interview?

A. I am not definite about that, but I recall that she left—I believe she left before we did.

Mr. Campbell: You may cross-examine.

Mr. Gillen: I just want to make an inquiry of counsel, or stipulate—there was an answer given to a rather unusual question as to whether Mr. Harkness' recollection of the incident on April 8, 1948, coincides with his and he said it coincides with his.

Mr. Campbell: Coincides with the testimony given on the stand by Mr. Morgan.

Mr. Gillen: Yes, that is what I wanted to get straightened out. There are no questions.

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(Jury and alternate jurors admonished and recess taken at 3:35 p.m.) [2919]

Thursday, February 14, 1952, 10:00 A.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

MRS. HELEN SPRINGER

a witness for the plaintiff, being duly sworn, testified on rebuttal as follows:

Direct Examination

By Mr. Campbell:

Q. Will you state your name?

A. Helen Springer.

Q. Where do you reside, Mrs. Springer?

A. I live in Sparks, Nevada.

Q. How long have you been a resident of Nevada? A. Since 1906.

Q. What is your present occupation, Mrs. Springer?

A. Clerk for the Internal Revenue Bureau.

Q. In what Bureau or Department?

A. Field Division.

Q. Of the Collector's office? A. Yes, sir.

Q. How long have you been attached to the Collector's office as a clerk? A. Over four years.

Q. Prior to that time you were in private employment?

A. I worked for the Southern Pacific Railway.

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(Testimony of Mrs. Helen Springer.)

Q. Incidentally, now or at any time during that employment, [2920] has a part of your duties been that of stenographic work? A. Yes, sir.

Q. Referring to the month of April, 1948, did you have occasion to go to the office of an attorney by the name of Thatcher? A. Yes, sir.

Q. And with whom did you go to that office?

A. Three revenue agents from San Francisco.

Q. Do you recall their names?

A. I recall the name of one of them, Mr. Harkness.

Q. Do you recall the names of the other two?

A. No, I do not.

Q. You were introduced to them at the time, were you? A. Yes, sir.

Q. On whose instructions did you accompany them?

A. The Assistant Collector, Mr. Forrester.

Q. That is Mr. Homer Forrester?

A. Yes, sir.

Q. Now I will ask you if on any occasion you have met the defendant, Elmer Remmer?

A. Yes, sir.

Q. When did you meet him?

A. In Mr. Thatcher's office the morning I went there with the agents.

Q. That was on the same occasion, was it?

A. Yes, sir. [2921]

Q. And when you arrived at Mr. Thatcher's office, did you enter that office with the agents?

A. Yes, sir.

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(Testimony of Mrs. Helen Springer.)

Q. And who was present at that time?

A. Mr. Thatcher was in the office at that time.

Q. Now you say it was on that occasion you met Mr. Remmer. When did he enter the room, to the best of your recollection?

Mr. Gillen: Just a moment—that is assuming something not in evidence. She did not say he entered the room.

The Court: Will you reframe your question.

Q. You previously testified it was on that occasion that you met Mr. Remmer? A. Yes, sir.

Q. Was he in that room when you entered the office? A. No, sir.

Q. Did he subsequently come into the room?

A. Almost immediately after.

Q. Were you introduced to him on that occasion? A. Yes, sir.

Q. Now was there a conversation had at that time?

A. Well, when we entered the room one of the agents introduced himself and the other two agents to Mr. Thatcher.

Q. After Mr. Remmer entered the room?

A. After Mr. Remmer entered the room. Mr. Thatcher introduced him to all of us. [2922]

Q. Did anything take place at that time?

A. Almost immediately after that a lady came into the office and presented each one of us with a letter.

Q. Were you presented with a copy of that letter? A. Yes, sir.

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(Testimony of Mrs. Helen Springer.)

Q. What, if anything, did you do with the copy that was presented to you?

A. I don't remember, but I don't believe I ever took it out of Mr. Tatcher's office with me.

Q. I am going to show you Exhibit G-1 and ask you to read it over, if you will. Do you recognize that document as being a copy of a document you have seen before?

A. Well, yes, I believe that is the letter I read that morning.

Q. When did you leave Mr. Thatcher's office on that occasion, Mrs. Springer; that is, with relation to the time you met Mr. Remmer and you were shown a copy of this document?

A. Well, after reading that letter one of the agents told me that in view of that letter that I could be excused.

Q. And did you leave at that time?

A. And I left right after that.

Q. Is that the only occasion upon which you ever met Mr. Remmer? A. Yes, sir.

Q. Prior to going there on that occasion, did you know the name of the man whom you were to meet? [2923] A. No, sir.

Q. At the time of your introduction was the first time you had heard his name?

A. Yes, after I reached Mr. Thatcher's office is the first time.

Mr. Campbell: You may cross-examine.

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(Testimony of Mrs. Helen Springer.)

Cross-Examination

By Mr. Gillen:

Q. I understand you to say your name was Mrs. Springer? A. Yes, sir.

Q. Mrs. Springer, when did you go to work for the Collector of the Nevada District?

A. The first working day after January 1, 1948.

Q. Between January 1, 1948, and April 8, 1948, on how many occasions did you go out with revenue agents or other attaches of the government for the purpose of taking any statements?

A. This was my first time.

Q. How many times since then have you gone out with revenue agents or other attaches of the government to take statements?

A. Well, I wouldn't remember, but it has been several.

Q. Well, more than 20 times?

A. Well, perhaps 15 or 20.

Q. How many times did you go to the office of Thatcher & Woodburn after April 8th?

A. I was only in the office that once.

Q. How many other lawyer's offices have you gone to to take [2924] statements from taxpayers?

A. I have never gone to any other lawyer's office.

Q. When did you first learn that you were going to testify in this case? A. Yesterday.

Q. Who was it that imparted that information to you?

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(Testimony of Mrs. Helen Springer.)

A. The United States Attorney's office at Reno.

Q. What particular member of the United States Attorney's office?

A. I don't know the name of the party, but it was Mr. Thompson's representative.

Q. Was it in person or by telephone?

A. Telephone.

Q. Did you recall the incident immediately or was it recalled to you?

A. No, I recalled the incident.

Q. And were you told anything by other persons who had been present at that meeting in Mr. Thatcher's office and who had previously testified?

A. I don't understand your question.

Q. I say were you informed that other persons who were present with you in Mr. Thatcher's office on April 8th had testified in the case?

A. No, I wasn't given any information.

Q. Were you asked what you recalled about that incident? [2925] A. Yes.

Q. Were you reminded of anything by the person who talked to you? A. No, sir.

Q. You were not reminded of anything?

A. No.

Q. Do you recall how Mr. Remmer was dressed on that occasion?

A. No, I don't believe I do.

Q. Do you recall what kind of shoes he wore?

A. No, sir.

Q. Was there anything unusual about his ap-

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(Testimony of Mrs. Helen Springer.)

pearance in the manner of dress to you on that occasion? A. Nothing unusual.

Q. Before you were talked to yesterday on the telephone and notified that you were to testify in this case, did anybody prior to that time talk to you about the incident of being in Mr. Thatcher's office on April 8, 1948?

A. I was asked once previously, yes. I remember the circumstances.

Q. By whom were you asked?

A. Mr. Harkness.

Q. When was that?

A. Oh, perhaps ten days ago.

Q. And did he recount to you what he recalled about the matter? A. No, sir. [2926]

Q. He didn't tell you what he remembered about it at all? A. No, sir.

Q. Did you tell him what you remembered about it? A. Yes, sir.

Q. And did he correct you or take issue with you on your recollection of the matter at all?

A. He did not.

Q. Now Mrs. Springer, it is your testimony here now that you have a distinct recollection of this particular incident in Mr. Thatcher's office, although since that time you have been on 15 or 20 other calls outside of your office, is that correct?

A. Yes, sir.

Q. Do you recall what the purposes were of any other calls that you made outside of your office?

A. To obtain statements from taxpayers——

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(Testimony of Mrs. Helen Springer.)

Mr. Campbell: Objected to as immaterial.

The Court: It is already answered.

Q. Do you recall whose offices you went to to obtain statements from taxpayers?

Mr. Campbell: Objected to as incompetent and immaterial.

The Court: Objection sustained.

Mr. Gillen: It is perfectly proper cross-examination for the purpose of testing the recollection of a person who recalls an isolated incident. [2927]

The Court: I will permit the question.

A. In each case I went to the Revenue Agent's office.

Q. I do not quite understand that—you went from your own office to a different office?

A. Yes, sir.

Q. I asked you about how many other occasions you left your office to take a statement or carry on some duty you were assigned to outside of your office?

A. On each occasion when I have taken statement from a taxpayer it has been at the Revenue Agent's office.

Q. You never went outside the Revenue Agent's office or your own office?

Mr. Campbell: Objected to as misleading. It is a matter of common knowledge the two offices are in the same building.

Mr. Gillen: That is not common knowledge to me. That is why I am inquiring.

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(Testimony of Mrs. Helen Springer.)

Q. Your particular office is what office and located where?

A. On the second floor of the Postoffice Building at Reno.

Q. And the Revenue office that you refer to is located where?

A. The Clay Peters Building, between First and Second on Virginia.

Q. You are not sure where it is?

A. Oh, yes, I know where it is. I don't know the number of the office. [2928]

Q. Do you know the name of the building?

A. The Clay Peters Building.

Q. You are sure of that? A. Yes, sir.

Q. Can you recall the names of any taxpayers whose statements you took 15 or 20 other times?

Mr. Campbell: Objected to as incompetent and calling for disclosure of confidential information.

The Court: Yes. Objection sustained.

Q. Do you remember of any agents you went with to take those 15 or 20 statements in the Revenue office?

A. Yes, a Mr. Thurman from Sacramento.

Q. When was that that you went with Mr. Thurman to take statement at the Revenue office?

A. I don't remember.

Q. Can you tell us what fixes it in your mind that you went over to Mr. Thatcher's office on April 8, 1948?

A. Yes, sir. I had been working for the Wage and Excess Tax Division and they loaned me to the

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(Testimony of Mrs. Helen Springer.)

Audit Section because they had several income tax returns that they wanted processed before April 15th and I don't remember that the date was April 8th, but I do remember it was some time before the 15th of April.

Q. How many other statements did you take between April 8th and April 15th? [2929]

A. I didn't take any.

Q. You didn't take any statements from anybody at all, is that correct? A. No, sir.

Q. You didn't take any statements at all?

A. No, sir.

Q. How recent was this occasion that you went with Mr. Thurman of Sacramento to take a statement?

A. Well, I wouldn't remember. I have taken statements for Mr. Thurman on two or three occasions and I have taken statements for Mr. Kimmel on two or three occasions, but I wouldn't remember the dates.

Q. Do you remember the year?

A. Well, the last one was probably four months ago.

Q. Probably four months ago—you are not sure of that? A. Well, it was last fall.

Q. Do you remember the first time you took a statement with Mr. Thurman from Sacramento, what year? A. No, I wouldn't remember.

Q. But you did have a specific recollection, without being aided by anybody refreshing your mem-

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(Testimony of Mrs. Helen Springer.)

ory, that it was in 1948 that you went to Mr. Thatcher's office? A. Yes, sir.

Q. Now can you describe Mr. Thatcher's office? Let me break it down this way. Can you describe Mr. Thatcher's office as [2930] you entered the office suite?

A. As I remember it, after getting off the elevator we passed the girl at the telephone switchboard and turned to the right, and I believe his office faces on Second Street, on the second floor of the building.

Q. Was there any delay from the time you arrived in the reception room until you got into Mr. Thatcher's office?

A. Practically none. I don't remember any delay.

Q. You do not recall any delay?

A. No, sir.

Q. And you do not recall the name of any of the agents who went with you excepting Mr. Harkness? A. No, sir.

Q. And the reason you remember Mr. Harkness is ten days ago Mr. Harkness talked to you about this incident?

A. Well, I have seen Mr. Harkness in the Collector's office on occasions since then.

Q. Isn't it a fact the reason Mr. Harkness was the only agent you remember is because he talked to you ten days ago and told you you would probably have to testify?

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(Testimony of Mrs. Helen Springer.)

A. Mr. Harkness did not tell me I would have to testify.

Q. And Mr. Harkness asked you if you remembered the incident? A. Yes, sir.

Q. And you recited what you [2931] remembered? A. Yes, sir.

Q. And Mr. Harkness didn't say anything about the incident to you? A. That's right.

Q. Do you know a revenue agent by the name of Ray Weaver?

A. No. The name is very familiar.

Q. I shouldn't call him revenue agent, I believe I should have called him a Special Agent.

A. No. The name is familiar but I don't know him.

Q. What time of day was this?

A. It was in the morning.

Q. Can you fix the approximate time in the morning?

A. Well, I believe at the time Mr. Forrester told me to come to his office he told me to be there before ten o'clock.

Q. Are you sure it wasn't two o'clock in the afternoon? A. No, sir, it was morning.

Q. You are positive it was morning?

A. Positive.

Q. And you are equally positive it wasn't two o'clock in the afternoon? A. Positive.

Q. Now reading from page 2193 of the transcript, I am going to read to you, Mrs. Springer, testimony given here by Special Agent Ray Weaver

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(Testimony of Mrs. Helen Springer.)

during the course of this trial, and I will advise you that Mr. Ray Weaver has been identified here as the [2932] man who was in charge of this particular investigation, and reading from——

Mr. Campbell: I am going to object to reading testimony of one witness to another witness, if the Court please.

Mr. Gillen: Why yesterday Mr. Campbell asked——

The Court (Interceding): It doesn't make any difference what somebody did yesterday or did today; the question is this present situation.

Mr. Gillen: We have different rules for different sides, I presume.

The Court: You do not infer I have different rules for different sides?

Mr. Gillen: Mr. Campbell——

The Court (Interceding): Please answer—do I understand you to infer I have different rules for different sides?

Mr. Gillen: No, I say I don't believe we have but Mr. Campbell seemed to believe we did.

The Court: There is nothing here involving Mr. Campbell whatever. We should address ourselves to the objection.

Mr. Gillen: Very well, there is an objection before your Honor.

The Court: Objection will be sustained.

Mr. Gillen: Now may I point out to your Honor that cross-examination [2933] of a witness who pretends to relate an incident that occurred, I can

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(Testimony of Mrs. Helen Springer.)

properly read—and this is fundamental in cross-examination—I can read that witness testimony of another witness who was present at the same time and would have ostensibly observed the same thing, and ask that witness if this wasn't what happened and if there were three witnesses present, I can read all three witnesses' versions and ask if that wasn't the way it was.

The Court: I have an idea it is proper for the jury to decide whether certain witnesses' testimony is to be credited or not. The thought I have in mind is that what you are about to do is to ask this witness to pass on the credibility and integrity of the witness Weaver. That is my purpose in making the ruling.

Mr. Gillen: May I point out to your Honor the reason this may be done is that it might refresh the recollection of the witness under cross-examination and direct her attention——

The Court: You may read it, go ahead, but I still feel that this witness is not to pass upon the credibility of any other witness' testimony.

Mr. Gillen: Hearing what another witness testified to might refresh her recollection or she might adopt his theory.

The Court: All right.

Mr. Gillen: I will reframe the question. [2934]

Q. Mrs. Springer, I am going to read you from page 2193 of the transcript, commencing at line 15 of that page. I am going to advise you that this is the testimony of Mr. Ray Weaver, who has been

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(Testimony of Mrs. Helen Springer.)

identified here as the agent in charge of the investigation and present at the incident related by you in Mr. Thatcher's office on April 8, 1948, and ask you if this refreshes your recollection as to what occurred at that time. Mr. Weaver was asked:

"Q. Was Mr. Remmer present in the room when you and your associates entered Mr. Thatcher's office? A. Yes.

"Q. Was anyone else beside himself and Mr. Thatcher present? A. Not that I recall.

"Q. Will you state again who was with you besides the stenographer, what other agents?

"A. Mr. Morgan, Mr. Harkness and myself."

Now was that, or was that not, the fact, namely, that when you went in the room with the three agents that Mr. Remmer was present with Mr. Thatcher?

Mr. Campbell: That is objected to because that is asking to directly pass upon the testimony of another witness. She can state what the fact is; if it refreshes her recollection that is different, she can so state.

The Court: I think so. Objection [2935] sustained.

Mr. Gillen: Your Honor will recall Mr. Thatcher was asked——

The Court (Interceding): I never heard of any rule that permits one witness to pass upon the credibility of another, on cross-examination or direct; I have never been advised of such a rule.

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(Testimony of Mrs. Helen Springer.)

Q. Does that refresh your recollection that when you went in the room with the three agents, Mr. Remmer was present with Mr. Thatcher?

A. I do not remember anyone but Mr. Thatcher being there when we entered the room.

Q. So it is your present recollection Mr. Thatcher was there alone?

A. That is the way I recall, yes.

Q. Now do you recall how long the interview between the persons present lasted, approximately?

A. Outside of the introduction——

Mr. Campbell: While she was present.

Mr. Gillen: Of course while she was present. I am talking about while you were present.

A. It was a very short time. After we went into the office one agent introduced himself and the others, Mr. Remmer came almost immediately into the room and Mr. Thatcher introduced him. Then after this letter was given to us, we had time to read that, I was dismissed. [2936]

Q. There was practically no conversation in your presence?

A. There was no conversation outside the introductions.

Q. Then as I understand your testimony, almost immediately after you arrived in the office with the agents and were introduced to Mr. Thatcher, Mr. Remmer arrived, is that correct? A. Yes.

Q. And immediately Mr. Thatcher introduced Mr. Remmer to all of you? A. Yes, sir.

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(Testimony of Mrs. Helen Springer.)

Q. And then almost immediately on the heels of that some young lady came in with these papers, one of which was handed to each of you?

A. Yes, sir.

Q. And then immediately after that you were excused? A. Yes, sir.

Q. Now I am going to read to you from page 2916 of the transcript and I will advise you that this is testimony which was given here yesterday by Mr. Robert Morgan, the government agent, and ask you if this refreshes your recollection—this is from line 23:

"Q. Do you recall whether the young lady——"

I will state that refers to you:

"——the young lady from the Collector's office, that you refer to as having gone there with you, was in the room throughout the interview? [2937]

"A. To the best of my recollection she was."

Does that refresh your recollection that you remained in the room with the agents throughout the entire interview had there with Mr. Remmer and Mr. Thatcher?

A. No, I was excused. At the time the agent told me I could leave, I wondered if he wanted me to wait outside until they discussed matters, but he told me I could go back to my own office.

Q. Do you recall before the arrival of Mr. Remmer in the room, as you stated he did enter the room, whether or not there was any discussion regarding the purpose of your visit, any discussion

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(Testimony of Mrs. Helen Springer.)

with Mr. Thatcher? A. I believe not.

Q. Do you recall whether or not Mr. Thatcher asked the agents, or any of the agents, in your presence, what was the purpose of their visit and what particular thing they were inquiring into regarding Mr. Remmer's income tax affairs?

A. No, we seemed to be expected there.

Q. So it is your testimony that you recollect no conversation at all about the purpose of your visit?

A. No, sir.

Q. Now would you say that the agents, in your presence, had talked with Mr. Thatcher for a period of 15 or 20 minutes before Mr. Remmer came into the room? A. Not in my presence, no. [2938]

Q. It is still your recollection that Mr. Remmer came into the room almost immediately on the heels of the introduction, is that correct?

A. Yes.

Q. When I say "introduction," I mean the introduction of you and the representatives of the government to Mr. Thatcher. A. Yes, sir.

Q. Reading from page 2915 of the transcript—and this is the testimony of Mr. Robert Morgan still, commencing at line 6 of that page, Mr. Morgan was asked these questions and gave these answers:

"Q. Was Mr. Remmer in the room, if you recall, when you entered Mr. Thatcher's office, or whatever office it was there that you said Special Agent Weaver and Revenue Agent Harkness and the young lady entered?"

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(Testimony of Mrs. Helen Springer.)

The young lady refers to you again, as the person accompanying the agents:

"A. You say was Mr. Remmer there?

"Q. At the time you entered the room?

"A. No, sir, he was not.

"Q. How soon after you entered the room on that day did you see him?

"A. We had a discussion——

"Q. You can't state what was said. [2939]

"A. No, I am just trying to refer to the time. I judge maybe 15 or 20 minutes. We had a preliminary discussion.

"Q. Then what occurred?

"A. Then Mr. Thatcher called Mr. Remmer into the room and he introduced all of us present to him."

Q. Now does that refresh your recollection that that was what happened instead of——

A. No.

Mr. Campbell: Just a minute—I object to the question in that form. I don't object to his reading the testimony, but the question was——

Mr. Gillen: My question was whether that testimony I read, relating the instance recounted by another witness, refreshed her recollection that that was the way things occurred instead of the way she originally recalled.

The Court: The objection will be sustained.

Q. Well, does that refresh your recollection, what I just read you as Mr. Morgan's testimony, as to what occurred there?

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(Testimony of Mrs. Helen Springer.)

A. There was no discussion in my presence.

Q. You have no recollection of a 15 or 20 minute discussion before Mr. Remmer was called into the room? A. None.

Q. Now you stated here that it is your recollection now, Mrs. Springer, that you were instructed by your superior to [2940] be at this place with these agents in Mr. Thatcher's office before 10:00 o'clock in the morning, is that correct?

A. No, sir. I was to report to Mr. Forrester's office and on reporting to Mr. Forrester's office, the agents informed me that we would go to a lawyer's office, and we went from Mr. Forrester's office to Mr. Thatcher's office.

Q. Now I am interested in the time that you fix. What was the time?

A. I am sure Mr. Forrester told me to be there before ten o'clock.

Q. To meet the agents in his office, is that correct? A. Yes.

Q. And what is your best recollection as to the time that you arrived in Mr. Thatcher's office?

A. Well, I was in Mr. Forrester's office before ten and that is when the agents told me that we would go to the lawyer's office and we went immediately from Mr. Forrester's office to Mr. Thatcher's office.

Q. You are sure, are you, that the appointment wasn't delayed until some time later in the day? You are positive it was approximately ten o'clock or thereabouts?

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(Testimony of Mrs. Helen Springer.)

A. I went in the morning at ten o'clock, yes, sir.

Q. Now I am going to read you from page 2912 of the transcript, commencing at line 14, and this is the testimony of Mr. Robert Morgan, direct examination, and I will ask you to [2941] listen to this testimony, if you please, and tell me whether or not it refreshes your recollection as to the time of the appointment:

"Q. Will you state whether or not your going there on that occasion was by reason of a prior appointment? A. That is correct.

"Q. And do you recall at that time, to the best of your recollection, what time of day it was that you went to that office?

"A. I wouldn't state definitely, but I believe it was in the early afternoon.

"Q. What is your recollection as to the time originally set for your appointment there on that date?

"A. My recollection is that the previous day I called Mr. Woodburn to arrange a time——

"Q. Don't relate the conversation, but details had been arranged the previous day?

"A. Correct.

"Q. And with whom?

"A. With Mr. Woodburn.

"Q. Do you know which Mr. Woodburn? I believe the evidence shows more than one Woodburn.

"A. I was not aware that there were two individuals at the time. [2942]

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(Testimony of Mrs. Helen Springer.)

"Q. And as a result of your conversation with Mr. Woodburn, was the appointment originally fixed? A. That is correct.

"Q. And for what hour, if you recall?

"A. As I recall, he first suggested we meet at approximately 10 o'clock in the morning.

"Q. Did you have a subsequent conversation with anyone, whereby the time of the appointment was changed? A. That is correct.

"Q. With whom, if you recall?

"A. As I recall, Mr. Woodburn called me later in the day, I believe at my hotel, and suggested a delay of a few hours.

"Q. At any rate, the following day you and Mr. Weaver and Mr. Harkness and this young lady went to those offices? A. That is correct.

"Q. Prior to going there, who was your appointment with, as you understood?"

There was an objection and voluntarily retracted by Mr. Campbell and then the question was put:

"Q. You say you arrived at the office early in the afternoon. Whom did you see there?

"A. We were ushered into the office of Mr. Thatcher." [2943]

Q. Does that refresh your recollection that the appointment was in the afternoon instead of ten o'clock in the morning?

Mr. Campbell: That is objected to, if the Court please, on the grounds she is called upon to refresh her recollection regarding conversation with Mr. Woodburn. The witness' testimony was that he

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(Testimony of Mrs. Helen Springer.)

wasn't sure, he couldn't state definitely the time of day, but he thought early afternoon. It is true the last question read, I assumed in my question, although that was not the question, that the meeting was in the early afternoon.

The Court: She may answer the question.

A. No, I was at the office in the morning.

Q. When you were shown defendant's Exhibit G-1 today—with the Court's permission, I will hand it to you again—you stated that you recalled the letter, that that was the statement that you had handed to you on April 8, 1948, is that correct?

A. Yes, sir.

Q. Have you ever seen that statement between April 8, 1948, until Mr. Campbell showed it to you this morning in court? A. Never.

Q. Nobody in the interim showed you what purported to be a copy of that statement?

A. No, sir.

Q. And is it your testimony now that, having only seen that [2944] statement once—did you read the statement on that occasion? A. Yes, sir.

Q. And having only seen that statement once, on April 8, 1948, and never having seen it since that time, you were able to recognize it this morning as appearing to you as the statement which you read that day?

A. The contents are the same as I remember them. The letter was handed to us and was written in the third person and I know it was on Mr. Rem-

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(Testimony of Mrs. Helen Springer.)

mer's refusal to give the statement that I was dismissed.

Q. Did you hear Mr. Remmer refuse to give a statement?

A. No, the information was in this letter.

Q. So it is your recollection now that you were able to recognize that letter this morning, although you had never seen it since the one occasion when you read it on April 8, 1948? A. Yes.

Mr. Gillen: I think that is all.

Mr. Campbell: Nothing further.

(Witness excused.)

Mr. Thompson: The government has no further evidence, your Honor.

Mr. Gillen: May it please the Court, the defense rests, but we do desire to call your Honor's attention that we have some legal matters to be presented to your Honor, which would [2945] have to be presented, of course, out of the presence of the jury, and we ask for your Honor's pleasure as to that.

The Court: I am going to excuse the jury at this time until Monday morning, and ladies and gentlemen of the jury, I want you to feel that the Court is not intentionally delaying the final conclusion of this case, but we have matters which must be taken care of and legal matters which will require all of our time until Monday. Now we will be ready Monday to proceed with the arguments in the case.

(Jury and alternate jurors admonished and excused at 11:00 a.m.) [2946]

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(In the absence of the jury.)

MOTION FOR ACQUITTAL

(Febr. 14, 1952—Notebook No. 344 P. 90-100, Notebook No. 345 P. 1-17.)

Mr. Avakian: Without entering into discussion in the matter, unless your Honor desires me to, I simply want at this time, your Honor, to renew motions to strike testimony, which were made at the close of the government's case and on the same grounds advanced at that time.

The Court: The motion will be denied.

Mr. Avakian: Now with respect to the motion for acquittal, your Honor, in addition to all of the grounds and matters presented to your Honor at the conclusion of the government's case, which I likewise do not intend to review, unless your Honor desires me to, we have certain additional factors which we think your Honor should consider, so our motion for acquittal made at this time incorporates the grounds and reasons advanced at the close of the government's case, together with the additional factors which I would like to take up at this time.

First of all, I would like to call your Honor's attention to a decision of the Tax Court decided on November 30, 1951, of which I was not aware at the time the motion for acquittal was argued approximately a week ago. For some reason I had been a little bit behind in my reading of advance sheets during the past two months, your Honor, and I did not run across this decision until the last few days.

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The case was decided by the Tax Court on November 30, 1951. The name is Blackman vs. Commissioner, cited in 10 TCM decision 18,692 (m). That was the case, your Honor, in which the Commissioner had assessed a deficiency against the taxpayer by the use of the net worth method and the taxpayer attacked the deficiency in the Tax Court on the ground that the net worth method was not the proper method to use and the Tax Court sustained that contention because the case was not a proper one for the use of the net worth method.

Now factually, your Honor, the Blackman case was the case of a man who operated a bar. The evidence showed that during the period involved and at the starting point of the period, he had in his possession in his safe sums of cash money, the exact amount of which was not and could not be determined at the time of the Tax Court trial, and that in addition, during the period involved he had borrowed sums of money from relatives. The evidence failed to show any omission from the records of the business, that is, the records of the bar, of any income of the bar. In other words, it was a case which was like this in all those respects I have mentioned—first of all, there was no evidence introduced in the case of any items of income that were not recorded in the books; in other words, there was no direct evidence of unrecorded income. Secondly, insofar as the attempted use of the net worth method was concerned, there was cash in some amount, which could not then be determined; and third, there were loans.

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Now in setting aside the deficiency, the Tax Court made this statement, and I am quoting:

"The use of the increase in the net worth method of determining income has been sustained in cases of failure of the taxpayer to maintain adequate records," citing Harris v. Commisioner, 174 Fed. (2), 70, "and also to produce records."

Citing Frank M. Wisley v. Commisioner, 13 TC 253, confirmed 185 Fed. (2) 263.

Continuing with the quotation from the Tax Court:

"This case, however, differs from those cases and others in which the increase in the use of net worth has been sustained. In this case petitioner's principal source of income was from sales at his bar room. As to those sales, he had records and the respondent did not find error in them in determining the deficiency, nor in any evidence of the trial, although there was considerable examination of witnesses as to the accuracy of the records."

That is the end of the quotation. Now if I may invite your Honor's attention to the rule of that case as applied here, I think it should be applied in two ways. First of all, your Honor, the evidence now clearly shows—and this was not entirely clear at the close of the government's case—but the evidence now clearly shows that the prosecution has in its possession books and records of various enterprises involved in this case which it has not produced in court and which, in fact, it has refused to produce in court. Your Honor will recall that we

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requested the production of these records during the trial, the prosecution objected to our request and the Court sustained the objection, and you will recall that prior to the trial we subpoenaed those records and the prosecution moved to quash the subpoena and your Honor granted that motion. I can not help but feel your Honor must have had in mind at the time those two rulings were made, that at some time before the trial ended, I am sure your Honor must have thought that the prosecution would bring those records into court, because they were relevant and material evidence and I can not believe your Honor had in mind that the defense would object at the time of this trial to having the jury consider the books and records of these other businesses involved in this case and which were in the possession of the prosecution. For reasons best known to itself, the prosecution has not produced those records. We feel, your Honor, as a matter of fundamental fairness, the prosecution should not be heard to say that the books and records are inadequate, when they refuse to bring in all of the books and records. That is a principle of fair play, which runs not only throughout the law, but through the minds of all of us in thinking of considerations of fair treatment of anybody. It isn't fair, your Honor, for the prosecution to say to this court and to the jury, "The records maintained by the defendant were incomplete," when they refuse to bring in some of those records which they have to let the Court and the jury determine for themselves whether they are complete; and so my first point,

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your Honor, is that your Honor, as a matter of fair play, as a matter of justice, should say to the prosecution, "You can't contend that the records are inadequate and incomplete and therefore the net worth method may properly be used, in view of the fact that you have not brought into court all of the records and documents."

Now I don't know, your Honor, what is in those records and documents which the prosecution has upstairs on the third floor of this building. I assume, your Honor, that their production would be harmful to the prosecution and beneficial to the defense, and I make that assumption because of the aggressiveness with which the prosecution has resisted our efforts to get those documents into court. I think it is proper to infer, your Honor, from the persistent refusal of the prosecution to produce those records, that there is something in those records which would help our case and it might hurt their case. Certainly, if the documents were immaterial, they wouldn't be to our benefit. Certainly, your Honor, if those records would be detrimental to us and beneficial to the prosecution, we could assume that the prosecution would have brought them into court. That leaves only one alternative, your Honor, the only reasonable assumption we can make is that there is something in those records helpful to the defense and that is why the prosecution has persistently and consistently refused to make them available to us or to the Court.

Now I think, your Honor, it is a well recognized legal presumption that failure of a party to a litiga-

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tion to produce evidence in its possession warrants the inference that the production of that evidence would be harmful to that party and beneficial to the other side. So, your Honor, in view of the rule that the net worth method can not be used unless there is first a showing that the books and records maintained are inadequate or incorrect, and in view of the fact that the evidence now shows that the prosecution has in its possession records and books additional to those presented in court here, books and records maintained by the enterprises involved, we submit, your Honor, that it would be unfair and unjust for your Honor to do anything else but to rule that, having taken that position, the prosecution can not, with clean hands, contend that the books and records of these enterprises were so inadequate that the net worth method is the proper method to use.

The Court: Let me ask you a question, please. The thought occurred to me as you were talking—what are books and records? Accounts of transactions. Now any book or record kept of these different enterprises necessarily have been kept within the knowledge of the defendant or his agents. The agents were here and if it had appeared during the trial that some accountant, Mr. Maundrell, or some one else who had custody of these books or records, if there is any other record of any transaction or any record, then we might have a question, but you haven't pointed to any specific record that is in existence or shown that there is any record in

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existence which has not been produced during the course of this trial.

Mr. Avakian: No, I think, your Honor, that that has been shown.

The Court: What particular record is there now? Can you name one that has been named and kept in the course of the business of any enterprise and not been produced in this case?

Mr. Avakian: Mr. Semenza testified in his discussions that Mr. Weaver told him that among the records he had in his room in San Francisco, on the occasion of that conversation, were some cash register tapes of these businesses. Those have not been produced.

The Court: From whose custody did Mr. Weaver originally get these books and records?

Mr. Avakian: Mr. Weaver, Mr. Ezralow and Mr. Morgan have all testified that they obtained them from Mr. Maundrell and Mr. Kyne and from other representatives with whom they dealt—and that means the accountants Slater and Ayton, now dead —from various representatives who were connected with the bookkeeping or management of these particular enterprises they obtained all of the books and records and documents, material, bank statements, and so on that they knew of. So, your Honor, everything was turned over.

You asked me for instances of things in existence which were not produced here to the jury—poker sheets of the Menlo Club, maintained by the cashier who were employees, three cashiers per day. Those poker sheets for the year 1946 are now in the pos-

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session of the prosecution. They chose to present in evidence here the poker sheet for January 1, 1946; for December 31, 1946; for January 1, 1947, and for one other day during 1946. In other words, they have presented the poker sheets for only three days during the year 1946, and they have not presented the poker sheets——

The Court: Have you at any time, during the course of the trial, asked for the production of those identical poker sheets yon now name?

Mr. Avakian: We asked your Honor during the course of this trial for an order directing the prosecution to deposit with the Clerk all the books and records of these enterprises they had in their possession.

The Court: Did you make any requests for any specific item? You knew about all those and did you ask for their production? Will you answer that question?

Mr. Avakian: We have, your Honor. We filed a motion with this Court listing the different types of records by enterprises, naming the enterprises. We made a motion here, got a subpoena issued, your Honor, and your Honor quashed the subpoena. Now, your Honor, as I stated to you, none of the defense counsel has ever been permitted to look at these documents, neither has our accountant ever examined them, the documents in question. He was told in 1949, when he took a small section of these documents and there were four or five boxes of them remaining, he was told those would be available to him at a later time, but, your Honor, they never

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were made available, so if your Honor is asking me whether I can give you a detailed list of every document in the possession of the prosecution, my answer is no. If your Honor is asking me whether I can state, from the evidence in this record, that there are books, records and documents relating to transactions of these businesses during the prosecution years, in possession of the prosecution, the answer is definitely yes, because the testimony shows it.

Now, your Honor, is it fair for the prosecution to say to the jury and to your Honor that the books and records are incomplete, they are inadequate, when they have in their possession books and records which they refuse to bring in? Your Honor, that is not fair, it violates every fundamental principle of fair play I can think of. That is not consistent with our principle of justice in this country. It is completely contrary.

The Court: If you had pointed out during the course of the trial any specific book or record, I would have been inclined to consider with some thought the request, but there has been no request for any specific book or record and I believe the records of these different enterprises were kept with the knowledge of the defendant or of his agents and if there was any record anywhere that would have been of any service to the defendant in this case, they would have been able to point it out and ask the Court to have it produced and that wasn't done at any time in the course of this trial or in any proceeding prior to this trial.

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Mr. Avakian: Your Honor, the witnesses of the government, the agents who took these records, testified that they did not give receipts for them, so we have no receipts from them.

The Court: I am going to deny the motion on that ground.

Mr. Avakian: May I complete my answer to your Honor?

The Court: I am satisfied with your answer.

Mr. Avakian: You have not heard my answer.

The Court: I do not want to hear any more.

Mr. Avakian: I want the record to show I am trying to answer your Honor's inquiry.

The Court: I am satisfied with your answer.

Mr. Avakian: If your Honor wants to read my mind, all right.

The Court: You are getting a little bit impertinent.

Mr. Avakian: I am not trying to be impertinent.

The Court: Whether you are trying or not, you are making a pretty fair job of it. Now let us go along and tone things down.

Mr. Avakian: I am sure your Honor appreciates——

The Court (Interceding): I appreciate and understand. Now let's go along.

Mr. Avakian: I have to make a record, your Honor.

The Court: All right, that is the record on that point. You asked on that ground and I am denying it on that ground. Now what is your next point?

Mr. Avakian: Your Honor has made a factual

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statement of what we have in mind and intend to do, which is not correct and I would like to correct it, and that is this, your Honor—we attempted to obtain through a subpoena duces tecum of this court, we attempted to obtain an opportunity to examine the records of these enterprises in possession of the prosecution, for the purpose of determining whether they had in their possession any specific documents material to this case, so that we could then specifically ask your Honor to force the production of those documents. Your Honor by granting the prosecution's motion to quash that subpoena, and by preventing us thereby from examining what they had in their possession, made it impossible for us to state to your Honor any specific document which we wanted brought in, so we are in the position, your Honor, of having to state to your Honor in a general way that there are books and records relating to these enterprises in the possession of the prosecution, which they have refused to produce and other, your Honor, than the cash register tapes, which I have enumerated specifically, and aside from the poker sheets of the Menlo Club, which I have enumerated specifically, we are not able to give you a detailed list of the precise documents they have and we are able to state to your Honor that there are documents and records in their possession which are the property of these enterprises, which were maintained by these enterprises as a recordation of their business transactions, which have not been produced in this court by the prosecution, although they have possession of them,

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and your Honor will recall, I am sure, that in addition to the subpoena which was quashed, we sought an order of your court prior to the trial and asked in Las Vegas, by motion, requesting that we have the opportunity at that time, prior to the trial, to examine these records, and that was on November 15th. The prosecution objected to that motion and your Honor denied our motion. Had we been permitted to examine those records between November 15th and November 28th, we would then have been in position to state to your Honor by specific description the exact documents in possession of the prosecution which we desired to have presented. That, your Honor, is why——

The Court (Interceding): I denied that on several grounds. One was you waited until a week before the trial and granting of that motion would have entailed a long delay.

Mr. Avakian: Your Honor states we were too late on November 15th and yet you state if we had asked for it during the trial, you would have let us have it.

The Court: I am not going to sit and listen to any further statements from you. Are you ready to take up your second point?

Mr. Avakian: Yes.

The Court: Very well.

Mr. Avakian: The second point of the argument is even if the prosecution had laid the preliminary foundation for the use of the net worth method, by means of showing inadequacy and incorrectness of records maintained, or by showing the failure

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to produce those records to the government, even with that testimony, there was still the factor, your Honor, that the net worth method could not be used under the law of the cases and under the Internal Revenue Code and the regulations, unless a starting point can be established and it can be determined that net worth can be measured accurately. Now that point was covered at the close of the government's case at the argument on the basis of evidence in existence at that time. Now additional testimony has come in, your Honor, and before the Court at the present time, showing, first of all, the impossibility of using the net worth method, in view of the impossibility of determining at this late date—or any date, for that matter—the amount of cash in existence on December 31st in each year involved in the indictment period. If you can not determine the net worth, you can not determine the net worth increase, and if you can not determine the net worth increase, you can not determine income by the net worth method.

In other words, your Honor, we have testimony that is uncontradicted by any accountant in this case, that it is possible to determine the income of the taxpayer, this defendant, by means of the books and records and the testimony of the witnesses in explanation of them in this case. Now that testimony of Mr. Semenza has not been challenged by any government accountants. Not one single government accountant has testified that he, as an accountant, could not determine the evidence from reference to receipts and disbursements through the

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use of books and records in this case. On the contrary, the government's accountants, in presenting their charts, testified simply this, that they had taken a list of assets and liabilities on Mr. Campbell's instructions, and on the basis of that list, which was enumerated to them by Mr. Campbell, they made computations. In other words, your Honor, they were simply human comptometers. They took the figures given to them by a man who is a lawyer and stipulates he is not an accountant, they took figures that he gave to them and they added them and they subtracted them and they come up with a result, but that, your Honor, is not accounting evidence. That is not evidence of an accountant that this is the correct income. That is not evidence of an accountant that this is the correct method to determine income. That is simply evidence from a man who is an accountant that he has taken certain figures, which have been handed to him, not figures based on his judgment or analysis of what is proper accountingwise, but rather certain items and figures which have been given to him by a non-accountant, and he has added and he has subtracted and he has come up with an answer.

So I say to your Honor that we now have in evidence, as uncontradicted testimony, the testimony of a certified public accountant as to what the proper method is for determining the income on the basis of the evidence in the record and as to what that income is. Your Honor, we now have in evidence, as uncontradicted testimony, from a certified public accountant, the fact that the manner in

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which the partnership investments and drawings were handled in this case is customary business practice with respect to partnerships in which one man puts up the investment and the other partners build up their equities by leaving their share of the profits in the business.

Now I think, your Honor, that this is a fair statement of the evidence and I think that the charts which have been presented and examination and cross-examination of the witnesses, makes it clear that there is no substantial deficiency in this case for any year, if the partnerships which were set up in the books of these enterprises and which were reflected in the partnership returns, are treated as partnerships, and if the income from those partnerships is taxed on a partnership basis. Now, your Honor, the only basis that I can find, which the prosecution may have in mind for contending that these partnerships are dummies rather than actual partnerships, is that Mr. Remmer put up the investment and the other partners did not, and, secondly, the other partners received credits in their capital accounts for their amount of the profits and, with some exception, did not actually draw out their profits during the years in question, although your Honor will recall substantial withdrawals subsequent to the indictment herein by various partners, Mr. Maundrell, for example, drawing out by February, 1948, substantially the full amount he had accumulated in his capital account; and, your Honor, if the evidence showed that the partners—

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just to use Mr. Maundrell as an example—if the evidence shows that Mr. Maundrell had taken his share of the profits out of the business and then had surreptitiously turned that money over to the defendant, that would be a good basis for contending that that was not in fact a partnership, that it was a dummy.

The Court: The question of whether the partnership is a real partnership would be left to this jury.

Mr. Avakian: Your Honor, that should be left to the jury only if there is some reasonable basis upon which they could infer that the partnerships are phony.

The Court: It will be left to the jury.

Mr. Avakian: Do I understand your Honor has already made up your mind on that point?

The Court: On that point, certainly that is a question to be determined by the jury and all facts and circumstances to be determined by the jury on that question.

Mr. Avakian: I had not finished my presentation of that point.

The Court: You know I have sat here for ten weeks myself and listened to this evidence.

Mr. Avakian: So have I, but it is my understanding, your Honor, no matter how long the case——

The Court (Interceding): On that point I will tell you, and I think it is only fair to tell you, that I think that is a question to go to the jury.

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Mr. Avakian: I had hoped that your Honor would have an open mind on that until I completed arguing my motion for acquittal, but I assume that your Honor——

The Court (Interceding): I listened to the testimony and your analysis of it is not going to change the impression I got from the evidence on that point. I think that is a question there for the jury. I do not know what the answer to the question is, but I think it is a question for the jury.

Mr. Avakian: I certainly do not question your Honor's right to form that opinion, but I hoped that wasn't your Honor's position and your mind would be open to the extent of listening to what I had to say or not cut me off before I finished, but rather keep your mind open, and in the event I present something to your Honor, you would reconsider, that your Honor would be open for that purpose. I do not know, your Honor, whether there is any point in my completing my presentation.

The Court: On that question I think it should go to the jury.

Mr. Avakian: Is your Honor's mind so definitely made up it is closed to any argument I might present? Shall I stop now or continue?

The Court: Go ahead. I am just telling you how I feel.

Mr. Avakian: I appreciate your telling me, but I hope your mind is open to anything I have to say.

The Court: If you say anything that could be considered sufficient to justify a change of opinion,

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I will consider it, certainly. I sat here during this trial and listened to this evidence and made notes and I have some of this evidence in mind and it is my opinion that the question should be answered by the jury.

Mr. Avakian: I recall yesterday your Honor made a statement from the bench, in connection with offer of proof on this particular point, that it appeared obvious to your Honor that if the agreements provided that Mr. Remmer was to withdraw his investment before the other partners drew their part of their share, he was entitled to do that, and the uncontradicted evidence is that he did have that right. Every prosecution witness who has testified on that point has said that that was the arrangement, to the extent that verbal agreements were recorded in the written agreements and the written agreements are in evidence here and show that the defendant had that right, and so, your Honor, I think that if the defendant had the right under his agreement with these partners, as the uncontradicted evidence shows, to withdraw his investment before the other partners commenced withdrawing their share of the profits, and if, your Honor, that practice or arrangement is customary in the business world, I do not see, your Honor, how there is anything from which the jury could infer fraud.

The Court: There isn't from that, of course, on the one circumstance, if it is customary for legitimate partnerships to operate that way, from that circumstances there is no reason why the jury would infer fraud.

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Mr. Avakian: Your Honor, I have listened to this trial, as we all have, and I have listened intelligently and with a careful ear on that very point, because I had assumed——

The Court (Interceding): I am not going to hear any more argument on that point.

Mr. Avakian: I just wanted to say that I have not heard anything to show fraud.

The Court: I do not want to hear any more argument. I do not know of any rule that requires a judge to sit and listen to argument which incites counsel—I am not going to sit and listen to any more. What other point have you?

Mr. Avakian: That, your Honor, is my point. In view of your Honor's ruling that I should not talk further on that point, that is the conclusion of my argument.

The Court: Now what has the government to say about it?

Mr. Thompson: Mr. Avakian, your Honor, in connection with his motion, has incorporated the same grounds which he asserted at the close of the government's opening case, and to save time I would like to incorporate the same rebuttal that we made at that time to those motions.

The Court: I would like to hear from you on this question of whether or not there are records of these enterprises which should have been produced in this trial.

Mr. Thompson: Here is our position on that, your Honor. The testimony is uncontradicted those records were produced by the government agents

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and obtained by the government agents from Mr. Kyne and Mr. Maundrell, both of whom were present here and both of whom knew what the records were. Those two witnesses, your Honor will recall, are the principal witnesses who identified the records of these businesses now before the Court. In addition to that, Mr. Semenza testified, and his testimony was supported by that of Mr. Weaver, that in June, I believe, of 1949, he was given full access to all the records then in the possession of the government's agents and was permitted to select from those records the ones which he desired to take. In addition to that, Mr. Weaver testified that Mr. Friedman, another accountant for the defendant, subsequent to Mr. Semenza having access to the records, also was given permission to work in that particular office and had access to all the records.

Now, in the first place, we think that it is clear that the defendant and his counsel know what those records are. We also think it is plain, from what has occurred here during the trial, that whenever any specific record was requested which the defendants thought would help their case, it was brought down immediately. That was done with some poker sheets. Further, we think that it is not proper for the prosecution or the defense, or any party to any case, civil or criminal, intentionally to encumber the record with a group of irrelevant material which does not aid in the prosecution or defense of the case. From our point of view, that is what would have been done had a miscellaneous group of poker sheets of the Menlo Club, for ex-

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ample, for the year 1946, been brought into court, in view of Mr. Maundrell's testimony that all of the information on those poker sheets had been entered in the ledger records of the Menlo Club for the year 1946; that those poker sheets were delivered to him by various cashiers of the club room operation. As a matter of fact, your Honor will recall that certain of the entries from the poker sheets were checked in connection with Mr. Maundrell's testimony and it was shown that the income reported on the poker sheets had been reported by him in the ledger books of the Menlo Club.

It is the contention of the defense that the books are accurate. The only purpose that could be served by producing the poker sheets themselves, for example, would be to show that they are inaccurate. It could not possibly aid the defense to have the poker sheets in evidence if the information transferred from the poker sheets to the ledger books of the Menlo Club is inadequate information on the poker sheets themselves. That would show only that the information was correctly transferred from one record to another and to that extent the books were accurate. So we say on the face of it, it does not hurt the defense a bit not to bring into court all this miscellaneous group of poker sheets from the Menlo Club, or, for example, cancelled checks or bank statements or cash register tabs, I believe were mentioned by Mr. Semenza, if the information from those records is correctly entered in the books themselves. The books compile it all in an easily understandable form and if that information is not entered in those books correctly, it

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would hurt rather than help the defendant's contention to show that. Inasmuch as the miscellaneous records to which I refer were not brought into court, the presumption is that they were correctly entered in these books which are now before the Court, and to that extent the production of them would only encumber the record in this case with miscellaneous information which would not assist either the Court or the jury or the defense in deciding the issues before it.

Now with regard to books and records, your Honor, you must bear in mind that the Menlo Club is not on trial here, the 110 Eddy Club is not on trial here. The taxpayer is Mr. Elmer Remmer. It is the contention of the government that Mr. Elmer Remmer's books and records were inadequate from which to determine his true net income for the years in question. True, we contend that in certain respects the books and records of these other enterprises were not properly kept. Mr. Semenza, in testifying that they were adequate, disagrees with the testimony of Mr. Weaver, but be that as it may, the most that Mr. Semenza could do on a computation of income on receipts and disbursements method was to use the sources of income of which he was acquainted here in evidence and he limited himself to those certain specific enterprises. You do not, for example, find Mr. Semenza trying to compute how much Mr. Remmer won or lost in gambling during those years, and there is specific evidence in the record that during those years Mr. Remmer did gamble and did have gam-

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bling income. As a matter of fact, on one of his returns he reported five thousand dollars gambling income, without any explanation where it came from or what gambling he was engaged in. There is a possible source of income in the liquor transactions, we find in the record of Mr. Remmer relative to the Gallagher and Burton whiskey. We find in the record of Mr. Remmer evidence relating to the purchase and sales of large stock of liquor which the witness was kept in a warehouse at 52 Mason Street. It is Mr. Remmer's records that are inadequate, your Honor. The inadequacy of those records, to a certain extent, is demonstrated by the inadequacy of some of the records of these businesses. The B & R Smoke Shop, the records for the gambling consist of one entry per day. Mr. Kyne testified those are the only records kept by the B & R Smoke Shop. Mr. Kyne did not know—I don't know who knows—if all of the B & R Smoke Shop records are in the record. Mr. Semenza did not testify that the B & R income was correctly reported. He testified that if the entries in those books were correct, the income was correctly reported, and I think it is fairly obvious when the only record of a business, handling thousands of dollars, is the record of one entry, win $200, loss $600, around three thousand dollars each day, that those records are wholly inadequate for the purpose of determining what the true net income of that business was.

The witness testified, for example, that all expenses of the operation of the B & R Smoke Shop

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were paid out before that net figure was entered. What were those expenses? Certain expenses that that B & R Smoke Shop may have might be considered expenses, but may not be deductible items, so far as income determination is concerned. We have no record of those expenses. As any record of those expenses, that is the B & R Smoke Shop, is wholly inadequate, Mr. Remmer's personal records are wholly inadequate. He got property in the names of three persons, he took license in the Menlo Club in the name of Joseph Billington, he kept no record of those things himself. He had safety deposit box in the name of Henry Clay. All those things, I think, point clearly that there is fully adequate evidence in the record to go to the jury on the adequacy of the record.

It is not my purpose at this time to rehash the argument before the jury. I think there is substantial evidence on any point for the jury to decide that issue. We think there is ample evidence on all points which the defense has mentioned to warrant a denial of the motion for judgment of acquittal.

I do not know just how far your Honor wants me to go. I tried to point out a few highlights to show our contention, and if your Honor desires additional argument on any additional point, I will be glad to give it.

The Court: We will take a recess until one o'clock, and then if counsel wants to argue, they may do so.

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1:05 P.M.

Mr. Thompson: I have nothing further at this time.

Mr. Avakian: I wish to be heard, very briefly, your Honor, with respect solely to this question of the matter of records.

The Court: Very well.

Mr. Avakian: Mr. Thompson takes the position, in answer to my argument, that it is not incumbent upon the government to encumber the record in this case with documents which do not aid the case. That argument, of course, begs the question, your Honor, because so far we have only the determination of Mr. Thompson, and the other members of the prosecution's staff, that these records would not aid the case. They have never permitted your Honor to rule on the materiality of these records because they have never brought them in. They have never permitted us, as the parties primarily responsible in determining whether certain evidence should be presented, is beneficial to the defendant, to determine whether or not those records might be material, and I only suggest this to your Honor, if the government really felt these records had no materiality to the case, they would have no objection to our examining them at the court, and even turning them over to us.

Second, Mr. Thompson states that the issue is not the adequacy of the records of the Menlo Club and the other enterprises, but rather the adequacy of the records of Mr. Remmer personally. Now, your Honor, if the government contends, as some of its

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witnesses have, that Mr. Remmer is the Menlo Club, there is no partnership, the Menlo Club is a sole enterprise of Mr. Remmer, then I do not see how a distinction could be drawn of the kind Mr. Thompson draws. The fact remains that the only evidence of income shown in this case is the income of these different enterprises. Now whether the enterprise is solely Mr. Remmer or is a partnership, does not enter the question of whether the business records of that enterprise were adequate. Now the issue then is, your Honor, whether the business records of these enterprises were adequate. Mr. Thompson states that the production of the poker sheets would serve no purpose because Mr. Maundrell testified that the income shown on the poker sheets was all entered in the books.

Now, your Honor, if the prosecution is right in saying that these partnerships were fraudulent, then Mr. Maundrell is equally guilty with the defendant in the crime of tax evasion, because he was then a direct participant, he would have been a direct participant, in the crime, and so the jury might feel that Mr. Maundrell's testimony that all the income shown on the poker sheets was entered on the books, would not be as competent as an actual examination of the poker sheets themselves and a direct comparison of them, a direct proof that all income shown on the poker sheets was entered in the books, because your Honor will remember that the poker sheets were made up, not by the partners, but by employees, a large number of them, and the jury might very well feel that proof,

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direct proof from the actual introduction into evidence of the poker sheets, that everything shown on the poker sheets was entered in the books, would be stronger than the simple verbal word of Mr. Maundrell who, under the government's theory, would have been a participate in the crime, that he entered all that evidence, so we think, your Honor, that it must be clear that the production of those poker sheets and the opportunity to so prove, through analysis of the poker sheets themselves, that everything was in evidence, would have been material in this case.

Then he states, with respect to the B & R Smoke Shop, that Mr. Kyne said the one entry per day were the only records of the B & R Smoke Shop. Your Honor will recall that during the time Mr. Kyne was in the service, Mr. Pritchett was keeping the records. Mr. Pritchett testified he turned these 1945 records over to Mr. Slater. The government obtained records from Mr. Slater. Mr. Slater is now dead, died some time ago, and it may be included in these records that the prosecution has upstairs, is material taken from Mr. Slater which may include Pritchett records. Now, your Honor, if that were true, it would be a material fact for the jury to consider what those records show as income of the B & R Smoke Shop for that period. Mr. Slater is not available to us. We do not know whether the records taken from Mr. Slater include the records from Mr. Pritchett or not because the prosecution won't let us look at what they took from Mr. Slater. They won't let the jury look at

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what they took from Mr. Slater and they haven't shown to your Honor what they took from Mr. Slater; so I think, your Honor, Mr. Thompson's argument simply emphasizes what is an arbitrary position by the prosecution as to which records maintained by these enterprises are material and which are not material. Now I suggest to your Honor again that that sort of procedure violates every principle of American justice. That is not the way criminal trials are supposed to be conducted in this country, and I say to your Honor in all sincerity, in all earnestness, that the proper thing for your Honor to do, under these circumstances, is to say to the prosecution: "You will not be heard in this Court to contend that the records of these businesses are inadequate unless you produce for examination by the Court all of the records of these businesses which you have in your possession."

The Court: The motion is denied.

State of Nevada,
County of Clark—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had at the trial of the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, held in Carson City, Nevada, commencing November 28, 1951, and that the foregoing pages, numbered 1 to 246, inclusive, comprise a full, true, and correct

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transcript of my said shorthand notes of proceedings had in the absence of the jury on February 5, 6, 7, 8, 11, 13 and 14, 1952, to the best of my knowledge and ability.

Dated at Las Vegas, Nevada, April 10, 1952.

/s/ MARIE D. McINTYRE,
Reporter.

[Endorsed]: Filed April 18, 1952.

Monday, February 18, 1952—10:00 A.M.

(Defendant present with counsel.)

(Jury not present.)

The Court: Now at this time I call attention to Rule 30 of the Rules of Federal procedure. The Court has noted that the first part of this rule has been complied with. Counsel have presented their written requests as to instructions to the jury and those requests have, of course, been served on the parties. Now at this time I wish to inform counsel for the government and counsel for the defendant the Court will give, and proposes to give, the instructions, copies of which just before coming into court were handed to counsel for both the government and the defendant, the instructions being numbered 1 to 45, inclusive. I want to at this time inform counsel they have an opportunity now to make objection to the giving of any of these proposed instructions or take exceptions as to the failure of the Court or refusal of the Court, to give instructions

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requested by counsel. I believe it would be well to take that matter up now.

I want to inform counsel also that that proposed change suggested in regard to the form of verdict and last instruction will not be followed. The Court [2947] will give the form of verdict which is the practice of this court to be submitted to the jury and the form of instruction in that regard will be followed in this case. That probably is the last instruction proposed. That proposal to give the instructions constitutes the Court's action on the requests.

Mr. Campbell: Your Honor, as I understand the Court's order is that instructions previously numbered 1 to 45 will be the instructions as given by the Court.

The Court: As just presented to counsel will be the instructions.

Now at this time the Court will give counsel an opportunity to object to any of the proposed instructions, 1 to 45, inclusive, and also an opportunity to take exceptions to the refusal of the Court to give any other instruction and at this time counsel should make their objections and state the grounds of the objection.

Mr. Campbell: The government has no objections or exceptions.

The Court: Counsel for the defendant?

Mr. Golden: Yes, your Honor. We object and except to the Court giving the instruction which we believe is numbered Court's Instruction No. 7.

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The Court: That instruction reads: "You are instructed [2948] that the theory of law——"

Mr. Golden: Yes, your Honor, and the grounds are that it does not state the law, in that the presumption of innocence, in our opinion, applies to every defendant and is not qualified as set forth in that instruction.

We object and except to the Court giving the instruction which the Court has numbered 40, the one that starts: "The matter of sympathy * * *" on the ground that it presents only one phase of the subject matter which it purports to cover and therefore is not an impartial instruction, in that it instructs the jury not to consider the matter of sympathy for the defendant and says nothing about the fact the jury should not consider the matter of prejudice against him. And while those two points are, I believe, covered in another instruction which the Court will give, the addition of this instruction emphasizes the matter of the disregard of sympathy without repeating the matter of disregard of prejudice.

Those are the only objections and exceptions we have to the matter the Court proposes to give.

We do, however, wish to object and except to proposed instructions which the defendant has requested and the Court has refused and we do in each case on the grounds that the instruction refused is a correct statement of the law and applicable to the case; that it is the Court's duty, in a criminal case, to instruct upon every phase of the law which pertains to the [2949] case and that the

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refusal to give those instructions, or the substance of them, results in the Court not performing that duty. I say that respectfully, of course.

Now those instructions, your Honor, are—I am using now the numbers on our proposed instructions—those requested instructions Nos. 10, 16, 17, 19, 21, 26, 28, 39, 40, 41, 42, 43, 47, 48, 49, 50, 54, 56, 57, 60, 69, 75, 77, 78, 79, 80, 81, 82, 88, 89, 90, 107, 108, 109, 111, 114, 124, and 129, and we make the objection and exception to the refusal to give those instructions jointly and severally; that is, we object and except to the refusal to give each one of them. I say that because some of them concern the same subject matter. I think that covers it.

The Court: I think we have complied with Rule 30 now. Any question about it?

Mr. Golden: I think so, yes.

The Court: So we will call in the jury and proceed with the arguments. [2950]

[Title of District Court and Cause.]

JURY TRIAL

Thursday, February 21, 1952, 11:35 A.M.

DEFENDANT'S MOTION TO CORRECT ERRORS IN RECORD ARISING FROM OMISSIONS

The Court: You may proceed.

Mr. Golden: If the Court please, this motion is made in writing and filed and the motion has at-

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tached to it an affidavit made by myself and Mr. Avakian and Mr. Lohse. It is one affidavit but it is made by each of us for himself, not one for the other, and the motion, your Honor, is to insert some additional matter in the transcript, and the pages in the transcript which are relevant are pages 833 and 834. Now it might assist if those pages are available.

The Court: You may read it.

Mr. Golden: Commencing on page 833, the middle of the page, line 12, Mr. Gillen says: "May I be heard?" and the Court says: [2951]

"Just let me finish. I am doing the talking here. There is no necessity of that remark. Your remark in making that objection to these nicknames received here, imputing something against government's counsel—Mr. Campbell has not conducted himself in any way to merit that kind of treatment. That isn't fair treatment of one lawyer to another. This isn't a contest between counsel for the defendant and counsel for the plaintiff. Now we will call in the jury."

The Court: The record shows that those remarks were made in the absence of the jury?

Mr. Golden: Yes, your Honor—"Now we will call in the jury:

"Mr. Gillen: You are not going to let me say a word?

"The Court: We are going to call the jury.

"(Off-the-record remarks by counsel.)"

The Court says:

"I will direct the reporter not to put your re-

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marks in the record. Sit down. I will make a finding that your conduct, the remarks made this morning, are in contempt of this court and I will fine you $100 and you are committed to the custody of the marshal until the fine is paid.

"Mr. Gillen: I will pay it right now.

"The Court: We will be in recess. [2952]

"Mr. Avakian: Can't we have what was said here in the record?

"The Court: No. We will be in recess for five minutes."

Now according to the affidavit which is on file with the motion, at the point where Mr. Gillen says: "May I be heard?" and the Court says: "Just let me finish. I am doing the talking here," at that point the affidavit states that at that point the Court informed Mr. Gillen, in reply to his question, "May I be heard?" that he would have an opportunity to explain his position to the Court when the Court had completed the Court's remarks, and the first request made by the motion is that at that point, after the Court says: "I am doing the talking here," there be inserted language to the effect that the Court then said to Mr. Gillen that when the Court was finished Mr. Gillen would have an opportunity to explain his position.

Then the second request made by the motion comes at a place in the transcript after the Court says: "We are going to call the jury" and where the reporter has inserted in parentheses the off-the-record remarks by counsel, the affidavit shows that at point Mr. Gillen stated that he wanted the

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record to show that the Court would not hear what he wanted to say, and we move that words to that effect be inserted at that point.

The Court: Let me ask you a question. Both these requests pertain to matters after the adjudication of the [2953] contempt?

Mr. Golden: No, your Honor, actually they are before the adjudication.

The Court: Both of them are?

Mr. Golden: Both of them, yes, your Honor.

The Court: Go ahead. Pardon me for interrupting. I just wanted to get that point certain.

Mr. Golden: The third and last matter of my motion occurs after the Court's finding Mr. Gillen's conduct to be in contempt of the Court and at the end of the language which I read to your Honor from pages 833 and 834 and that is this, that at that time I, myself, requested that the record show the grounds upon which your Honor found Mr. Gillen's conduct to be contemptuous and the affidavit shows that I made that request and that the Court left the bench without reply to that request.

Now, specifically, the first insertion which we request would occur after the first word on line 14 of page 833 of the transcript and the second requested insertion would occur in lieu of the reporter's statement in parenthesis of "(Off-the-record remarks by counsel)," which on the last line of page 833, and the third requested insertion would occur after line 11 on page 834 of the transcript. I say that in order to make the matter clear.

This is simply a matter, your Honor, where the

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transcript is admittedly incomplete, if at no other place, in the [2954] place where the reporter says, "(Off-the-record remarks by counsel)." The matter occurred in court on December 14th. The affidavit was made on December 17th and represents the best recollection of affiants as to what was actually said. I suppose no human being could be positive as to the exact words which we used which, of course—I say this respectfully—the precise matter said in court being unreported. However, it represents, we are satisfied, the substance of what was said and there is no contrary showing from the prosecution and therefore we ask that the record be corrected by inserting that matter as set forth in the affidavit at the places I have indicated.

Mr. Campbell: If the Court please, I must confess with Mr. Golden that the matter happened at the time so precipitously and suddenly that I can not definitely state I have a clear recollection of the exact language used at the time. I do recall, however, one statement which Mr. Gillen made immediately after the jury had left and prior to some of the matters set forth here. Mr. Gillen stated something to this effect—I am not trying to quote the exact language—what I am referring to was made during the off-the-record period and prior to the contempt. He stated something to the effect as follows that—"You are just trying to intimidate me with another threat of contempt for the benefit of the newspapers." I do have a definite recollection of a statement to that effect. [2955] As I say, I cannot state the exact words. Now, as to these

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matters set forth in the affidavit of Mr. Golden and Mr. Avakian——

The Court: I remember such remarks.

Mr. Campbell: ——my recollection would coincide with theirs as to the statements set forth here. That is the extent of my recollection. The thing happened very rapidly at the time, but I do remember that particular statement of counsel after the jury was excused and during the period of time when the Court had instructed the reporter: "Do not take this down. Do not make this a part of the record." I simply want to make that for the record.

Mr. Golden: Apparently, your Honor, Mr. Campbell agrees that the affidavit is substantially correct. Now, it may well be that Mr. Gillen said something to the effect as Mr. Campbell has stated at another portion of the transcript. In other words, your Honor, at the bottom of page 833 the affidavit says that Mr. Gillen requested that he wanted the record to show that the Court would not hear what he had to say.

The Court: I have a recollection here I would like to give you right now. At the time shortly after the jury was excluded we had a discussion here and I, at that time, had no thought of any adjudication of contempt and requested to have the jury brought in, when Mr. Gillen, in an outburst—something which you [2956] can't place in these records, these records are cold—insulting outburst, outrageous, ungentlemanly, in an unkind manner, accused this Court of making a play to the gallery, as you might

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say, and that interrupted the calling in of the jury and to my mind the conduct of Mr. Gillen at that time left no other alternative, to either get off the bench and step off, or to adjudicate him for contempt. Now, that is my recollection.

Mr. Golden: Your Honor, we understand that is your position but we are not trying to change anything about the contempt——

The Court: I do not see anything about that in the record.

Mr. Golden: It is in your Honor's ruling and I want to point to that certificate, that will give it. Has your Honor got that ceretificate before you?

The Court: No.

Mr. Golden: According to the Court's certificate, page 3 of the certificate, your Honor sets forth that after you said on the second line of page 834, after you said to Mr. Gillen: "Sit down," then your Honor says the following: "After the Court ordered the reporter not to put Mr. Gillen's remarks——"

The Court (Interceding): You recollect what took place and so does Mr. Gillen. You know the manner in which he addressed the Court. He wasn't in any [2957] frame of mind for an ordinary human being to give a sound, decent explanation of anything in this record. Now, I am going to deny this motion now.

Mr. Golden: Your Honor, we are not appealing to do anything about the contempt.

The Court: The motion is denied.

Mr. Golden: Just change the record to speak the truth the way it is.

The Court: Motion denied. [2958]

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State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the jury trial held at Carson City, Nevada, commencing November 28, 1951, and concluding February 21, 1952, and that the foregoing pages, numbered 2012 to 2958, inclusive, dated January 28 to 31, inclusive, 1952, and February 1 to 21, 1952, inclusive, comprising the last and fourth volume, are a full and correct transcript of my said shorthand notes, excluding arguments in the absence of the jury, to the best of my knowledge and ability.

Dated at Carson City, Nevada, February 21, 1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed February 23, 1952.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that the following and accompanying documents and exhibits, listed below, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

1. Indictment.
2. Motion for a bill of particulars.
3. Memorandum of Points and Authorities supporting motion for a bill of particulars.
4. Copy of docket entry of June 15, 1951, denying motion for bill of particulars.
5. Reporter's transcript of arraignment.
6. Notice of Motion for Continuance.
7. Motion for Continuance.
8. Notice of Motion to inspect and take copies.
9. Motion to inspect and take copies.
10. Affidavit of John R. Golden in support of motion for continuance and of motion to inspect and take copies.
11. Affidavit of Spurgeon Avakian in support of motion for continuance and of motion to inspect and take copies.
12. Affidavit of Walter M. Campbell, Jr., in op-

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position to motion for continuance and to motion to inspect and take copies.

13. Copy of criminal docket entry of November 15, 1951, denying motion for a continuance and motion to inspect and take copies.

14. Notice of motion for production and inspection of books, papers, documents and objects.

15. Motion for production and inspection of books, papers, documents and objects.

16. Affidavit of Christopher P. Miller in support of motion for production and inspection of books, papers, documents and objects.

17. Affidavit of Leslie C. Gillen in support of motion for production and inspection of books, papers, documents and objects.

18. Reporter's transcript of hearing on motion for continuance.

19. Notice of Motion to Quash Subpoena Duces Tecum.

20. Motion to Quash Subpoena Duces Tecum.

21. Reporter's transcript of hearing on motion to quash subpoena and motion for inspection.

22. Copy of criminal docket entry of November 27, 1951, denying motion for production and inspection; granting plaintiff's motion to quash subpoena duces tecum; and denying telegraphic request of Walter M. Campbell, Jr., for postponement of trial.

23. Reporter's transcript of hearing on contempt of court of David N. Kessel and Walter M. Pechart.

24. Affidavit Supplying Omissions in the Record.

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25. Copy of criminal docket entry of February 21, 1952, denying motion to correct errors arising from omissions.

26. Reporter's transcript of arguments during course of trial in the absence of the jury.

27. Reporter's transcript of hearing on defendant's motion for bill of particulars.

28. Instructions to the Jury given by the Court.

29. Defendant's Requested instructions refused by the Court.

30. Verdict of the Jury.

31. Judgment and Commitment.

32. Copy of criminal docket entry of February 22, 1952, denying defendant's oral motion for order releasing defendant on bail.

33. - Motion for New Trial.

34. Affidavit in Support of Motion for New Trial.

35. Copy of criminal docket entry of February 29, 1952, denying motion for new trial; and Judgment.

36. Election not to commence service of sentence and motion to stay payment.

37. Copy of criminal docket entry of February 29, 1952, staying payment of fines upon the filing of a bond.

38. Motion for Bail upon Review.

39. Copy of criminal docket entry of February 29, 1952, denying motion for bail upon review.

40. Notice of Appeal.

41. Designation of Record on Appeal.

42. Reporter's Transcript of Arguments during

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course of trial in absence of the jury. (2nd volume.)

43. Four volumes of Reporter's Transcript of Testimony.

44. Plaintiff's Exhibits Nos. 1 to 188, inclusive, excepting those exhibits marked for identification only, and as shown on the list of government exhibits admitted in evidence, which list is accompanying this record.

45. Defendant's Exhibits Nos. A through Z and A-1 through M-1, page 3, excepting those defense exhibits marked for identification only, and as shown on the list of defense exhibits admitted in evidence, which list is accompanying this record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court this 19th day of March, 1952.

AMOS P. DICKEY,
Clerk.

By /s/ O. F. PRATT,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby

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certify that, pursuant to "Order that Defense Exhibits for Identification be Included in Record on Appeal," filed April 4, 1952, in the above-entitled case, there is accompanying this certificate the following Defendant's Exhibits marked for Identification: Nos. E, I, L-1, L-2, L-3, L-4, Z, D-1, E-1, and F-1; all of which were marked for identification and constitute a part of the record on appeal in the above-entitled case.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said United States District Court this 8th day of April, 1952.

AMOS P. DICKEY,
Clerk.

By /s/ O. F. PRATT,
Deputy Clerk.

[Endorsed]: No. 13281. United States Court of Appeals for the Ninth Circuit. Elmer F. Remmer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed March 24, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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[Title of District Court and Cause.]

MOTION FOR AN ORDER THAT DEFENSE EXHIBITS FOR IDENTIFICATION BE INCLUDED IN RECORD OR APPEAL

The defendant, through his undersigned counsel, respectfully moves the Court for its order that the defense exhibits for identification introduced at the trial of the above-entitled action, be included in the record on appeal herein and that the Clerk of the above-entitled Court forward the same to the Clerk of the United States Court of Appeals for the Ninth Circuit as part of said record.

This motion will be made under Rule 47 of the Federal Rules of Criminal Procedure upon the grounds that it is necessary that said exhibits be included in said record and forwarded to the Clerk of the United States Court of Appeals for the Ninth Circuit, because one of the assignments of error on said appeal is the trial Court's denial of the offers of said exhibits in evidence and the sustaining of the plaintiff's objections to their admission in evidence, and the United States Court of Appeals for the Ninth Circuit can not pass upon such assignment of error and decide whether or not said exhibits or any of them should have been received in evidence, unless said exhibits are before said Court.

Dated this 28th day of March, 1952.

JOHN R. GOLDEN,
Attorney for Defendant.

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A true copy from the records.

Attest:

AMOS P. DICKEY,
Clerk.

By /s/ O. F. PRATT,
Deputy.

[Endorsed]: Filed April 1, 1952.

[Title of District Court and Cause.]

ORDER THAT DEFENSE EXHIBITS FOR IDENTIFICATION BE INCLUDED IN RECORD ON APPEAL

Upon motion and cause appearing, it hereby is ordered that the defense exhibits for identification introduced at the trial of the above-entitled action, be included in the record on appeal herein and that the Clerk of the above-entitled Court forward the same to the Clerk of the United States Court of Appeals for the Ninth Circuit as part of said record.

Dated this 4th day of April, 1952.

ROGER T. FOLEY,
United States District Judge.

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A true copy from the records.

Attest:

/s/ AMOS P. DICKEY,
Clerk.

By /s/ O. F. PRATT,
Deputy.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER THAT DEFENSE EXHIBITS FOR IDENTIFICATION BE INCLUDED IN RECORD ON APPEAL

To United States of America, Plaintiff, and to Honorable Miles N. Pike, United States Attorney:

Please take notice that the undersigned counsel for defendant will, on Monday, the 7th day of April, 1952, at 10:00 o'clock in the morning, at the Courtroom of the above-entitled Court, at Las Vegas, Nevada, move the above-entitled Court for its order that the defense exhibits for identification introduced at the trial of the above-entitled action, be included in the record on appeal herein and that the Clerk of the above-entitled Court forward the same to the Clerk of the United States Court of

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Appeals for the Ninth Circuit as part of said record. A copy of said motion is attached hereto.

Dated this 28th day of March, 1952.

JOHN R. GOLDEN,
Attorney for Defendant.

A true copy from the records.

Attest:
[Seal] AMOS P. DICKEY,
Clerk,

By /s/ O. F. PRATT,
Deputy.

[Endorsed]: Filed April 9, 1952.

In the United States Court of Appeals
for the Ninth Circuit

No. 13281

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The points on which appellant intends to rely on appeal are as follows:

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1. The Court erred in denying defendant's motion for a bill of particulars.

2. The Court erred in denying defendant's motion to inspect and take copies.

3. The Court erred in denying defendant's motion for production and inspection of books, papers, documents and objects and in quashing the subpoena duces tecum issued in connection therewith.

4. The Court erred in denying defendant's challenge for cause to the prospective juror John W. Humphrey.

5. The Court erred in compelling defendant's counsel during the trial, to produce defendant's books and records and in denying defendant's motions to return them and suppress their use in evidence, and in admitting them in evidence over defendant's objections.

6. The Court erred in denying defendant's motions, during the trial, for the production and inspection of defendant's books and records taken and retained by the Government and withheld from him, and in denying defendant's motions to suppress their use in evidence.

7. The Court erred in denying defendant's request to adduce evidence in support of defendant's motions described in the preceding points 5 and 6.

8. The Court erred in sustaining objections to questions addressed to the Witnesses Kyne, Maundrell, Schriber, Weaver, Brady, Morgan and Hark-

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ness, and each of them for the Government, and the Witnesses Semenza, Woodburn, Thatcher, Graham, Edna Jeffress, James Jeffress and Golden, and each of them for the defense, and in rejecting defendant's offers of proof in connection with said defense witnesses and said Brady.

9. The Court erred in refusing to allow in evidence Defendant's Exhibits for Identification Z, D-1, E-1 and F-1, and each of them.

10. The Court erred in admitting and denying defendant's motion to strike certain testimony of the Witness Weaver.

11. The Court erred in denying defendant's motions and each motion for a mistrial.

12. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the trial judge.

13. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the Court, the jury, the prosecuting attorneys and Agents of the Federal Bureau of Investigation, and each of them, in the matters and things and under the circumstances described in the affidavit filed with the motion for new trial.

14. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

15. The Court erred in instructing the jury.

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16. The Court erred in refusing to instruct the jury.

17. The Court abused its discretion in denying defendant's motion for new trial.

18. The Court abused its discretion in denying defendant a trial of the issues raised by the affidavit of defendant's counsel on motion for new trial.

19. The judgment against defendant is not supported by substantial evidence.

Dated this 14th day of April, 1952.

LESLIE C. GILLEN,
JOHN R. GOLDEN,
SPURGEON AVAKIAN,
LOHSE AND FRY,
By /s/ JOHN R. GOLDEN,
Attorneys for Appellant.

[Endorsed]: Filed April 15, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED

Appellant hereby requests that the entire transcribed record forwarded and to be forwarded by the Clerk of the United States District Court for the District of Nevada, including Government Exhibits 1, 2, 3, 4, 68, 78, 81, 82, 84, 85, 87, 87a, 88,

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88a, 89, 113, 125c, 130, 140, 153, 163, 164, 165, 168, 169, 172, 174, 175 and 183 and defense Exhibits F, G, H, O, X, Y, A-1, G-1 and M-1 and defense Exhibits for Identification Z, D-1, E-1 and F-1, be printed.

Dated this 14th day of April, 1952.

JOHN R. GOLDEN,
For Appellant's Attorneys.

[Endorsed]: Filed April 15, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER RE EXHIBITS

Appellant having designated for printing Government Exhibits 1, 2, 3, 4, 68, 78, 81, 82, 84, 85, 87, 87a, 88, 88a, 89, 113, 125c, 130, 140, 153, 163, 164, 165, 168, 169, 172, 174, 175 and 183 and defense Exhibits F, G, H, O, X, Y, A-1, G-1 and M-1 and defense Exhibits for Identification Z, D-1, E-1 and F-1 and the remainder of the exhibits introduced at the trial, irrespective of their materiality or their immateriality in the opinion of either appellant or appellee, being in the main incapable by their nature of being printed or of such nature that the printing thereof would entail exorbitant expense, it hereby is stipulated by and between appellant and appellee by their undersigned counsel thereunto duly authorized, that each and all of said exhibits,

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not previously designated to be printed, may be used and considered as part of the record herein on appeal in their original form.

Dated this 26th day of April, 1952.

MILES N. PIKE,
United States Attorney;

WALTER M. CAMPBELL, JR.,
Special Assistant,
United States Attorney;

By /s/ BRUCE R. THOMPSON,
Attorneys for Appellee.

LESLIE C. GILLEN,

JOHN R. GOLDEN,

SPURGEON AVAKIAN,

LOHSE AND FRY,

By /s/ JOHN R. GOLDEN,
Attorneys for Appellant.

ORDER

Upon reading and filing the foregoing Stipulation and cause appearing,

It Hereby Is Ordered that all of the exhibits herein not heretofore designated to be printed, may

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be used and considered as part of the record on appeal herein in their original form.

Dated this 28th day of April, 1952.

/s/ WILLIAM DENMAN,

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals, for the Ninth Circuit.

[Endorsed]: Filed April 28, 1952.

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Vol. IX

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 304

UNITED STATES OF AMERICA

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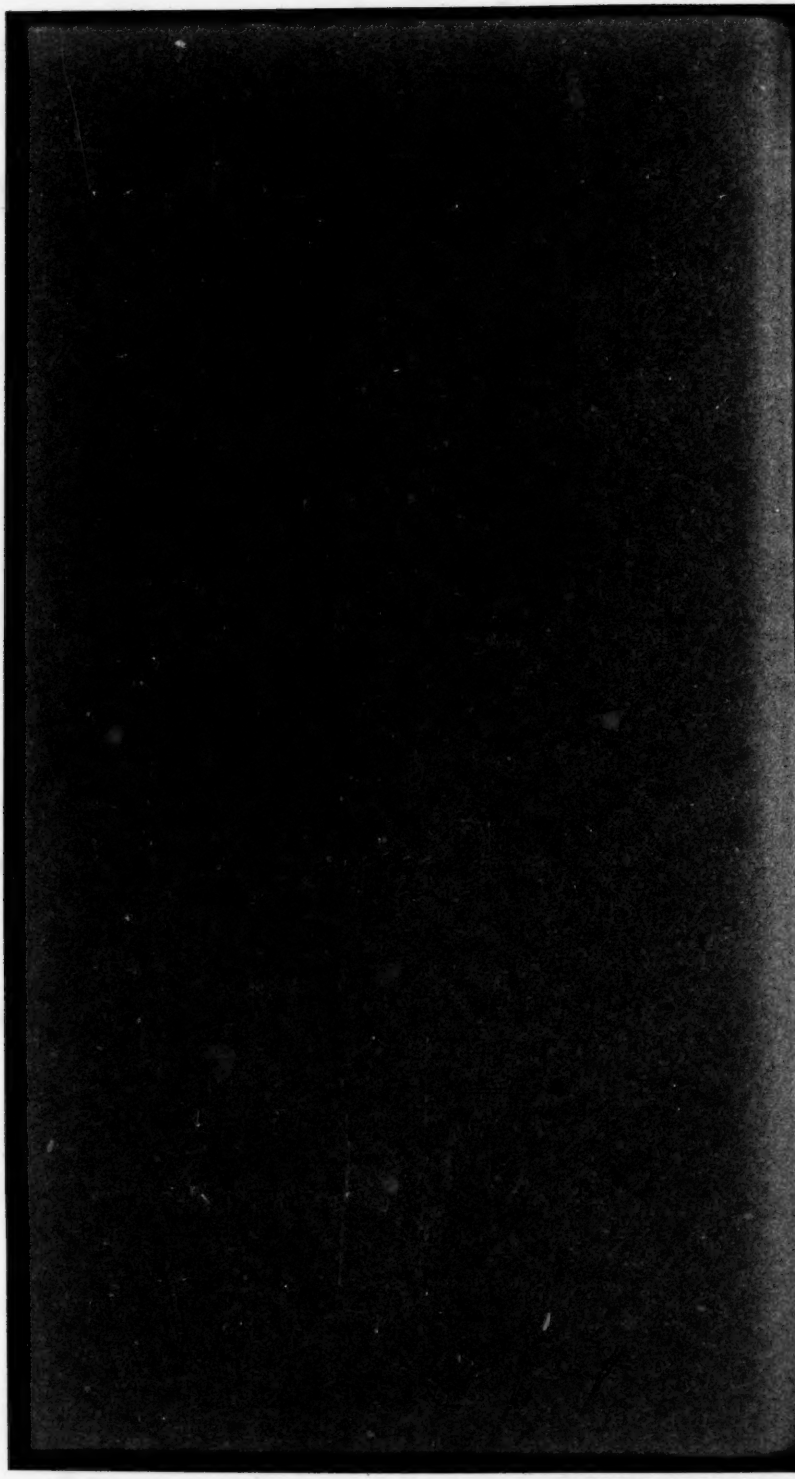

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Nine Volumes

Volume IX
(Pages 3519 to 3665)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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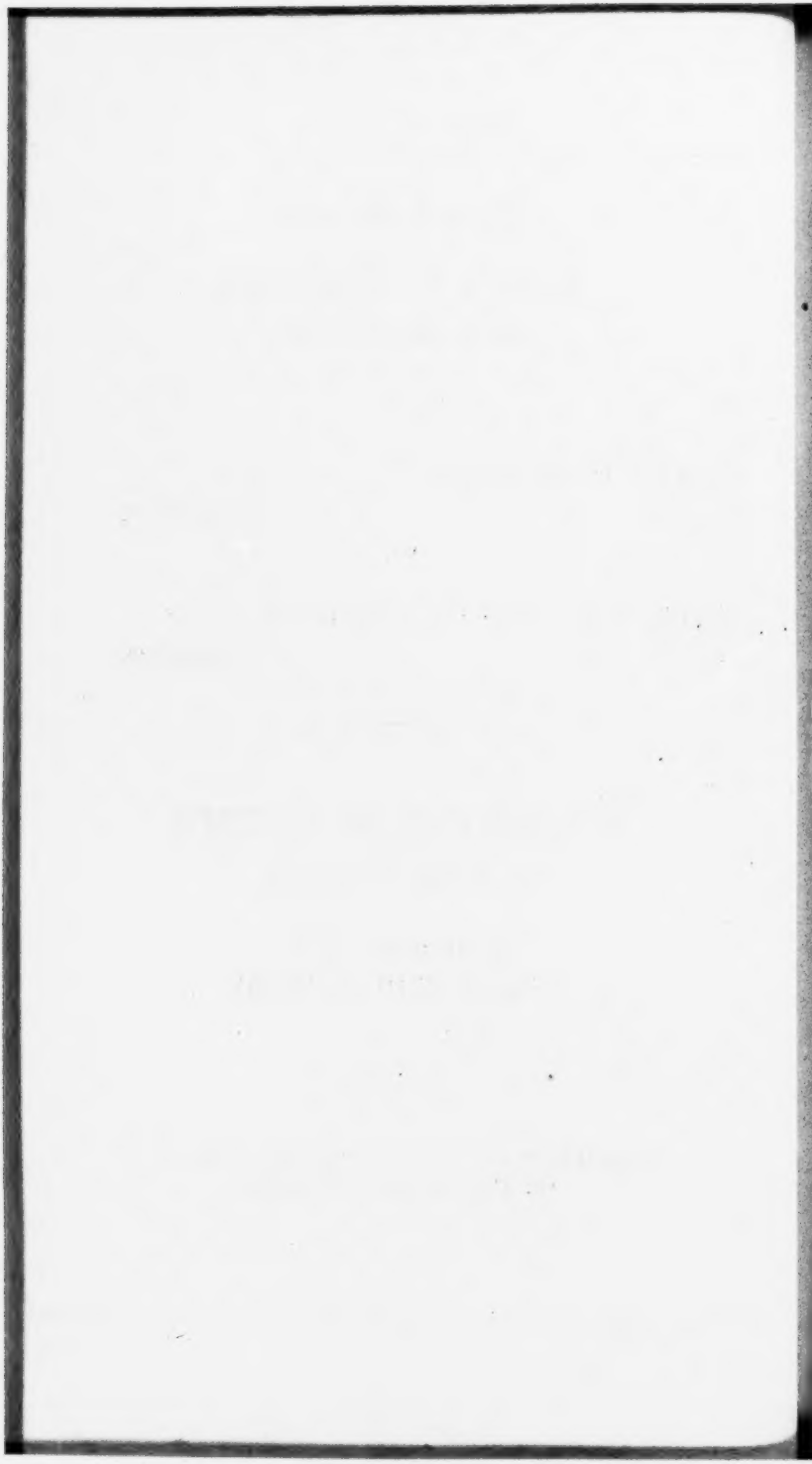

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PLAINTIFF'S EXHIBIT No. 1

Form 1040—Treasury Department Internal Revenue Service

U. S. Individual Income Tax Return 1944
For Calendar Year 1944
or fiscal year beginning....., 1944, and ending April, 1945

File Code 153; Serial No. 300136; District Nevada.
(Cashier's Stamp) 420 Rec'd With Remittance 88 Apr. 13, 1945.

Name, Elmer F. Remmer,
Address, Cal-Neva,
Lake Tahoe, Nev.

Your Exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.
Your name, Elmer F. Remmer.
Helen L. Remmer, wife.

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Print Employer's Name, various.
Where Employed, self employed, C.P. Basis, Amount $20,000

5. Add amounts in items 2, 3, and 4, and enter the total here.....$10,000

If item 5 includes income of both husband and wife, show husband's income here, $10,000.00; wife's income here, $10,000.00.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4.....$2,570.00

7. How much have you paid on your 1944 income tax?
(B) By payments on 1944 Declaration of Estimated Tax $1,500.00 $1,500.00

8. If your tax (item 6) is larger than payments (item 7), enter Balance of Tax Due here.....$1,070.00

9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here.....Int. 5.35
$1,075.35

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If you filed a return for a prior year, what was the latest year? 1943.

To which Collector's office was it sent? Reno.

To which Collector's office did you pay amount claimed in item 7 (B), above? Reno.

Is your wife (or husband) making a separate return for 1944? Yes.

If "Yes," write below:

Name of wife (or husband) Helen L. Remmer.
Collector's office to which sent, Reno.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Taxpayers figures. 4/12/45.

/s/ ELMER F. REMMER.
(Signature of taxpayer)

[Stamped]: Received June 9, 1947, Internal Revenue Agent in Charge, San Francisco. Computation proved. Not Investigated. Filed.

[Shown in crayon in margins]: Ext. Cash 1075.35.

Tax Computation—For Persons Not Using Tax Table on Page 2

1.	Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$10,000
2.	Enter Deductions	500
3.	Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$ 9,500
4.	Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	500
5.	Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income	$ 9,000
6.	Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here	$ 2,300
7.	Copy the figure you entered on line 3, above	$ 9,500
8.	Enter your Normal-Tax Exemption	500
9.	Subtract line 8 from line 7, and enter the difference here	$ 9,000

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10. Enter here 3 percent of line 9. This is your Normal Tax ..... $ 270

15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax..... $ 2,570.00

[Endorsed]: Filed November 29, 1951.

PLAINTIFF'S EXHIBIT No. 2

Form 1040—Treasury Department Internal Revenue Service

U. S. Individual Income Tax Return 1944
For Calendar Year 1944

or fiscal year beginning....., 1944, and ending April, 1945

File Code, 155; Serial No. 300135; District, Nevada.

(Cashier's Stamp) 420 Rec'd With Remittance 88 Apr. 13, 1945.

Name, Helen L. Remmer,
Address, Cal-Neva,
Lake Tahoe, Nevada.

Your Exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your name, Elmer F. Remmer.

Helen L. Remmer, wife.

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Print Employer's Name, various.

Where Employed ....., C.P. Basis.....Amount $20,000

5. Add amounts in items 2, 3, and 4, and enter the total here.....$10,000

If item 5 includes income of both husband and wife, show husband's income here, $10,000.00; wife's income here, $10,000.00.

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Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 ..... $2,570.00

7. How much have you paid on your 1944 income tax?

(B) By payments on 1944 Declaration of Estimated Tax $1,500.00 $1,500.00

8. If your tax (item 6) is larger than payments (item 7), enter Balance of Tax Due here $1,070.00

9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here ..... Int. 5.35

$1,075.35

If you filed a return for a prior year, what was the latest year? 1943.

To which Collector's office was it sent? Reno.

To which Collector's office did you pay amount claimed in item 7 (B), above? Reno.

Is your wife (or husband) making a separate return for 1944? Yes.

If "Yes," write below:

Name of wife (or husband) Elmer F. Remmer.

Collector's office to which sent, Reno.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Taxpayers figures. 4/12/45.

/s/ HELEN L. REMMER.
(Signature of taxpayer)

[Stamped]: Received May 3, 1948, Internal Revenue Agent in Charge, San Francisco. Computation proved. Not Investigated. Filed.

[Shown in crayon in margins]: Ext. Cash 1075.35.

Tax Computation—For Persons Not Using Tax Table on Page 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income $10,000
2. Enter Deductions 500
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income ..... $ 9,500
4. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1) 500

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5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income.....$ 9,000

6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here.....$ 2,300

7. Copy the figure you entered on line 3, above.....$ 9,500

8. Enter your Normal-Tax Exemption..... 500

9. Subtract line 8 from line 7, and enter the difference here .....$ 9,000

10. Enter here 3 percent of line 9. This is your Normal Tax .....$ 270

15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax.....$ 2,570.00

[Endorsed]: Filed November 29, 1951.

PLAINTIFF'S EXHIBIT No. 3

Form 1040—Treasury Department Internal Revenue Service

U. S. Individual Income Tax Return 1945

For Calendar Year 1945

or fiscal year beginning ....., 1945, and ending June, 1946

File Code, 153; Serial No. 320025; District, Nevada.

(Cashier's Stamp) 88 Received June 14, 1948, Coll. Int. Rev., Dist. Nev.

Assessment

Tax $3,500.00, Int. By Coll., Total $3,500.00, Initials IT:Cl:p-7, Sec. Orig. Tax I.P.C., List June 17, 1949, Acct. No. 519004.

Name, Elmer F. Remmer,
Address, Cal Neva Lodge,
Lake Tahoe, Nevada.
Occupation, Gaming.

Your Income

2. See Schedule return Helen L. Remmer.

4. If you received any other income, give details on page 2 and enter the total here.....$65,859.36

5. Add amounts in items 2, 3, and 4 and enter the total here.

Wife's income here, ½.....$32,929.68

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6. Enter your tax from table on page 4, or from line 15, page 3 C.P.B.....$13,072.02
7. How much have you paid on your 1945 income tax?
   (B) By payments on 1945 Declaration of Estimated Tax .....½ $6,000 6,000.00
   Taxpayers figures without audit.
8. If your tax (item 6) is larger than payments (item 7), enter Balance of Tax Due here.....$ 7,072.02
9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here.....Int $ 141.44

$ 7,213.46

If you filed a return for a prior year, what was the latest year? 1944.

To which Collector's office was it sent? Reno.

To which Collector's office did you pay amount claimed in item 7 (B), above? Reno.

Is your wife (or husband) making a separate return for 1945? Yes.

If "Yes," write below:

Name of wife (or husband) Helen L. Remmer.

Collector's office to which sent Reno, Nevada.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Date) 6/14/46.

/s/ ELMER F. REMMER.
(Signature of taxpayer)

[Stamped]: April 14, 1947, April 20, and May 9, 1950, Received, Internal Revenue Agent in Charge, San Francisco.

[Figures shown in margin]: Ext. 6/15. 200, 649, 50, 4, 300, 0, 1, 2, 3, 8, 4, 2.

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Income Tax Return 1945
Elmer F. Remmer and Helen L. Remmer

J. Billington, DBA, San Diego Social Club and 21 Club, El Cerrito, California		$19,829.74
Deduct 10% Commission to following		
Anthony Riggiardo, 110 Eddy	$1,982.97	
Andrew Desemoiue, 110 Eddy	1,982.97	
Dave Billington, 110 Eddy	1,982.97	
	$5,948.91	$ 5,948.91
Net Income		$13,880.83
Peachart, Kessel & Grunewald, DBA, A 311 Club, El Cerrito, California		$ 584.92
Menlo Club, Mason and Eddy		43,613.50
110 Eddy Club		5,532.50
186 Day & Night Club		1,350.00
186 Day & Night Cigar Store		897.61
		$65,859.36
C.P.B. ½ Helen L. Remmer		$32,929.68

Deductions

Contributions

St. Thomas Aquinas Catholic Church, Reno	$2,500	
Donations to various organizations Menlo Club, 21 Club, Day & Night Cigar Store, 110 Eddy	750	
Allowable Contributions (not in excess of 15 percent of item 5, page 1)		$ 3,250.00

Taxes

Personal Taxes on Home and Auto	$ 226.00	
Total Taxes		226.00

Miscellaneous (See Instructions)

Entertainment and Travel for Production of Income	$ 575.00	
Total Miscellaneous Deductions		575.00
Total Deductions		$ 4,041.00

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Tax Computation—For Persons Not Using Tax Table on Page 4

1.	Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$32,929.68	
2.	Enter Deductions	4,041.00	
3.	Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$28,888.68	
4.	Enter your Normal-Tax Exemption	500.00	
5.	Subtract line 4 from line 3. Enter the difference here	$28,388.68	
6.	Enter here 3 percent of line 5. This is your Normal Tax		$ 851.04
7.	Copy the figure you entered on line 3, above	$28,888.68	
8.	Enter your Surtax Exemptions	500.00	
9.	Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	$28,388.68	
10.	Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here		12,220.98
11.	Add the figures on lines 6 and 10, and enter the total here		$13,072.02
15.	Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax		$13,072.02

[Endorsed]: Filed November 29, 1951.

PLAINTIFF'S EXHIBIT No. 4

Form 1040—Treasury Department Internal Revenue Service

U. S. Individual Income Tax Return 1945
For Calendar Year 1945
or fiscal year beginning ....., 1945, and ending June, 1946

File Code, 155; Serial No. 320026; District, Nevada.

(Cashier's Stamp) 88 Received June 14, 1946, Coll. Int. Rev., Dist. Nev.

Assessment

Tax $3,500.00, Int. By Coll., Total $3,500.00, Initials IT:Cl:p-7, Sec. Orig. Tax I.P.C., List June 17, 1949, Acct. No. 519005.

Name, Helen L. Remmer,
Address, Cal Neva Lodge,
Lake Tahoe, Nevada.
Occupation, Housewife.

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Your Income

2. See Return of Elmer F. Remmer, Other ½.

6. Enter your tax from table on page 4, or from line 15, page 3 ½ C.P.B. $14,074.29

7. How much have you paid on your 1945 income tax?
(B) By payments on 1945 Declaration of Estimated Tax ..... ½ $6,000 6,000.00
Taxpayers figures without audit.

8. If your tax (item 6) is larger than payments (item 7), enter Balance of Tax Due here ..... $ 8,074.29

9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here ..... Int. $ 161.48

$ 8,235.77

If you filed a return for a prior year, what was the latest year? 1944.

To which Collector's office was it sent? Reno.

To which Collector's office did you pay amount claimed in item 7 (B), above? Reno.

Is your wife (or husband) making a separate return for 1945? Yes.

If "Yes," write below:
Name of wife (or husband) Elmer F. Remmer.
Collector's office to which sent Reno, Nevada.

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ HELEN L. REMMER.
(Signature of taxpayer)

[Stamped]: Nov. 25, 1946, April 20, and May 9, 1950, Received, Internal Revenue Agent in Charge, San Francisco.

[Figures shown in margin]: Ext. 6/15. 200, 300, 0, 1, 4, 3, 8, 4, 2.

Income Tax Return 1945

Elmer F. Remmer and Helen L. Remmer

J. Billington, DBA, San Diego Social Club and 21 Club, El Cerrito, California $19,829.74

Deduct 10% Commission to following
Anthony Riggiardo, 110 Eddy $1,982.97
Andrew Desemoiue, 110 Eddy 1,982.97
Dave Billington, 110 Eddy 1,982.97

$5,948.91 $ 5,948.91

Net Income $13,880.83

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	Carried forward....	$13,880.83
Peachart, Kessel & Grunewald, DBA, A 311 Club, El Cerrito, California	$	584.92
Menlo Club, Mason and Eddy		43,613.50
110 Eddy Club		5,532.50
186 Day & Night Club		1,350.00
186 Day & Night Cigar Store		897.61
		$65,859.36
C.P.B. ½ Helen L. Remmer		$32,929.68

Deductions

Contributions

½ St. Thomas Aquinas Catholic Church, Reno	$	2,500.00
Total Deductions	$	2,500.00

Tax Computation—For Persons Not Using Tax Table on Page 4

1.	Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$32,929.68	
2.	Enter Deductions	2,500.00	
3.	Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$30,429.68	
4.	Enter your Normal-Tax Exemption	500.00	
5.	Subtract line 4 from line 3. Enter the difference here	$29,929.68	
6.	Enter here 3 percent of line 5. This is your Normal Tax		$ 897.89
7.	Copy the figure you entered on line 3, above	$30,429.68	
8.	Enter your Surtax Exemptions	500.00	
9.	Subtract line 8 from line 7. Enter the difference here. This is your Surtax Net Income	$29,929.68	
10.	Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 9. Enter the amount here		13,176.40
11.	Add the figures on lines 6 and 10, and enter the total here		$14,074.29
15.	Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax		$14,074.29

[Endorsed]: Filed November 29, 1951.

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PLAINTIFF'S EXHIBIT No. 68

Treasury Department
Internal Revenue Service
Reno, Nevada

Office of Deputy Collector
District of Nevada

In Replying Refer to
Elmer F. Remmer
110 Eddy St.
San Francisco, California

March 20, 1945.

My dear Mr. Remmer:

Attached you will find two (2) Forms 1040 made out in the name of Mrs. Remmer and yourself. You will sign those forms and return them to this office immediately, otherwise you will be penalized, as they have to come in here the 15th of March. There is also, two (2) copies, one for each of you enclosed.

You will note that you owe $1070 each. I took it off of your estimate for last summer, which has made you a $20,000 basis. If there is any change to be made, we will make it on your first visit to Reno, as you may want to raise the amount. Bring all of the data from the different places, so that we may file a proper amended return.

At this time you are supposed to make a declaration of expected income for year 1945. This should be filed now or March 15.

With very kind regards, I am

Yours sincerely,

/s/ PAT MOONEY,
Chief Field Deputy.

PM:kc
Encl:

[Endorsed]: Filed December 6, 1951.

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PLAINTIFF'S EXHIBIT No. 78

Form 1065—Treasury Dept., Internal Revenue Service

United States 1944

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1944

or fiscal year beginning .....,1944, and ending ....., 1945

Serial No. 8704686.

[Stamped]: 94 Received Feb. 14, 1945, Coll. Int. Rev., 1st Dist. Cal.

B-R Smoke Shoppe
50 Mason Street
San Francisco, California

Gross Income—13. Total income in items 3 to 12.....$1,200.00

Deductions—26. Ordinary net income (item 13 less item 25) $1,200.00

Schedule I.—Partners' Shares of Income and Credits.
(See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income less interest on Government obligations, etc.
(a) Elmer Remmer, Orinda, California, ½	$600.00
(b) Wm. E. Kyne, 975 Lawton Ave., San F., ¼	300.00
(c) Sylvan Lando, 611 Marina Blvd., San F. ¼	300.00
Totals	$1,200.00

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ A. B. SLATER, 2/10/45
(Name of firm, etc.) Self

/s/ WM. E. KYNE, partner, 2/10/45
975 Lawton Ave., San Francisco

Subscribed and sworn to before me this 13th day of Feb., 1945.

/s/ RUTH NATUSCH,

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

[Stamped]: Accepted.

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 81

Form 1065—Treasury Dept., Internal Revenue Service

United States 1944

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1944

or fiscal year beginning .....,1944, and ending ....., 1945

Serial No. 8705832.

[Stamped]: 94 Received Feb. 14, 1945, Coll. Int. Rev., 1st Dist. Cal.

One Ten Eddy
110 Eddy Street
San Francisco 2, California

Business or Profession, Cocktail Bar.

Gross Income

1.	Gross receipts from business or profession		$85,200.80
2.	Less cost of goods sold:		
	(a) Inventory at beginning of year	$22,510.00	
	(b) Merchandise bought for sale	36,275.45	
	(d) Total of lines (a), (b) and (c)	$58,785.45	
	(e) Less inventory at end of year	28,131.45	30,654.00
3.	Gross profit (or loss) from business or profession (item 1 less item 2)		$54,546.80
13.	Total income in items 3 to 12		$54,546.80

Deductions

14.	Salaries and wages (do not include compensation for partners)	$24,187.00
15.	Rent	2,520.00
16.	Repairs	2,710.27
17.	Interest on indebtedness (explain in Schedule F)	47.07
18.	Taxes (explain in Schedule C)	5,798.50
21.	Depreciation (explain in Schedule E)	822.00
24.	Other deductions authorized by law (See Schedule Attached)	5,780.79
25.	Total deductions in items 14 to 24	$41,865.63
26.	Ordinary net income (item 13 less item 25)	$12,681.17

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Schedule C.—Taxes. (See Instruction 18)

Nature	Amount
State Liquor, Beer and Wine	$ 525.00
Federal Liquor, Beer and Wine	27.50
Federal Machine License	10.00
City and County, San Francisco	42.76
Payroll Taxes	1,993.24
State Board of Equalization, assessed on predecessor business for claimed shortage on Sales Tax returns	3,200.00
Total (enter as item 18, page 1)	$5,798.50

Schedule F.—Explanation of Deductions Claimed in Items 17 and 24

Item No.	Explanation	Amount
17.	Interest:	
	State Board of Equalization	$45.60
	Bank of America	1.47
		$47.07

One Ten Eddy

Schedule "F"	Other Deductions	Year 1944	
Accounting	$480.00	Music	$ 58.50
Advertising	865.95	Newspapers	75.00
Cartage & Storage	132.58	Office Supplies	44.36
Donations	167.00	Service	195.31
Flowers	68.99	Shortages	211.77
Garbage Hauling	128.00	Special Police	270.00
Gas & Electric	346.30	Supplies Misc.	495.84
Ice	862.01	Telephone	27.94
Insurance	675.64	Water	90.50
Laundry	412.47	Miscellaneous	172.63
			$5,780.79

Schedule I.—Partners' Shares of Income and Credits. (See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income less interest on Government obligations, etc.
(a) Wm. E. Kyne, 975 Lawton Ave., San F., ¼	$ 3,170.29
(b) F. Cavani, 1922 Taylor St., San F., ¼	3,170.30
(c) Thos. C. Turner, 383 Grand Ave., Oakland, ¼	3,170.29
(d) E. Remmer, Orinda, California, ¼	3,170.29
Totals	$12,681.17

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Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ A. B. SLATER, 2/10/45
(Name of firm, etc.) Self

/s/ WM. E. KYNE, partner, 2/10/45
975 Lawton St., San Francisco

Subscribed and sworn to before me this 13th day of Feb., 1945.

/s/ RUTH NATUSCH,

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

[Stamped]: Accepted.

[Endorsed]: Filed December 7, 1951.

PLAINTIFF'S EXHIBIT No. 82

Form 1065—Treasury Dept., Internal Revenue Service

United States 1945

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1945

or fiscal year beginning ....., 1945, and ending ....., 1946

Serial No. 8701657.

[Stamped]: 94 Received Mar. 15, 1946, Coll. Int. Rev., 1st Dist. Cal. Received Oct. 17, 1946, Internal Revenue Agent in Charge, San Francisco.

One Ten Eddy
110 Eddy Street
San Francisco 2, California

Gross Income

1.	Gross receipts from business or profession		$100,978.85
2.	Less cost of goods sold:		
	(a) Inventory at beginning of yr.	$28,131.45	
	(b) Merchandise bought for sale	32,821.15	
	(d) Total of lines (a), (b), (c)	$60,952.60	
	(e) Less inventory at end of year	25,059.62	35,892.98

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3.	Gross profit (or loss) from business or profession (item 1 less item 2)	$ 65,085.87
13.	Total income in items 3 to 12	$ 65,085.87

Deductions

14.	Salaries and wages (do not include compensation for partners)	$ 27,988.50
15.	Rent	2,520.00
16.	Repairs	594.46
18.	Taxes (explain in Schedule C)	2,891.22
21.	Depreciation (explain in Schedule E)	882.00
24.	Other deductions authorized by law (explain in Schedule F)	7,987.42
25.	Total deductions in items 14 to 24	$ 42,863.60
26.	Ordinary net income (item 13 less item 25)	$ 22,222.27
		$ 65,049.62

Schedule C.—Taxes. (See Instruction 18)

State Liquor, Beer and Wine	$ 525.00
Federal Liquor, Beer and Wine	27.50
Federal Machine	10.00
City and County	619.44
Payroll	1,262.33
Internal Revenue Dept., assessed on predecessor business for claimed admission tax	446.95
Total	$2,891.22

Schedule F.—Explanation of Deductions Claimed in Items 17 and 24

One Ten Eddy	Schedule "F"	Other Deductions.	
Accounting	$ 800.00	Music	$ 10.75
Advertising	282.00	Newspapers	78.15
Storage & Cartage	71.14	Office Supplies	20.55
Flowers	55.62	Service	197.50
Garbage Disposal	122.00	Shortages	286.03
Gas, Heat & Power	433.50	Special Police	180.00
Ice	1,015.72	Supplies, Misc.	732.56
Insurance	632.00	Telephone	34.74
Laundry	508.13	Water	100.97
Legal	1,690.00	Misc. Expense	736.06
Total			$7,987.42

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Schedule I.—Partners' Shares of Income and Credits.
(See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income less interest on Government obligations, etc.
(a) Wm. E. Kyne, 975 Lawton St., San F., ¼	$ 5,532.50
(b) Frank Cavani, 1922 Taylor St., San F., ¼	5,532.50
(c) Thos. C. Turner, 383 Grand Ave., Oakland, ¼	5,532.50
(d) Elmer Remmer, Orinda, Calif., ¼	5,532.50
Totals	$22,130.02

Affidavit. (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ HAROLD A. MAUNDRELL, 3/13/46
(Name of firm, etc.) Self

/s/ FRANK CAVANI, 3/13/46
1922 Taylor St., S. F.

Subscribed and sworn to before me this 13th day of Mar., 1946.

/s/ NAN G. SCULLEY, Notary.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed December 7, 1951.

PLAINTIFF'S EXHIBIT No. 84

Form 1065—Treasury Dept., Internal Revenue Service

United States 1944

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1944

or fiscal year beginning ....., 1944, and ending ....., 1945

Serial No. 8705015.

[Stamped]: 94 Received Feb. 14, 1945, Coll. Int. Rev., 1st Dist. Cal. Received Sept. 23, Internal Revenue Agent in Charge, San Francisco. Accepted.

Day-Nite Cigar Store
186 Eddy Street
San Francisco 2, Calif.

Business or Profession, Cigars, Liquors, Periodicals.

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Gross Income

1.	Gross receipts from business or profession		$96,779.17
2.	Less cost of goods sold:		
	(a) Inventory at beginning of yr...	$ 11,889.00	
	(b) Merchandise bought for sale....	90,529.97	
	(d) Total of lines (a), (b), (c)....	$102,418.97	
	(e) Less inventory at end of year..	24,747.27	77,671.70
3.	Gross profit (or loss) from business or profession (item 1 less item 2)		$19,107.47
13.	Total income in items 3 to 12		$19,107.47

Deductions

14.	Salaries and wages (do not include compensation for partners)	$11,384.98
15.	Rent	1,200.00
16.	Repairs	7.22
17.	Interest on indebtedness (explain in Schedule F)	17.84
18.	Taxes (explain in Schedule C)	976.02
21.	Depreciation (explain in Schedule E)	245.84
24.	Other deductions authorized by law (See schedule attached)	3,023.10
25.	Total deductions in items 14 to 24	$15,829.94
26.	Ordinary net income (item 13 less item 25)	$ 3,277.53

Schedule C.—Taxes. (See Instruction 18)

Day-Nite Cigar Store

State Liquor Taxes	$110.00
Federal Liquor Taxes	27.50
Federal Machine Taxes	110.00
Payroll Taxes	722.52
City and County, San Francisco	6.00
Total	$976.02

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Schedule F.—Explanation of Deductions Claimed in Items 17 and 24

Day-Nite Cigar Store

Schedule "F"		Other Deductions	Year 1944
Accounting	$460.00	Service	$148.86
Advertising	284.94	Supplies	43.86
Insurance	226.70	Telephone	206.71
Laundry	32.45	Water	23.10
Light & Gas	401.23	Window Cleaning	37.29
Scavenger	109.00	Misc. Expenses	23.90
			$1,998.04

Schedule I.—Partners' Shares of Income and Credits.
(See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income less interest on Government obligations, etc.
(a) Wm. E. Kyne, 975 Lawton St., San F., ⅓	$1,092.51
(b) Syl Lando, 611 Marina Blvd., San F., ⅓	1,092.51
(c) E. Remmer, Orinda, Calif., ⅓	1,092.51
Totals	$3,277.53

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ A. B. SLATER, 2/10/45
(Name of firm, etc.) Self

/s/ WM. E. KYNE, partner, 2/10/45
975 Lawton Ave., San Francisco

Subscribed and sworn to before me this 13th day of Feb., 1945.

/s/ RUTH NATUSCH,

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 85

Form 1065—Treasury Dept., Internal Revenue Service

United States 1945

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1945

or fiscal year beginning ....., 1945, and ending ....., 1946

Serial No. 8704457.

[Stamped]: 94 Received May 15, 1946, Coll. Int. Rev., 1st Dist. Cal. Received Oct. 17, 1946, Internal Revenue Agent in Charge, San Francisco.

Day-Nite Cigar Store
186 Eddy Street
San Francisco 2, California

Gross Income

1.	Gross receipts from business or profession		$104,102.16
2.	Less cost of goods sold:		
	(a) Inventory at beginning of yr.	$ 24,747.27	
	(b) Merchandise bought for sale	85,877.93	
	(d) Total of lines (a), (b), (c)	$110,625.20	
	(e) Less inventory at end of year	23,694.59	86,530.61
3.	Gross profit (or loss) from business or profession (item 1 less item 2)		$ 17,571.55
12.	Other income—Telephone Concessions		1,483.82
13.	Total income in items 3 to 12		$ 19,055.37

Deductions

14.	Salaries and wages (do not include compensation for partners)	$ 11,554.75
15.	Rent	1,800.00
16.	Repairs	37.20
17.	Interest on indebtedness (explain in Schedule F)	8.45
18.	Taxes (explain in Schedule C)	976.02
21.	Depreciation (explain in Schedule E)	208.32
24.	Other deductions authorized by law. Schedule Attached	1,777.80
25.	Total deductions in items 14 to 24	$ 16,362.54
26.	Ordinary net income (item 13 less item 25)	$ 2,692.83

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Schedule C.—Taxes. (See Instruction 18)

State Liquor Taxes	$110.00
Federal Liquor Taxes	27.50
Federal Machine Taxes	110.00
Payroll Taxes	722.52
City and County, San Francisco	6.00
Total (enter as item 18, page 1)	$976.02

Schedule F.—Explanation of Deductions Claimed in Items 17 and 24

Accounting	$495.00	Supplies	$100.49
Insurance	259.84	Telephone	161.83
Laundry	23.20	Water	47.07
Light, Heat & Power	401.05	Window Cleaning	36.00
Scavenger	45.00	Misc. Expense	208.32
Total			$1,777.80

Schedule I.—Partners' Shares of Income and Credits. (See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income less interest on Government obligations, etc.
(a) Wm. E. Kyne, 975 Lawton St., San Francisco	$ 897.61
(b) Elmer Remmer, Orinda, Calif.	897.61
(c) Sylvan Lando, 611 Marina Blvd., San Francisco	897.61
Totals	$2,692.83

Questions

3. Was a return of income filed for preceding year? Yes. If so, to which collector's office was it sent? San Francisco.
4. Check whether this return was prepared on the cash [X] or accrual [ ] basis.

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ ELMER F. REMMER.

Subscribed and sworn to before me this 10th day of May, 1946.

/s/ JOHN A. BURNS.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires April 12, 1949.

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Treasury Department
Internal Revenue Service
100 McAllister Street Building
San Francisco 2, Calif.

Office of the Collector
First District of California

In Replying Refer to jsb:710 March 15, 1946.

Day-Nite Cigar Store
186 Eddy Street
San Francisco, Calif.

Dear Sirs:

Receipt is acknowledged of your letter of recent date requesting for the reasons therein given, an extension of time within which to file your partnership return of income for the calendar year ended December 31, 1945.

An extension of time to May 15, 1946, is hereby granted within which to file Form 1065.

This Letter or a copy thereof, Must Be Attached to the return when filed, as authority for the extension of time herein granted.

Very truly yours,
JOSEPH D. NUNAN, JR., Commissioner.
By /s/ JAMES G. SMYTH,
Collector.

Form 1065

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 87

Form 1120—Treasury Dept., Internal Revenue Service.

United States
Corporation Income and Declared Value Excess-Profits
Tax Return for Calendar Year 1943
or fiscal year beginning July 1, 1943, and ending June 30, 1944

[Stamped]: 7017; Dec.; Tentative Return.

One Eighty Six Club
186 Eddy Street
San Francisco, California

Serial No. 410016.

(Cashier's Stamp): Received With Remittance Sept. 22, 1944, Collector of Int. Rev., First Dist. Calif.

Kind of business: Social Club.

Normal-Tax Net Income Computation

31.	Net income for declared value excess-profits tax computation (item 15 minus item 30)		$13,265.15
33.	Total of lines 31 and 32		$13,265.15
34.	Less: Declared value excess-profits tax		None
35.	Net income		$13,265.15
37.	Adjusted net income	$	
38.	Less: Income subject to excess-profits tax (From Form 1121)	$1,544.16	
39.	Dividends received credit (85% of column 2, Schedule E, but not in excess of 85% of item 37 minus item 38, above)		1,544.16
40.	Normal-tax net income		$11,720.99

Total Income and Declared Value Excess-Profits Taxes

41.	Total income tax (line 28 or 50, page 2, whichever is applicable)	$3,064.67	
43.	Balance of income tax		$ 3,064.67
44.	Total declared value excess-profits tax (line 8, page 2)		None
45.	Total income and declared value excess-profits taxes due (One-fourth $766.17)		$ 3,064.67

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Affidavit. (See Instruction E)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ BERT BUSTERNA, Pres.

/s/ WM. E. KYNE, Secy.

Subscribed and sworn to before me this 22nd day of September, 1944.

/s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

Affidavit. (See Instruction E)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

/s/ A. B. SLATER.

Subscribed and sworn to before me this 22nd day of September, 1944.

/s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

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Declared Value Excess-Profits Tax Computation. (See Computation Instructions)

Line No.			Rate	Amt. of Tax
1.	Net income for declared value excess-profits tax computation (item 31, page 1)	$13,265.15		
2.	Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1943 (or for year ended June 30, 1944, if your income tax fiscal year began in 1943 and ended on or after July 31, 1944) $200,000.00			
3.	10 percent of line 2 $ 20,000.00			
4.	Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 37 minus item 38, page 1)	20,000.00		
5.	Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)	None		
6.	Amount taxable at 6.6 percent (5 percent of line 2, but not more than line 5); and tax	None	6.6%	None
7.	Balance taxable at 13.2 percent (line 5 minus line 6, column 1); and tax	None	13.2%	None
8.	Total declared value excess-profits tax (total of line 6, column 3, and line 7, column 3)			None

Income Tax Computation. (See Computation Instructions)

Normal Tax Computation

Domestic Corporations With Normal-Tax Net Incomes Not Over $50,000

9.	Normal-tax net income (item 40, page 1)	$11,720.99		
10.	Portion of line 9 (not in excess of $5,000); and tax at 15 percent	$ 5,000.00	15%	$ 750.00
11.	Portion of line 9 (in excess of $5,000 and not in excess of $20,000); and tax at 17 percent	6,720.99	17%	1,142.57
14.	Total normal tax (total tax in column 3 of lines 10, 11, 12, and 13)			$ 1,892.57

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Line No.	Surtax Computation		Rate	Amt. of Tax
17.	Net income (item 35, page 1)	$13,265.15		
18.	Less: Income subject to excess-profits tax	$1,544.16		
20.	Dividends paid on certain preferred stock if taxpayer is a public utility	1,544.16		
21.	Surtax net income			$11,720.99
	Corporations With Surtax Net Incomes Not Over $50,000			
22.	Portion of line 21 (not in excess of $25,000); and tax at 10 percent (or 12 percent in the case of a consolidated return)	$11,720.99	10%	$ 1,172.10
24.	Total surtax in column 3 of lines 22 and 23			$ 1,172.10
	Corporations With Surtax Net Incomes of Over $50,000			
27.	Total normal and surtax (line 14 or 16, plus line 24 or 26, whichever is applicable)			$ 3,064.67
28.	Total tax (line 27 or line 33, Schedule C)			$ 3,064.67

Copy

Treasury Department
Internal Revenue Service
100 McAllister Street
San Francisco 2, California

One Eighty Six Club
186 Eddy Street
San Francisco, California

September 15, 1944.

Sirs:

Receipt is acknowledged of your letter of recent date requesting for reasons therein given, extension of time within which to file your return of income for the fiscal year ended June 30, 1944.

Provided a Tentative Return Is Filed With the Collector of Revenue for Your District on or Before September 22, 1944, and Payment Made at That Time of at Least One-Fourth of the Total Estimated Tax Thereon to Be Due, you are hereby granted an extension of time to October 15, 1944, within which to file Form 1120.

Any deficiency in the first installment of tax will bear interest at the rate of one-half per cent per month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of taxpayer and the estimated amount, if any, of the tax due. The items and schedules on the form need not be filled in.

This Letter, or a copy thereof, must be Attached to the tentative and completed returns as authority for the extension of time herein granted.

To completed return when filed should be plainly marked "completed return."

Very truly yours,

Joseph D. Nunan, Jr., Commissioner.

By Harold A. Berliner,
Collector.

Questions

1. Date of incorporation July 9, 1939.
2. State or country California.
3. State collector's office where the corporation's return for the preceding year was filed First California.
4. The corporation's books are in care of Wm. E. Kyne. Located at 186 Eddy Street, San Francisco, Cal.
5. Number of places of business One.
7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No.

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8. Is this a consolidated return? No.
10. Is this return made on the basis of cash receipts and disbursements? Yes.
11. Did the corporation at any time during its taxable year have in its employ more than eight individuals? Yes. If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? No.
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower None.
13. Did the corporation make a return of information on Forms 1096 and 1099 or Forms V-2 and W-2 for the calendar year 1943 (see Instruction G-(1))? Yes.
14. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? No.

Excess-Profits Tax. (See Instructions for Form 1121)

(a) Is an excess-profits tax return on Form 1121 being filed for the taxable period covered by this return? Yes.

Form 1121—Treasury Dept., Internal Revenue Service

United States 1943

Corporation Excess-Profits Tax Return

For Calendar Year 1943

or fiscal year beginning July 1, 1943, and ending June 30, 1944

One Eighty Six Club
186 Eddy Street
San Francisco, California

Serial No. 801462.

(Cashier's Stamp): Received With Remittance Sept. 22, 1944, Collector of Int. Rev., First Dist. Calif.

[Stamped]: 7017; Tentative Return.

Excess-Profits Tax Computation

1.	Excess profits net income (line 16, Schedule A)		$13,265.15
2.	Specific exemption	$5,000	$ 7,500.00
4.	Excess profits credit—based on invested capital (line 41, Schedule C)		4,220.99
6.	Total of items 2 to 5		$11,720.99
7.	Difference between item 1 and item 6		$ 1,544.16

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8.	Adjusted excess profits net income (item 7, column 1, or item 7, column 2, whichever is applicable	$ 1,544.16
9.	92.5 percent of item 8	$ 1,428.35
10.	Net income (computed without regard to the credit provided by section 26 (e)) (item 35, page 1, Form 1120)	$13,265.15
12.	Surtax net income (computed without regard to the credit provided by section 26 (e))	$11,720.99
13.	80 percent of item 12	9,376.79
14.	Income tax under Chapter 1 (other than section 102) for the taxable year (item 41, page 1, Form 1120)	3,064.67
15.	Excess of item 13 over item 14	6,312.12
16.	Item 9, or item 15, whichever is lesser	$ 1,428.35
18.	Excess profits tax:	
	(a) Item 16 minus item 17 $1,428.35	
	(c) Item 18 (a) or item 18 (b), whichever is applicable	$ 1,428.35
20.	Item 18 (c) minus item 19	$ 1,428.35
22.	Item 20 minus item 21	$ 1,428.35
24.	Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)	$ 1,428.35

Post-War Refund of Excess Profits Tax and Credit for Debt Retirement

25.	Balance of excess profits tax (item 18 (c), above) (One-fourth $357.09)	$ 1,428.35
26.	Credit allowable under sections 780 and 781 (10 percent of item 25)	$ 142.84
29.	Net post-war refund credit (item 26 minus item 28)	$ 142.84

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of

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his knowledge and belief, a true, correct, and complete return made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ BERT BUSTERNA, Pres.

/s/ WM. E. KYNE, Secy.

Subscribed and sworn to before me this 22nd day of September, 1944.

/s/ RUTH MATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess-profits tax liability of the person for whom this return has been prepared of which, I/we have any knowledge.

/s/ A. B. SLATER.
(Person preparing the return)

Subscribed and sworn to before me this 22nd day of September, 1944.

/s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

Questions

(a) Date of incorporation July 7, 1939.

(b) State or country California.

(c) Collector's office in which your income tax return for the taxable year was filed 1st California.

(d) Is this a consolidated return? No.

(e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 None.

(f) Are you a transferor or transferee No.

(g) Does this return involve an adjustment of excess profits tax liability No.

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Schedule A.—Excess Profits Net Income Computation

Line No.		Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 37, page 1, Form 1120)	$13,265.15
7.	Total of lines 1 to 6	$13,265.15
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$13,265.15

4/30/45

Form 707 Will Be Forwarded When Available.

Treasury Department
Internal Revenue Service
100 McAllister Street
San Francisco 2, California

One Eighty Six Club
186 Eddy Street
San Francisco, California

September 15, 1944.

Sirs:

Receipt is acknowledged of your letter of recent date requesting for the reasons therein given, extension of time within which to file your return of income for the fiscal year ended June 30, 1944.

Provided a Tentative Return Is Filed With the Collector of Internal Revenue for Your District on or Before September 22, 1944, and Payment at That Time of at Least One-Fourth of the Total Estimated Tax Shown Thereon to Be Due, you are hereby granted an extension of time to October 15, 1944, within which to file Form 1121.

Any deficiency in the first installment of tax will bear interest at the rate of one-half per cent per month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of the taxpayer and the estimated amount, if any, of the tax due. The items and schedules on the form need not be filled in.

This Letter, or copy thereof, must be Attached to the tentative and completed returns as authority for the extension of time herein granted.

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This completed return when filed should be plainly marked "completed return."

Very truly yours,

Joseph D. Nunan, Jr., Commissioner.

By Harold A. Berliner,
Collector.

Schedule C.—Excess Profits Credit—Based on Invested Capital

Equity Invested Capital at the Beginning of the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

1.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital	$42,500.00
4.	(a) Accumulated earnings and profits $10,262.32 (d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)	10,262.32
8.	Total of lines 1 to 7	$52,762.32
14.	Equity invested capital at beginning of taxable year (line 8 minus line 13)	$52,762.32

Average Addition to Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

22.	Total of lines 14 to 21	$52,762.32

Average Reduction in Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 28 to 41, inclusive)

28.	Average equity invested capital (line 22 minus line 27)	$52,762.32
31.	Average invested capital (line 28 plus line 30)	$52,762.32
36.	Invested capital (line 31 minus line 35)	$52,762.32
37.	Portion of line 36 (not in excess of $5,000,000); and credit at 8 percent $4,220.99 8%	
41.	Excess profits credit—based on invested capital (total of lines 37 to 40)	$ 4,220.99

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 87-A

Form 1120—Treasury Dept., Internal Revenue Service.

United States
Corporation Income and Declared Value Excess-Profits
Tax Return for Calendar Year 1944
or fiscal year beginning July 1, 1943, and ending June 30, 1944

One Eighty Six Club
186 Eddy Street
San Francisco, California

Kind of business: Social Club.
File Code 553
Serial No. 410016
District 1-Calif.
(Cashier's Stamp): Received With Remittance Nov. 15, 1944, Collector of Int. Rev., First Dist. Calif.

[Stamped]: Field; 8658; Dec.; Posting Dec. 11, 1944; Extension Granted to Nov. 15, 1944; Revenue Agent in Charge, Received Jan. 9, 1946, San Francisco.

[Marginal notations]: 9/22/44 Tent. Ret. 766.17, $357.09 Paid 9/22; St.; First Payment C $564.14; 751.

Normal-Tax Net Income Computation
Deductions

31.	Net income for declared value excess-profits tax computation (item 15 minus item 30) (See schedule attached)		$6,620.00
34.	Total of lines 31, 32, and 33		$6,620.00
35.	Less: Declared value excess-profits tax		None
36.	Net income		$6,620.00
37.	Less: Interest on certain obligations		None
38.	Adjusted net income		$6,620.00
39.	Less: Adjusted excess profits Net Income	None	
	Dividends received	None	None
41.	Normal-tax net income		$6,620.00

Total Income and Declared Value Excess-Profits Taxes

42.	Total income tax (line 28 or 50, page 2, whichever is applicable)	$1,687.40	
44.	Balance of income tax		$1,687.40
46.	Total income and declared value excess-profits taxes due (See schedule inside)		$1,687.40

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Affidavit. (See Instruction E)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ ATTILIO CASSELINI, Vice-Pres.

/s/ WM. E. KYNE, Secretary.

Subscribed and sworn to before me this 15th day of November, 1944.

/s/ LOUIS H. MOOSER, JR., Dept. Coll.

Affidavit. (See Instruction E)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

/s/ A. B. SLATER.
(Person preparing the return)

Subscribed and sworn to before me this 15th day of November, 1944.

/s/ LOUIS H. MOOSER, JR., Dept. Coll.

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Declared Value Excess-Profits Tax Computation. (See Computation Instructions)

Line No.			Rate	Amt. of Tax
1.	Net income for declared value excess-profits tax computation (item 31, page 1)	$ 6,620.00		
2.	Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1944 (or for year ended June 30, 1945, if your income tax fiscal year began in 1944 and ended on or after July 31, 1945)	$200,000.00		
3.	10 percent of line 2	$ 20,000.00		
4.	Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 38 minus item 39, page 1	20,000.00		
5.	Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)	None		
6.	Amount taxable at 6.6 percent (5 percent of line 2, but not more than line 5); and tax	None	6.6%	None
7.	Balance taxable at 13.2 percent (line 5 minus line 6, column 1); and tax	None	13.2%	None
8.	Total declared value excess-profits tax (total of line 6, column 3, and line 7, column 3)			None

Income Tax Computation. (See Computation Instructions)

Normal Tax Computation

Domestic Corporations With Normal-Tax Net Incomes Not Over $50,000

9.	Normal-tax net income (item 41, page 1)	$ 6,620.00		
10.	Portion of line 9 (not in excess of $5,000); and tax at 15 percent	5,000.00	15%	$ 750.00
11.	Portion of line 9 (in excess of $5,000 and not in excess of $20,000); and tax at 17 percent	1,620.00	17%	275.40
14.	Total normal tax (total tax in column 3 of lines 10, 11, 12, and 13)			$ 1,025.40

Line No.	Surtax Computation		Rate	Amt. of Tax
17.	Net income (item 36, page 1)	$ 6,620.00		
20.	Less: Dividends paid on certain preferred stock if taxpayer is a public utility	None		
21.	Surtax net income			$ 6,620.00
	Corporations With Surtax Net Incomes Not Over $50,000			
22.	Portion of line 21 (not in excess of $25,000); and tax at 10 percent (or 12 percent in the case of a consolidated return)	$ 6,620.00	10%	$ 662.00
23.	Portion of line 21 (in excess of $25,000 and not in excess of $50,000); and tax at 22 percent (or 24 percent in the case of a consolidated return)	.....	22%	662.00
	Corporations With Surtax Net Incomes of Over $50,000			
27.	Total normal tax and surtax (line 14 or 16, plus line 24 or 26, whichever is applicable)			$ 1,687.40
28.	Total tax (line 27, or line 31 Schedule C)			$ 1,687.40

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One Eighty Six Club
186 Eddy Street—San Francisco, Calif.

Summary of Income and Excess Profit Taxes
Year Ending June 30, 1944

Final Returns

Form 1120	$1,687.40	
Form 1121	None	$1,687.40

Tentative Returns

Form 1120	$3,064.67	
Form 1121	1,428.35	
	$4,493.02	
25% paid 10/15/'44		$1,123.26

Additional amount due for fiscal year July 1, 1943-
June 30, 1944—as per check submitted herewith..... $ 564.14

Copy
Treasury Department
Internal Revenue Service
100 McAllister Street Building
San Francisco 2, Calif.

Office of The Collector
First District of Calif.

In replying refer to mgm: 710 October 15, 1944.
One Eighty Six Club,
186 Eddy Street,
San Francisco, Calif.

Final Extension

Gentlemen:

Receipt is acknowledged of your request for a further extension of time within which to file a complete return of income for the fiscal year ended June 30, 1944.

The records of this office indicate that a previous extension of time has been granted which expires October 15, 1944.

A further extension of time to November 15, 1944, is hereby granted within which to file the completed return, Form 1120 and pay the tax shown thereon to be due.

In all cases where an extension of time is granted, interest is collectible at the rate of one-half of one per cent a month from the due date of each installment up to and including the date of payment.

This Letter, or a copy thereof, must be Attached to the completed return when filed as authority for the extension of time herein granted.

Very truly yours,
JOSEPH D. NUNAN, JR., Commissioner.
By: /s/ HAROLD A. BERLINER,
Collector.

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One Eighty Six Club
186 Eddy Street—San Francisco, Calif.

Schedule 1:

During the month of June, 1944, Louis H. Mooser, Jr., Deputy Collector from the office of the Collector of Internal Revenue at San Francisco, California, called at the office of the above stated corporation and examined its books and records for the fiscal period ending June 30, 1943, and required said corporation to file forms 1120, 1121 and 707 for said period.

These returns were filed under Section 2606 of the I.R. Code, which gives a deputy collector the authority to file such returns where either no records are kept or where records were not adequately kept.

In the case of the One Eighty Six Club, the records reported only the net daily take and were therefore not adequately kept and this was the status of the accounts of said corporation, up to and including June, 1944, the date on which Deputy Collector Mooser made his audit.

Mr. Mooser determined from an examination that he made of daily tally sheets, that the daily average net take was $70.00. Mr. Mooser believes that this determination would cover the entire period up to June, 1944.

The returns filed by the corporation for the fiscal year ending June 30, 1943, were prepared on this basis and have been approved by the Collector.

In 1944 the taxpayer filed an application with the Deputy Commissioner, Salary Stabilization Unit, for the following annual salaries for its officers:

Bert Busterno, President	$ 6,000.00
Attilio Casselini, Vice President	4,000.00
W. E. Kyne, Secretary	5,000.00
Sylvan Lando, Treasurer	4,000.00
	$19,000.00

The Salary Stabilization Unit has approved said application.

The books of account for the fiscal year ending June 30, 1944, disclose a total net take of $13,265.15.

In preparing the corporate returns (1120 and 1121) for said fiscal year, the corporation is reporting its total net take for the year on the same basis as that which was used by Deputy Collector Mooser: $70.00 per day—366 x $70.—$25,620.(A)

However, when the returns for the prior period were prepared by the Deputy, no provision was made for compensation of administrative officers; this, however, has now been approved at $19,000.00 per year by the Salary Stabilization Unit. Therefore, the net taxable corporate income for the fiscal year ending June 30, 1944, is calculated as follows:

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(A) Net take on basis of Deputy Collector Mooser's findings (before administrative salaries) $25,620.00
(B) Administrative salaries allowed by S.S.Unit..... 19,000.00

Net Taxable Income.....$ 6,620.00

Questions

1. Date of incorporation July 9, 1939.
2. State or country California.
3. State collector's office where the corporation's return for the preceding year was filed 1st California.
4. The corporation's books are in care of Wm. E. Kyne. Located at 186 Eddy St., San Francisco, Calif.
5. Number of places of business One.
6. Did the corporation during the taxable year have any Government contracts or subcontracts? No.
7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No.
8. Is this a consolidated return? No.
9. If this is not a consolidated return: (a) did the corporation own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? No; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of the corporation's voting stock? No.
10. Is this return made on the basis of cash receipts and disbursements? Yes.
11. Did the corporation at any time during its taxable year have in its employ more than eight individuals? Yes. If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? No.
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower None.
13. Did the corporation make a return of information on Forms 1096 and 1099 or Form W-2 (or Form W-2a) for the calendar year 1944 (see Instruction G-(1))? Yes.
14. Has any transaction described in Instruction G-(4) occurred on or after October 8, 1940? No.
15. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? No.

Excess Profits Tax. (See Instructions for Form 1121)

(a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? Yes.

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Schedule N.—Excess Profits Net Income Computation

1.	Normal-tax net income (computed without credit for income subject to excess profits tax and dividends received credit) (item 38, page 1)	$6,620.00
5.	Total of lines 1 to 4	$6,620.00
11.	Total of lines 6 to 10	$6,620.00

Form 1121—Treasury Dept., Internal Revenue Service

United States 1944

Corporation Excess Profits Tax Return

For Calendar Year 1944

or fiscal year beginning July 1, 1943, and ending June 30, 1944

One Eighty Six Club
186 Eddy Street
San Francisco, California

File Code 553.

Serial No. 801462.

(Cashier's Stamp): Received Nov. 15, 1944, Collector of Int. Rev., First Dist. Calif.

[Stamped]: 8658.

Excess Profits Tax Computation

Item No.		Invested Capital Credit Method
1.	Excess profits net income (line 18, Schedule A)	$ 6,620.00
4.	Excess profits credit—based on invested capital (line 40, Schedule C)	4,220.99
5.	Unused excess profits credit adjustment (attach schedule)	14,220.99
7.	Difference between item 1 and item 6	None
24.	Excess profits tax due	None

Post-War Refund of Excess Profits Tax and Credit for Debt Retirement

25.	Balance of excess profits tax	None
26.	Credit allowable under sections 780 and 781	None
29.	Net post-war refund credit	None

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules

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and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ ATTILIO CASSELINI, Vice Pres.

/s/ WM. E. KYNE, Secretary.

Subscribed and sworn to before me this 15th day of November, 1944.

/s/ LOUIS H. MOOSER, JR.,
Dept. Coll.

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

/s/ A. B. SLATER.
(Person preparing the return)

One Eighty Six Club
186 Eddy Street—San Francisco, Calif.

Summary of Income and Excess Profit Taxes
Year Ending June 30, 1944

Final Returns		
Form 1120	$1,687.40	
Form 1121	None	$1,687.40
Tentative Returns		
Form 1120	$3,064.67	
Form 1121	1,428.35	
	$4,493.02	
25% paid 10/15/44		$1,123.26
Additional amount due for fiscal year July 1, 1943-June 30, 1944—as per check submitted herewith		$ 564.14

Schedule A.—Excess Profits Net Income Computation

Line No.		Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 38, page 1, Form 1120)	$6,620.00

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7.	Total of lines 1 to 6	$6,620.00
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$6,620.00

Copy

Treasury Department
Internal Revenue Service
100 McAllister Street Building
San Francisco 2, Calif.

Office of the Collector
First District of Calif.

In replying refer to mgm: 710 October 15, 1944.

One Eighty Six Club,
186 Eddy Street,
San Francisco, California

Gentlemen:

Receipt is acknowledged of your request for a further extension of time within which to file a complete return of income for the fiscal year ended June 30, 1944.

The records of this office indicate that a previous extension of time has been granted which expires October 15, 1944.

A further extension of time to November 15, 1944, is hereby granted within which to file the completed return, Form 1121 and pay the tax shown thereon to be due.

In all cases where an extension of time is granted, interest is collectible at the rate of one-half of one per cent a month from the due date of each installment up to and including the date of payment.

This Letter, or a copy thereof, must be Attached to the completed return when filed as authority for the extension of time herein granted.

Very truly yours,

JOSEPH D. NUNAN, JR., Commissioner.

By /s/ HAROLD A. BERLINER,
Collector.

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Schedule C.—Excess Profits Credit—Based on Invested Capital
Equity Invested Capital at the Beginning of the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

1.	Money paid in for stock, as or paid-in surplus, or as a contribution to capital		$42,500.00
4.	(a) Accumulated earnings & profits	$10,262.32	
	(b) Adjustment for transferor's deficit under section 718 (c) (5)		10,262.32
8.	Total of lines 1 to 7		$52,762.32

Average Addition to Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

22.	Total of lines 14 and 21	$52,762.32

Average Reduction in Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 28 to 40, inclusive)

28.	Average equity invested capital (line 22 minus line 27)		$52,762.32
31.	Average invested capital (line 28 plus line 30)		$52,762.32
36.	Invested capital (line 31 minus line 35)		$52,762.32
37.	Portion of line 36 (not over $5,000,000); and credit at 8 percent	$4,220.99 8%	
40.	Excess profits credit—based on invested capital (total of lines 37 to 39)		$ 4,220.99

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 88

Form 1120—Treasury Dept., Internal Revenue Service.

United States
Corporation Income and Declared Value Excess-Profits
Tax Return for Calendar Year 1944
or fiscal year beginning ....., 1944, and ending ....., 1945

One Eighty Six Club
186 Eddy Street
San Francisco, California

Kind of business: Social Club.

File Code 553.

Serial No. 410070.

District 1-Calif.

(Cashier's Stamp): Received With Remittance Oct. 26, 1945, Collector of Int. Rev., First Dist. Calif.
First Payment $300.00.

[Stamped]: Dec.; 4269; Tentative Return.

Normal-Tax Net Income Computation

Total Income and Declared Value Excess-Profits Taxes

44. Balance of income tax.....$1,200.00

Affidavit. (See Instruction E)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ BERT BUSTERNA, Pres.

/s/ A. B. SLATER, Chief Acct. Officer.

mgm: 710 September 14, 1945.
One Eighty Six Club,
Olympic Hotel,
San Francisco, Calif.
Fiscal June 30, 1945.
October 26, 1945
November 15, 1945 1120
OR 4524 #15-A

Mailed to:
A. B. Slater
964-A Market St., S.F.

In the case of an application being received too late to permit a tentative to be filed on or before the due date and a later date is set, interest will be added at the rate of six percent per annum to the amount paid with the tentative return.

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 88-A

Form 1120—Treasury Dept., Internal Revenue Service.

United States
Corporation Income and Declared Value Excess-Profits
Tax Return for Calendar Year 1944
or fiscal year beginning July 1, 1944, and ending June 30, 1945

One Eighty Six Club
186 Eddy Street
San Francisco, California

Kind of business: Social Club.

File Code 553.

Serial No. 410070.

District 1-Calif.

(Cashier's stamp): Rec'd With Remittance, 94 Nov. 29, 1946, Coll. Int. Rev., 1st Dist. Cal., 30.

First Payment $875.38.

[Stamped]: Internal Revenue Agent in Charge, Received Aug. 11, 1947, San Francisco; Field; Extension Granted to 11/15/45; Computation proved; Copy; Affidavit Attached; Dec. 1946; 6031.

Normal-Tax Net Income Computation

31.	Net income for declared value excess-profits tax computation (item 15 minus item 30) (See Schedule Attached)	$14,450.00
34.	Total of lines 31, 32, and 33	$14,450.00
35.	Less: Declared value excess-profits tax	None
36.	Net income	$14,450.00
37.	Less: Interest on certain obligations, etc.	None
38.	Adjusted net income	$14,450.00
39.	Less: Adjusted excess profits net income from Form 1121 ..... None Dividends received credit, etc. ..... None	None
41.	Normal-tax net income	$14,450.00

Total Income and Declared Value Excess-Profits Taxes

42.	Total income tax (line 28 or 50, page 2, whichever is applicable) $3,801.50	
44.	Balance of income tax	$ 3,801.50
45.	Total declared value excess-profits tax (line 8, page 2)	None

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46. Total income and declared value excess-profits taxes due ..... $ 3,801.50

[Pencilled in items 45 and 46]: Int. on $300.00 from 9/15 to 10-26-46=$2.04; Int. on $650.38 from 9/15 to 11-29-46=$8.00. Int. Paid $10.04.

Affidavit. (See Instruction E)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

/s/ BERT BUSTERNA, Pres.

/s/ A. B. SLATER, Chief Acct. Officer.

Subscribed and sworn to before me this 15th day of November, 1945.

/s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

Affidavit. (See Instruction E)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

/s/ A. B. SLATER.
(Person preparing the return)

Subscribed and sworn to before me this 15th day of November, 1945.

/s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

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Declared Value Excess-Profits Tax Computation. (See Computation Instructions)

Line No.			Rate	Amt. of Tax
1.	Net income for declared value excess-profits tax computation (item 31, page 1)	$14,450.00		
2.	Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1944 (or for year ended June 30, 1945, if your income tax fiscal year began in 1944 and ended on or after July 31, 1945) $200,000.00			
3.	10 percent of line 2 $ 20,000.00			
4.	Dividends received credit (85 percent of column 2, Schedule E, but not in excess of 85 percent of item 38 minus item 39, page 1)	20,000.00		
5.	Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)	None		
6.	Amount taxable at 6.6 percent (5 percent of line 2, but not more than line 5); and tax	None	6.6%	None
7.	Balance taxable at 13.2 percent (line 5 minus line 6, column 1); and tax	None	13.2%	None
8.	Total declared value excess-profits tax (total of line 6, column 3, and line 7, column 3)			None

Income Tax Computation. (See Computation Instructions)

Normal Tax Computation

Domestic Corporations With Normal-Tax Net Incomes Not Over $50,000

9.	Normal-tax net income (item 41, page 1)	$14,450.00		
10.	Portion of line 9 (not in excess of $5,000); and tax at 15 percent	5,000.00	15%	$ 750.00
11.	Portion of line 9 (in excess of $5,000 and not in excess of $20,000); and tax at 17 percent	9,450.00	17%	1,606.50
14.	Total normal tax (total tax in column 3 of lines 10, 11, 12, and 13)			$ 2,356.50

Line No.	Surtax Computation		Rate	Amt. of Tax
17.	Net income (item 36, page 1)	$14,450.00		
20.	Less: Dividends paid on certain preferred stock if taxpayer is public utility	None		
21.	Surtax net income			$14,450.00
	Corporations With Surtax Net Incomes Not Over $50,000			
22.	Portion of line 21 (not in excess of $25,000); and tax at 10 percent (or 12 percent in the case of a consolidated return)	$14,450.00	10%	$ 1,445.00
23.	Portion of line 21 (in excess of $25,000 and not in excess of $50,000); and tax at 22 percent (or 24 percent in the case of a consolidated return)	.....	22%	None
24.	Total surtax in column 3 of lines 22 and 23			$ 1,445.00
	Corporations With Surtax Net Incomes of Over $50,000			
27.	Total normal tax and surtax (line 14 or 16, plus line 24 or 26, whichever is applicable)			$ 3,801.50
28.	Total tax (line 27, or line 31 Schedule C)			$ 3,801.50

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Copy

Treasury Department
Internal Revenue Service
100 McAllister Street Building

mgm: 710 September 14, 1945.

One Eighty Six Club,
Olympic Hotel,
San Francisco, Calif.

Sirs:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for the fiscal year ended June 30, 1945.

Provided a Tentative Return Is Filed With the Collector of Internal Revenue for Your District on or Before October 26, 1945, and Payment Made at That Time of at Least One-Fourth of the Total Estimated Tax Shown Thereon to Be Due, you are hereby granted an extension of time to November 15, 1945, within which to file Form 1120.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of taxpayer and the estimated amount, if any, of the tax due. The items and schedules on the form need not be filled in.

This Letter, or a copy thereof, Must Be Attached to the tentative and completed returns as authority for the extension of time herein granted. The completed return when filed, should be plainly marked—"completed return."

Very truly yours,

JOSEPH D. NUNAN, JR., Commissioner.

By /s/ JAMES G. SMYTH, Collector.

Mailed to:
A. B. Slater
964-A Market St., S.F.

In the case of an application being received too late to permit a tentative to be filed on or before the due date and a later date is set, interest will be added at the rate of six per cent per annum to the amount paid with the tentative return.

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One Eighty Six Club
186 Eddy Street, San Francisco, California

Summary of Income and Excess Profit Taxes
Fiscal Year Ending June 30, 1945

Final Returns

Form 1120	$3,801.50	
Form 1121	None	$3,801.50

Tentative Returns

Form 1120	$1,200.00	
Form 1121	None	
Total	$1,200.00	
25% paid 10/26/45		$ 300.00
Additional amount due for fiscal year July 1, 1944-June 30, 1945		$3,501.50
Check submitted for 25% thereof		$ 875.38

Copy One Eighty Six Club Copy
186 Eddy Street—San Francisco, California

Schedule 1:

During the month of June, 1944, Louis H. Mooser, Jr., Deputy Collector from the office of the Collector of Internal Revenue at San Francisco, California, called at the office of the above stated corporation and examined its books and records for the fiscal period ending June 30, 1943, and required said corporation to file Forms 1120, 1121 and 707 for said period.

These returns were filed under Section 2606 of the I. R. Code, which gives a deputy collector the authority to file such returns where either no records are kept or where records were not adequately kept.

In the case of the One Eighty Six Club, the records reported only the net daily take and were therefore not adequately kept and this was the status of the accounts of said corporation up to and including June, 1944, the date on which Deputy Collector Mooser made his audit. At the date of this filing—November 14, 1945—the books of account of this corporation are kept on the same basis.

Mr. Mooser determined from an examination that he made of daily tally sheets that the daily average net take was $70.00. The Returns filed by the Corporation for the fiscal year ending June 30, 1943, were prepared on this basis and have been approved by the Collector.

In 1944, the taxpayer filed an application with the Deputy Commissioner, Salary Stabilization Unit, for annual salaries for its officers which has been approved as follows:

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Bert Busterno, President	$4,500.00
Attilio Casselini, Vice President	(A) 3,000.00
W. E. Kyne, Secretary	(B) 3,600.00
Sylvan Lando, Treasurer	3,000.00

(A) Resigned April 15, 1945—no salary paid during the fiscal year 7/1/44-6/30/45.

(B) Served 7½ mos., succeeded by Elmer F. Remmer, who served during the remaining 4½ mos. at the same rate; said W. E. Kyne earning $2,250.00 and Elmer F. Remmer $1,350.00.

The books of account for the year 1944, disclose a total net take of $20,533.15.

In preparing the corporate returns (1120 and 1121) for the fiscal year ending June 30, 1945, the corporation is reporting its total net take for the year on the same basis as that which was used by Deputy Collector Mooser, $70.00 per day—$70.00 x 365 = $25,550.00 (C).

However, when returns for the prior period were prepared by the Deputy, no provision was made for compensation of administrative officers; this, however, has been approved at $14,100.00 per year by the Salary Stabilization Unit. As stated hereinbefore total salaries actually paid during the fiscal year ending June 30, 1945, were $11,100.00 (D). Therefore, the net taxable corporate income for the fiscal year ending June 30, 1945, is calculated as follows:

(C) Net take on basis of Deputy Collector Mooser's findings (before administrative salaries paid)	$25,550.00
(D) Administrative salaries allowed by Salary Stabilization Unit, actually paid by corporation	11,100.00
Net Taxable Income	$14,450.00

Questions

1. Date of incorporation July 9, 1939.
2. State or country California.
3. State collector's office where the corporation's return for the preceding year was filed 1st, California.
4. The corporation's books are in care of Elmer F. Remmer. Located at 186 Eddy St., San Francisco, Calif.
5. Number of places of business One.
6. Did the corporation during the taxable year have any Government contracts or subcontracts? No.
7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No.
8. Is this a consolidated return? No.

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9. If this is not a consolidated return: (a) did the corporation own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? No; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of the corporation's voting stock? No.
10. Is this return made on the basis of cash receipts and disbursements? Yes.
11. Did the corporation at any time during its taxable year have in its employ more than eight individuals? Yes. If answer is "yes," has the corporation in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate? No.
12. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower None.
13. Did the corporation make a return of information on Forms 1096 and 1099 or Form W-2 (or Form W-2a) for the calendar year 1944 (see Instruction G-(1))? Yes.
14. Has any transaction described in Instruction G-(4) occurred on or after October 8, 1940? No.
15. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? No.

Excess Profits Tax. (See Instructions for Form 1121)

(a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? Yes.

Schedule N.—Excess Profits Net Income Computation

1.	Normal-tax net income (computed without credit for income subject to excess profits tax and dividends received credit) (item 38, page 1)	$14,450.00
5.	Total of lines 1 to 4	$14,450.00
11.	Total of lines 6 to 10	$14,450.00

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[Stamped]: Rec'd With Remittance Nov. 29, 1946, Coll. Int. Rev., 1st Dist. Cal. 30.

Return No. 1120

Affidavit

State of California,
City and County of San Francisco—ss.

Re: One Eighty Six Club
186 Eddy Street, San Francisco

Final Return, Fiscal Year Ended June 30, 1945

A. B. Slater, 964-A Market Street, San Francisco, California, appearing before me this 20th day of November, 1946, and being duly sworn, deposes and says that the delinquency in filing Corporate Income Tax return on Form 1120, which should have been filed on or before November 15, 1946, was not due to any intent on his part to evade taxation, but was due entirely to the following causes:—

As noted above, this return was for One Eighty Six Club, 186 Eddy St., San Francisco, on which an extension to November 15, 1945, had been granted and a Tentative Return duly prepared and filed previously as provided for in said extension.

This Final Return was completed and a Cashier's Check—No. 6603433—purchased from Bank of America (11-177) in the amount of $875.38, attached thereto. This was mailed at Rincon Annex Post Office in Mission Street, San Francisco, on the afternoon of November 15, 1945.

Our first intimation that above return had never gone through the Collector's records came through a telephone call from Mrs. Hart, a Cashier in said office, inquiring as to Why a Final Return had never been filed in this matter. Affiant had turned over all records in this account over to an out of town Auditor and got back the carbon copy of Return 1120 as filed only yesterday, and complete copies are attached hereto. Under the circumstances it would appear that no penalties should be assessed.

/s/ A. B. SLATER.

Subscribed and sworn to before me this 20th day of November, 1946.

/s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1947.

[Stamped]: 6031.

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Form 1121—Treasury Dept., Internal Revenue Service.

United States
Corporation Excess Profits Tax Return
or fiscal year beginning July 1, 1944, and ending June 30, 1945

One Eighty Six Club
186 Eddy Street
San Francisco, California

File Code 553.
Serial No. 9401640
District 1 Calif.
(Cashier's stamp): 94 Rec'd With Remittance, Nov. 29, 1946, Coll. Int. Rev., 1st Dist. Cal.

[Stamped]: Internal Revenue Agent in Charge, Received Aug. 25, 1947, San Francisco; Copy.

[Marginal notations]: No Tentative; See affidavit attached to Form 1120—FY—1945; 11-29-46 HA.

Excess Profits Tax Computation

Item and Inst. No.		Invested Capital Credit Method
1.	Excess profits net income (line 18, Schedule A)	$14,450.00
4.	Excess profits credit—based on invested capital (line 40, Schedule C)	$ 5,376.99
5.	Unused excess profits credit adjustment (attach schedule)	15,376.99
7.	Difference between item 1 and item 6	None
24.	Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)	None

Post-War Refund of Excess Profits Tax and Credit for Debt Retirement

25.	Balance of excess profits tax (item 18 (c), above)	None
26.	Credit allowable under sections 780 and 781 (10 percent of item 25)	None
29.	Net post-war refund credit (item 26 minus item 28)	None

Schedule A.—Excess Profits Net Income Computation

Line No.		Invested Capital Credit Method
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 38, page 1, Form 1120)	$14,450.00

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7.	Total of lines 1 to 6	$14,450.00
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$14,450.00

Copy

Treasury Department
Internal Revenue Service
100 McAllister Street Building

mgm: 710 September 14, 1945.

One Eighty Six Club,
Olympic Hotel,
San Francisco, Calif.

Sirs:

Receipt is acknowledged of your letter of recent date requesting, for the reasons therein given, extension of time within which to file your return of income for the fiscal year ended June 30, 1945.

Provided a Tentative Return Is Filed With the Collector of Internal Revenue for Your District on or Before October 26, 1945, and Payment Made at That Time of at Least One-Fourth of the Total Estimated Tax Shown Thereon to Be Due, you are hereby granted an extension of time to November 15, 1945, within which to file Form 1121.

Any deficiency in the first installment of tax will bear interest at the rate of one-half of one per cent a month from the original due date.

By a "tentative return" is meant a return on the appropriate income tax form, showing only the name and address of taxpayer and the estimated amount, if any, of the tax due. The items and schedules on the form need not be filled in.

This Letter, or a copy thereof, Must Be Attached to the tentative and completed returns as authority for the extension of time herein granted. The completed return when filed, should be plainly marked—"completed return."

Very truly yours,

JOSEPH D. NUNAN, JR., Commissioner.

By /s/ JAMES G. SMYTH, Collector.

Mailed to:
A. B. Slater
964-A Market St., S.F.

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One Eighty Six Club
186 Eddy Street, San Francisco, California

Summary of Income and Excess Profit Taxes
Fiscal Year Ending June 30, 1945

Final Returns

Form 1120	$3,801.50	
Form 1121	None	$3,801.50

Tentative Returns

Form 1120	$1,200.00	
Form 1121	None	
Total	$1,200.00	
25% paid 10/26/45		$ 300.00
Additional amount due for fiscal year July 1, 1944-June 30, 1945		$3,501.50
Check submitted for 25% thereof		$ 875.38

Copy One Eighty Six Club Copy
186 Eddy Street—San Francisco, California

Schedule 1:

During the month of June, 1944, Louis H. Mooser, Jr., Deputy Collector from the office of the Collector of Internal Revenue at San Francisco, California, called at the office of the above stated corporation and examined its books and records for the fiscal period ending June 30, 1943, and required said corporation to file Forms 1120, 1121 and 707 for said period.

These returns were filed under Section 2606 of the I. R. Code, which gives a deputy collector the authority to file such returns where either no records are kept or where records were not adequately kept.

In the case of the One Eighty Six Club, the records reported only the net daily take and were therefore not adequately kept and this was the status of the accounts of said corporation up to and including June, 1944, the date on which Deputy Collector Mooser made his audit. At the date of this filing—November 14, 1945—the books of account of this corporation are kept on the same basis.

Mr. Mooser determined from an examination that he made of daily tally sheets that the daily average net take was $70.00. The returns filed by the Corporation for the fiscal year ending June 30, 1943, were prepared on this basis and have been approved by the Collector.

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In 1944, the taxpayer filed an application with the Deputy Commissioner, Salary Stabilization Unit, for annual salaries for its officers which has been approved as follows:

Bert Busterno, President	$4,500.00
Attilio Casselini, Vice President	(A) 3,000.00
W. E. Kyne, Secretary	(B) 3,600.00
Sylvan Lando, Treasurer	3,000.00

(A) Resigned April 15, 1945—no salary paid during the fiscal year 7/1/44-6/30/45.

(B) Served 7½ mos., succeeded by Elmer F. Remmer, who served during the remaining 4½ mos. at the same rate; said W. E. Kyne earning $2,250.00 and Elmer F. Remmer $1,350.00.

The books of account for the year 1944, disclose a total net take of $20,533.15.

In preparing the corporate returns (1120 and 1121) for the fiscal year ending June 30, 1945, the corporation is reporting its total net take for the year on the same basis as that which was used by Deputy Collector Mooser, $70.00 per day—$70.00 x 365 = $25,550.00(C).

However, when returns for the prior period were prepared by the Deputy, no provision was made for compensation of administrative officers; this, however, has been approved at $14,100.00 per year by the Salary Stabilization Unit. As stated hereinbefore total salaries actually paid during the fiscal year ending June 30, 1945, were $11,100.00(D). Therefore, the net taxable corporate income for the fiscal year ending June 30, 1945, is calculated as follows:

(C) Net take on basis of Deputy Collector Mooser's findings, (before administrative salaries paid)	$25,550.00
(D) Administrative salaries allowed by Salary Stabilization Unit, actually paid by corporation	11,100.00
Net Taxable Income	$14,450.00

Schedule C.—Excess Profits Credit—Based on Invested Capital

Equity Invested Capital at the Beginning of the Taxable Year
(See Instructions for Schedule C, lines 1 to 12, inclusive)

1.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital	$42,500.00
4.	(a) Accumulated earnings & profits	$24,712.32
	(d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)	24,712.32
8.	Total of lines 1 to 7	$67,212.32

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Average Addition to Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 1 to 12, inclusive)

22. Total of lines 14 and 21 ..... $67,212.32

Average Reduction in Equity Invested Capital During the Taxable Year

(See Instructions for Schedule C, lines 28 to 40, inclusive)

28. Average equity invested capital (line 22 minus line 27) $67,212.32

31. Average invested capital (line 28 plus line 30) $67,212.32

36. Invested capital (line 31 minus line 35) $67,212.32

37. Portion of line 36 (not over $5,000,000); and credit at 8 percent $5,376.99 8%

40. Excess profits credit—based on invested capital (total of lines 37 to 39) ..... $ 5,376.99

[Endorsed]: Filed December 7, 1951.

PLAINTIFF'S EXHIBIT No. 89

Form 1065—Treasury Dept., Internal Revenue Service

United States 1945

Partnership Return of Income

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1945

or fiscal year beginning ....., 1945, and ending ....., 1946

File Code 1952; Serial No. 8704459; District 1 Calif.

[Stamped]: 94 Received May 15, 1946, Coll. Int. Rev., 1st Dist. Cal. Received May 22, 1947, Internal Revenue Agent in Charge, San Francisco.

[Penciled in margin]: RAR 41—Bond & Conf, no chg 40-38-37; 649.

Menlo Club
30 Turk Street
San Francisco, California

Business or Profession, Social Club.

Gross Income

1. Gross receipts from business or profession $558,632.00
2. Less cost of goods sold:
   (b) Promotion Expense $286,837.75
   (d) Total of lines (a), (b), (c) $286,837.75
   (e) Less inventory at end of year 286,837.75

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3.	Gross profit (or loss) from business or profession (item 1 less item 2)	$271,794.25
4.	Income (or loss) from other partnerships, syndicates, pools, etc—Tiny's Waffle Shop & Bar. (Statement attached)	*(5,509.75)*
13.	Total income in items 3 to 12	$266,284.50

Deductions

14.	Salaries and wages (do not include compensation for partners)	$114,491.87
15.	Rent	5,200.00
16.	Repairs	1,059.14
18.	Taxes (explain in Schedule C)	4,679.95
21.	Depreciation (explain in Schedule E)	200.00
24.	Other deductions authorized by law (explain in Schedule F) (Statement Attached)	19,892.90
25.	Total deductions in items 14 to 24	$145,523.86
26.	Ordinary net income (item 13 less item 25)	$120,760.64

Schedule C.—Taxes. (See Instruction 18)

Social Security: Employer	$1,262.19
Unemployment Reserve Employer	3,407.91
Personal Property Tax	9.85
Total (enter as item 18, page 1)	$4,679.95

Schedule E.—Depreciation. (See Instruction 21)

1. Kind of property—Furniture and Fixtures.
2. Acquired 5/1/45. 3. Cost—$2,000.00.
7. Estimated life used in accumulating depreciation—10 yrs.
8. Estimated remaining life from beginning of year—10 years.
9. Depreciation allowable this year—$200.00.

Total (enter as item 21, page 1) $200.00

Tiny's Waffle Shop

Profit and Loss Statement

Period—May 1 to December 31, 1945

Income:	
Sales—Food	$126,588.08
Sales—Bar	43,152.89
	$169,740.97

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Purchases:			
Liquor		$ 7,851.32	
Beer		4,266.36	
Food		48,312.22	
		$60,429.90	
Inventory May 1, 1945	Dec. 31, 1945		
Liquor, Beer	$25,675.50	$22,891.46	
Food	5,523.00	2,446.31	5,860.73
Cost of Sales			66,290.63
Gross Profit			$103,450.34
Expense:			
Payroll		$73,849.84	
Rent		8,000.00	
Sales Tax		4,159.50	
Advertising		541.10	
Ice		383.16	
Laundry		2,175.38	
Bar Supplies		664.36	
House Supplies		1,846.40	
Licenses and Federal Stamps		652.58	
Scavenger—Cleaning		431.00	
Insurance		2,054.86	
Social Security Tax		716.06	
Unemployment Reserves Tax		1,933.38	
Repairs and Maintenance		3,222.89	
Telephone		158.41	
Bar Service		128.71	
Miscellaneous		3,024.42	
Light, Heat and Water		1,673.23	
Office Supplies		39.24	
Taxes: Miscellaneous		244.35	105,898.87
Loss From Operations			*(2,448.53)*
Other Income:			
Coin Machines			960.50
			(1,488.03)

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Other Charges:		
Depreciation:		
Tiny's Waffle Shop	$ 3,870.00	
Neon Sign	100.00	
Furniture and Equipment	171.72	4,021.72
Net Loss		*(5,509.75)*

[Figures shown in italics appeared in red on original.]

Schedule I.—Partners' Shares of Income and Credits.
(See Instruction for Schedule I)

1.	2. Total	3. Profit	4. Wages
(a) Elmer F. Remmer 30 Turk Street, 40%	$43,613.50	$43,613.50	
(b) William E. Kyne, 30 Turk Street, 15%	16,355.06	16,355.06	
(c) Masse Dito, 30 Turk Street, 10%	14,583.90	10,903.38	$3,680.52
(d) Oscar F. Nelson, 30 Turk Street, 10%	11,548.88	10,903.38	645.50
(e) Harold H. Maundrell, 30 Turk Street, 10%	13,003.37	10,903.37	2,100.00
(f) William E. Fricker, 30 Turk Street, 10%	13,804.25	10,903.37	2,900.88
(g) Thomas C. Turner, 30 Turk Street, 5%	7,851.68	5,451.68	2,400.00
Totals	$120,760.64	$109,033.74	$11,726.90

1. Name and address of each partner, etc.
2. Ordinary net income less interest on Government obligations, etc., subject to surtax only (item 26, page 1, less item 7(a), page 1).
3. Net short-term gain (or loss) from sale or exchange of capital assets (from Schedule G Summary, line 1, column 4).
4. Net long-term gain (or loss) from sale or exchange of capital assets (from Schedule G Summary, line 2, column 4).

Questions

1. Date of organization May 1, 1945.
2. Nature of organization—Partnership.
3. Was a return of income filed for preceding year? No.
4. Check whether this return was prepared on the cash [X] or accrual [ ] basis.
5. State whether inventories at the beginning and end of the taxable year, etc.—No Inventory.

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6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? No.
7. Was return of information on Forms 1096 and 1099, or Form W-2a, filed for the calendar year 1945? Yes. (See Instruction H.)

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ ELMER F. REMMER.

Subscribed and sworn to before me this 10th day of May, 1946.

/s/ JOHN F. BURNS.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires April 12, 1949.

Treasury Department
Internal Revenue Service
100 McAllister Street Building
San Francisco 2, Calif.

Office of the Collector
First District of California
In Replying Refer to jsb:710 March 15, 1946.

Tiny's Waffle Shop, Bar & Menlo Club
18-24 Turk Street
San Francisco, California

Dear Sirs:

Receipt is acknowledged of your letter of recent date requesting for the reasons therein given, an extension of time within which to file your partnership return of income for the calendar year ended December 31, 1945.

An extension of time to May 15, 1946, is hereby granted within which to file Form 1065.

This Letter or a copy thereof, Must Be Attached to the return when filed, as authority for the extension of time herein granted.

Very truly yours,

JOSEPH D. NUNAN, JR., Commissioner.

By /s/ JAMES G. SMYTH,
Collector.

Form 1065

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Menlo Club
30 Turk Street,
San Francisco.

May 10, 1946.

The Collector of Internal Revenue,
San Francisco, California.

Dear Sir:

In submitting the accompanying Partnership Return, taxpayer desires to state that the daily records of the Cash Receipts and Promotion Expenses of the Menlo Club were inadvertently destroyed in mistake for other papers, and were consequently unavailable for computation. Disbursements for rent, salaries and wages, cards, and all other expenses for which receipts were taken separately and recorded are available, and have been properly reported.

In order to submit what is believed to be more than a fair return to the Government, the cash receipts and promotion expenses for a like period in the preceding year of 1944 have been used as a basis of income after deducting an amount of $6,000.00 per month from the promotion expense, thus increasing the income.

Regretting the necessity for this method of filing, we are,

Very Truly Yours,

MENLO CLUB,

By /s/ ELMER F. REMMER,
Partner.

Menlo Club
Income Tax 1945—Period May 1, to Dec. 31

Deductions

Item 24: Other Deductions

Laundry	$ 997.62
General Miscellaneous Expenses	85.30
Bank Charges and Returned Checks	2,960.43
Garbage Collection	80.00
Supplies, Janitor and Miscellaneous	745.31
Light and Power	1,115.46
Telephone and Telegraph	285.48
Playing Cards	12,332.34
Poker Chips	1,000.00
Stationery and Printing	151.45
Water	139.51
Total Item 24	$19,892.90

[Endorsed]: Filed December 7, 1951.

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PLAINTIFF'S EXHIBIT No. 113

Agreement

This Agreement made and entered into this 4th day of November, 1946, by and between Elmer F. Remmer, hereinafter called First Party, and William E. Kyne, hereinafter called Second Party,

Witnesseth:

Whereas, said first party acquired by purchase on or about the 1st day of May, 1945, that certain social room business known and designated as Menlo Social Club and situated at No. 30 and 32 Turk Street, together with that certain restaurant business known and designated as Tiny's Waffle Shop situated at 24 Turk Street, San Francisco, California, together with that certain bar business formerly known as Tiny's Bar and now known as the Menlo Bar situated at 18 Turk Street, together with the leasehold interest in and to said premises; and

Whereas, the purchase price of said businesses and said leasehold interest was the sum of $175,000, all of which said sum was paid by said First Party; and

Whereas, it is the desire of First Party to sell, assign and convey to said Second Party a 15% interest in and to said social room business and in and to said restaurant business; and

Whereas, said Second Party is desirous of acquiring a 15% interest in and to said social room business and in and to said restaurant business; and

Whereas, said 15% interest of Second Party in and to said social room and restaurant businesses shall not come into being until there shall have been paid to said First Party out of the profits of said businesses the sum of $175,000, the original purchase price of said businesses;

Now, Therefore, in consideration of the mutual promises and agreements made by each of the parties hereto with the other, the parties hereto do hereby covenant and agree as follows:

Effective as of May 1, 1945, First Party hereby does assign, transfer, set over and convey to William E. Kyne, Second Party herein, a 15% working interest in and to the profits derived from the operation of the aforesaid social room and restaurant businesses situated as aforesaid;

It is understood and agreed between the parties hereto that said working interest does not represent an actual interest in and to the assets of said business or in or to the leasehold in said premises; that is to say, all moneys credited to the account of Second Party pursuant to said working interest shall be applied on account of Second Party's payment for an actual interest in and to said social club business and restaurant business;

It is further understood and agreed between the parties hereto that an actual interest in and to said businesses and their assets

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shall not be acquired by Second Party until First Party has been fully reimbursed in the sum of $175,000;

First Party does hereby sell, assign, set over, transfer and convey to Second Party a 15% interest in and to said social club business and restaurant business and their assets upon the receipt by First Party of the sum of $175,000 representing the purchase price expended by First Party as more particularly hereinabove appears;

Second Party shall continue to devote such time and attention as might be required of him by First Party in assisting in the management and operation of said businesses;

In the event of the death of the Second Party herein during the existence of this agreement the interest of said Second Party and his estate shall cease and terminate and the interest of said decedent, together with the interest of his estate, shall revert to and become the property of First Party herein; provided, however, there shall be paid by said First Party or his successors in interest to the legal representative of the estate of Second Party the balance remaining on the account book maintained by First Party in which is set forth the amount of profits accruing to Second Party, if Second Party at the time of his death shall have acquired said working interest;

In the event Second Party shall have acquired at the time of his death an actual interest in said businesses and their assets, then and in that event First Party shall pay forthwith to the legal representative of the estate of Second Party the sum of $26,250.00 in full payment, satisfaction and discharge of any and all interest acquired by Second Party and/or his estate in said businesses;

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ ELMER F. REMMER,
First Party.

/s/ WILLIAM E. KYNE,
Second Party.

[Endorsed]: Filed December 17, 1951.

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PLAINTIFF'S EXHIBIT No. 125-C

Furniture, Fixtures, Equipment & Lease

Tiny's Restaurant
Menlo Bar
Menlo Club

1945	Chk. No.	From whom bought	Description	Cost of Lease	Cost of Equipment & Inventory	Credit	Balance
		Gene Schriber	Tiny's Bar, 18 Turk St. Tiny's Rest., 24 Turk St. Menlo Club, 32 Turk St.	$143,801.50	$31,895.50		$175,000.00
1945/8/ 8	#1242	Gene Schriber				$25,000.00	150,000.00
1945/9/ 8	1334	Gene Schriber				15,000.00	135,000.00
1945/9/ 8	35	Gene Schriber				8,500.00	126,500.00
1945/9/ 8	36	Gene Schriber				1,500.00	125,000.00
1946/2/28		Gene Schriber				25,000.00	100,000.00
1946/5/ 1		Gene Schriber				25,000.00	75,000.00
1947/5/ 1		Gene Schriber				25,000.00	50,000.00

[Endorsed]: Filed December 27, 1951.

PLAINTIFF'S EXHIBIT No. 130

Agreement

This Agreement made and entered into this 4th day of November, 1946, by and between Elmer F. Remmer, hereinafter called First Party, and Harold H. Maundrell, hereinafter called Second Party,

Witnesseth:

Whereas, said first party acquired by purchase on or about the 1st day of May, 1945, that certain social room business known and designated as Menlo Social Club and situated at No. 30 and 32 Turk Street, together with that certain restaurant business known and designated as Tiny's Waffle Shop situated at 24 Turk Street, San Francisco, California, together with that certain bar business formerly known as Tiny's Bar and now known as the Menlo Bar situated at 18 Turk Street, together with the leasehold interest in and to said premises; and

Whereas, the purchase price of said businesses and said leasehold interest was the sum of $175,000, all of which said sum was paid by said First Party; and

Whereas, it is the desire of First Party to sell, assign and convey to said Second Party a 10% interest in and to said social room business and in and to said restaurant business; and

Whereas, said Second Party is desirous of acquiring a 10% interest in and to said social room business and in and to said restaurant business; and

Whereas, said 10% interest of Second Party in and to said social room and restaurant businesses shall not come into being until there shall have been paid to said First Party out of the profits of said businesses the sum of $175,000, the original purchase price of said businesses;

Now, Therefore, in consideration of the mutual promises and agreements made by each of the parties hereto with the other, the parties hereto do hereby covenant and agree as follows:

Effective as of May 1, 1945, First Party hereby does assign, transfer, set over and convey to Harold H. Maundrell, Second Party herein, a 10% working interest in and to the profits derived from the operation of the aforesaid social room and restaurant businesses situated as aforesaid;

It is understood and agreed between the parties hereto that said working interest does not represent an actual interest in and to the assets of said business or in or to the leasehold in said premises; that is to say, all moneys credited to the account of Second Party pursuant to said working interest shall be applied on account of Second Party's payment for an actual interest in and to said social club business and restaurant business;

It is further understood and agreed between the parties hereto that an actual interest in and to said businesses and their assets

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shall not be acquired by Second Party until First Party has been fully reimbursed in the sum of $175,000;

First Party does hereby sell, assign, set over, transfer and convey to Second Party a 10% interest in and to said social club business and restaurant business and their assets upon the receipt by First Party of the sum of $175,000 representing the purchase price expended by First Party as more particularly hereinabove appears;

Second Party shall continue to devote such time and attention as might be required of him by First Party in assisting in the management and operation of said businesses;

In the event of the death of the Second Party herein during the existence of this agreement the interest of said Second Party and his estate shall cease and terminate and the interest of said decedent, together with the interest of his estate, shall revert to and become the property of First Party herein; provided, however, there shall be paid by said First Party or his successors in interest to the legal representative of the estate of Second Party the balance remaining on the account book maintained by First Party in which is set forth the amount of profits accruing to Second Party, if Second Party at the time of his death shall have acquired said working interest;

In the event Second Party shall have acquired at the time of his death an actual interest in said businesses and their assets, then and in that event First Party shall pay forthwith to the legal representative of the estate of Second Party the sum of $17,500.00 in full payment, satisfaction and discharge of any and all interest acquired by Second Party and/or his estate in said businesses;

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ ELMER F. REMMER,
First Party.

/s/ HAROLD H. MAUNDRELL,
Second Party.

[Endorsed]: Filed December 20, 1951.

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PLAINTIFF'S EXHIBIT No. 140

Furniture, Fixtures, Equipment and Buildings

1945	No.	Ch.	From whom bought	Description	Cost of Lease	Cost of Equip. & Inventory	Pay'ts on Equip.	Credits	Balance
				Tiny's Bar, 18 Turk St.					
4/30			Gene Schriber	Tiny's Rest., 24 Turk St.		$75,000	$25,000	$25,000	$ 50,000
				Menlo Club, 32 Turk St.					
4/30			Gene Schriber	Menlo Club, 32 Turk St.	$100,000				150,000
8/ 8	1242		Gene Schriber					25,000	125,000
9/ 8	1334		Gene Schriber					15,000	110,000
9/ 8	1335		Gene Schriber					8,500	101,500
9/ 8	1336		Gene Schriber					1,500	100,000
2/28/1946			Gene Schriber					25,000	75,000

[Endorsed]: Filed December 21, 1951.

PLAINTIFF'S EXHIBIT No. 153

Statement of
William E. Kyne
Finance Section No. 4
Separation Center
Ft. Bragg, N.C.
made
November 15, 1945, at the Finance Section No. 4,
Separation Center, Ft. Bragg, N.C.

I, William E. Kyne, being first duly sworn according to law, depose and say:

I am at present a soldier in the U.S. Army and have been for the past nine months. I am married and have one child, who resides with me at 654 Hay St., Fayetteville, N.C. I formerly worked and lived in San Francisco, California.

Prior to my entry into the army, and at the present time the bar known as One-Ten Eddy located in San Francisco, California, is owned by myself, and Elmer Remmer in partnership. We do not own the building, but lease it. The equipment and fixtures are owned by Remmer and me and if they were to be sold the money derived therefrom would go to Remmer and me. Frank Cavani, and Chub Turner do not own any interest in the business, except a working interest, that is, they work for us for a salary and a cut of the profits. Cavani and Turner are in full charge of the business in so far as the purchasing of supplies and the payment of all bills in connection therewith. They both sign the checks for the money spent in the operation of the bar. Cavani and Turner are the actual operators of the bar and are both held accountable to Remmer and me, as the owners of the business. The license for the bar is issued in my name. However, neither Remmer or I do any of the actual work in the operation of the bar, but leave its operation up to Turner and Cavani.

I have carefully read the foregoing statement consisting of one page, have been given an opportunity to make corrections, and have signed it as evidence thereof, and the statement is true to the best of my knowledge and belief.

/s/ WILLIAM E. KYNE.

Subscribed and sworn to before me this 15th day of November, 1945.

/s/ T. L. HON,
Investigator, A.T.U.

[Shown in pencil]: Case file; #12.

[Endorsed]: Filed January 3, 1952.

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PLAINTIFF'S EXHIBIT No. 163

110 Eddy St.
Summary of Assets and Liabilities

Assets	Source	12/31/43	12/31/44	12/31/45	12/31/46
Bk. of America, 110 Eddy St., a/c	Books Ex. #112	3,946.62		6,141.46b	(1,803.65)c
Bk. of America, W. E. Kyne a/c	Books Ex. #112	3,565.51	216.43		
Cash Fund	Bks. Ex. #112 & wk. papers	400.00	1,600.00	1,400.00	1,400.00[1]
Prepaid Insurance	Books Ex. #112	333.93	160.00	428.36	
Prepaid Taxes	Books Ex. #112	547.75	552.75	1,050.00	
Inventory	Returns Ex. #80-83	22,510.00	28,131.45	25,059.62	26,775.00
Furniture and Fixtures	Bks. & Ret. Ex. #112, 80-83	10,495.90[2]	11,759.61[3]	13,496.39[4]	10,200.00[5]
Liquor License	Books Ex. #112	1,000.00	1,000.00	1,000.00	1,000.00
Total Assets		$42,799.71	$43,420.24	$48,575.83	$37,571.35
Liabilities					
Accounts Payable	Books Ex. #112	4,375.64			
Accrued Sales Tax	Books Ex. #112	203.81	227.01		
Accrued Payroll Taxes	Books Ex. #112	508.35	735.71	844.93	
Accrued Expense	Books Ex. #112			68.50	
Depreciation Reserve	Bks. & Ret. Ex. #112, 80-83	1,637.00	2,459.00	3,341.00	4,361.00
Total Liabilities		6,724.80	3,421.72	4,254.43	4,361.00
Net Worth		36,074.91	39,998.52	44,321.40	33,210.35
Total Liabilities and Net Worth		$42,799.71	$43,420.24	$48,575.83	$37,571.35

Assets	Source	12/31/43	12/31/44	12/31/45	12/31/46
Capital Accounts Per Books Ex. #112, 112A					
Wm. E. Kyne			•3,170.29	6,250.03	11,782.53
Frank Cavani			•3,170.30	3,582.18	7,391.40
Thos. C. Turner			•3,170.29	613.13	5,415.85
Elmer F. Remmer			•3,170.29	3,292.03	8,824.53
Arthur Pratt					
Clarence Bent		3,206.02			
Wm. E. Kyne Trustee Acct.		24,322.33	19,728.23	5,985.44	5,985.44
1943 Net Profit (P. & L. Acct. Books)		10,275.73	10,275.73a		
1945 Net Profit				22,130.02	
		$38,004.08	$42,685.13	$41,852.82	$39,399.77

Notes:

[1] No general ledger for 1946—receipts & disbursements show no change affecting this account during 1946.

[2] Books and return agree.

[3] Books.

[4] Books.

[5] Return—no G/L for 1946.

• 1944 profit.

a Not credited to capital accts. until 1945.

b See Schedule 1 attached.

c See Schedule 2 attached.

BLEED THROUGH– POOR COPY

Schedule 1

Bank of America, 110 Eddy St.

Balance—10/31/45		$ 9,136.89	Per General Ledger
Add Deposits Nov. 1945	$9,291.74		From CR page 37 Ex. #112
Dec. 1945	8,427.51	17,719.25	From CR page 38 Ex. #112
Deduct CD Nov. 1945	$ 4,883.01	26,856.14	From CD page 100 Ex. #112
Dec. 1945	15,831.67	20,714.68	From CD page 104 Ex. #112
Balance—12/31/45		$ 6,141.46	

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Schedule 2
Bank of America, 110 Eddy St.

Book Balance 12/31/45		$ 6,141.46
Add: Deposits Per Exhibit #		
1946—January C-1	$ 7,340.59	
February C-2	6,029.15	
March C-3	5,549.38	
April C-4	5,325.87	
May C-5	4,504.15	
June C-6	4,615.35	
July C-7	3,785.50	
August C-8	3,595.10	
September C-9	4,081.45	
October C-10	3,462.18	
November C-11	4,207.03	
December C-12	5,361.74	57,857.49
		$63,998.95
Deduct: Check Disbursements Per Exhibit #		
January	$ 4,397.70	
February	5,502.02	
March	7,131.57	
April	6,028.44	
May	11,559.84	
June	5,675.53	
July	3,675.28	
August	3,675.19	
September	4,532.83	
October	4,137.07	
November	3,398.51	
December	5,563.62	
	$65,277.60	
C.C. dated 12/30/46 (not in books)	525.00	$65,802.60
Book Balance 12/31/46		($1,803.65)

[Endorsed]: Filed January 9, 1952.

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PLAINTIFF'S EXHIBIT No. 164

Day Nite Cigar Store

Statement of Assets and Liabilities

Assets	Source	Ex. #	12/31/43	12/31/44	12/31/45	12/31/46
Bank of America	Schedule 1 attached					$ 1,068.52
	General Ledger	117	($ 973.87)	$ 2,383.26	$ 161.07	
Cash on Hand	General Ledger	117		965.25		
Cash Change Fund	General Ledger	117		200.00	200.00	
	1946 Partnership Return	86				100.00
Prepaid Insurance	General Ledger	117	226.70	165.70	434.00	
Prepaid Licenses—Taxes	General Ledger	117	344.10	191.00	49.00	
Deposits	General Ledger	117	104.50	104.50	104.50	
Account Receivable, 186 Club	General Ledger		4,878.58	9,538.04	3,743.55	
	Schedule 2 attached					3,572.67
Prepaid Insurance and ADT Installation at 52 Mason Whse	General Ledger	117			616.44	
Furniture and Fixtures	1946 Partnership Return	86	2,100.00	2,100.00	2,100.00	2,100.00
Inventory	Returns: 1943 W. E. Kyne	119	11,889.00			
	1944 Partnership	84		24,747.27		
	1945 Partnership	85			23,694.59	
	1946 Partnership	86				22,466.44
Total Assets			$18,569.01	$40,395.02	$31,103.15	$29,307.63

Liabilities			12/31/43	12/31/44	12/31/45	12/31/46
Accrued Sales Tax	General Ledger	117	$ 111.97	$ 282.36	$ 218.80	
Accrued Payroll Taxes	General Ledger	117	417.58	310.45	30.02	
Sales taxes collected	General Ledger	117	254.06			
Accrued expenses	General Ledger	117		62.00	9.70	
Reserve for Depreciation based on amounts claimed on partnership returns: 1943—none claimed						
1944		84		245.84		
1945		85			454.16	
1946		86				$ 664.16
Total Liabilities			$ 783.61	$ 900.65	$ 712.68	$ 664.16
Net Worth			$17,785.40	$39,494.37	$30,390.47	$28,643.47
Net Worth Accounts						
Wm. E. Kyne—Investment Account	General Ledger	117	$15,705.00	$36,895.22	$25,078.73	
Profit and Loss	—General Ledger	117	8,505.80	8,505.80		
Wm. E. Kyne — Personal Account	—General Ledger	117			1,677.78	
Sylvan Lando	—General Ledger	117		1,092.51	3,927.78	
E. Remmer	—General Ledger	117		1,092.51	3,927.77	
Income and expense accounts not closed out as of 12/31/45		117			2,667.36	
			$24,210.80	$47,586.04	$37,279.42	

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Schedule 1

Day-Nite Cigar Store
Bank of America

Book Balance 12/31/45		$ 161.07*
Add:		
Deposits 1946 Per Exhibit #117-B		
January	$ 9,611.13	
February	9,140.25	
March	12,132.74	
April	10,021.47	
May	7,970.61	
June	7,719.50	
July	10,562.43	
August	8,002.42	
September	9,811.27	
October	13,187.15	
November	8,476.21	
December	9,237.16	115,872.34
		$116,033.41
Deduct:		
Check Disbursements Per Exhibit # 117-B		
January	$12,661.13	
February	9,197.65	
March	9,112.48	
April	10,340.11	
May	10,169.26	
June	5,578.62	
July	11,502.57	
August	8,098.61	
September	10,944.11	
October	8,110.57	
November	8,800.62	
December	10,449.16	$114,964.89
Book Balance 12/31/46		$1,068.52
Book Balance 10/31/45 Exhibit #117	$2,917.01)	
Add Deposits Nov.	$9,169.87	
Dec.	9,478.01	18,647.88
		$15,730.87
Deduct C.D. Nov.	$6,988.65	
Dec.	8,581.15	15,569.80
Book Balance 12/31/45	$161.07*	

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Schedule 2

Day-Nite Cigar Store
186 Club—Accts. Receivable

Book Balance 12/31/45		$ 3,743.55
Add:		
Debits Per Check Disbursements Exhibit #117-A		
January	$ 1,519.90	
February	1,154.99	
March	1,172.64	
April	3,479.69	
May	2,466.92	
June	.....	
July	4,031.58	
August	1,345.15	
September	2,865.36	
October	1,401.99	
November	1,433.00	
December	2,919.77	
	$23,790.99	
Rent Proration	3,600.00	
Utility Proration	1,010.21	
Office Expense Proration	350.00	28,751.20
		$32,494.75
Deduct:		
Credits Per Cash Receipts Exhibit #117-A		
January	$ 1,350.85	
February	1,341.00	
March	3,500.00	
April	2,810.30	
May	1,338.45	
June	1,700.00	
July	4,070.00	
August	1,382.00	
September	2,447.00	
October	6,173.48	
November	1,234.00	
December	1,575.00	28,922.08
Book Balance 12/31/46		$3,572.67

[Endorsed]: Filed January 9, 1952.

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Menlo Club
Assets and Liabilities
December 31, 1945, and December 31, 1946

Assets		December 31 1945		1946
Cash on Hand, Bankroll, Poker Sheets Ex. 114-114A		$ 10,000.00		$ 10,003.00
Accounts Receivable, Advances for Purchase of Equipment for Mr. Remmer's Office, 50 Mason St.		7,489.76		8,600.20
Lease Deposit Ex. 132A		4,000.00		4,000.00
Cost of Ten-Year Lease Ex. 53		100,000.00		100,000.00
Cost of Other Assets at Acquisition	$75,000.00			
Inventory at Purchase (return) Ex. 89	31,198.50			
Other Assets—Equipment, license, goodwill, etc.		43,801.50		43,801.50
Inventory at Year End (return) Ex. 90		25,337.77		28,539.09
Improvements in 1945 Ex. 133K		920.00		920.00
Improvements in 1946 Ex. 134-5-6				2,355.16
Neon Sign 7/10/45 Ex. 132C		500.00		500.00
Petty Cash and Change Funds—				
Menlo Bar (Maundrell's Testimony)		300.00		300.00
Tiny's Restaurant (Maundrell's Testimony)		500.00		500.00
Deposit with P.G.&E. Ex. 132 & 133A		1,030.00		1,030.00
Crocker First National Bank Ex. 27	$ 5,492.69		$10,632.87	
Adjustment for outstanding checks and deposits in transit (Miner's Recon.)	4,779.39		7,963.51	
Adjusted Balance ($3,571.15)		713.30		2,669.36
Bank of America—Menlo Club Acct.—Ex. 34				15,265.54
Total Assets		$194,592.33		$218,483.85

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Liabilities	December 31 1945	1946
Reserve for Depreciation	$ 4,277.72	$ 8,980.71
Reserve for Amortization of Lease	6,666.67	16,666.67
Total Liabilities	$ 10,944.39	$ 25,647.38
Net Worth	$183,647.94	$192,836.47
Capital Accounts Per Books—		
Harold Maundrell	$ 13,003.37	$ 17,355.22
Thomas Turner	7,851.68	9,896.18
William Fricker	13,804.25	10,204.69
Elmer Remmer	43,613.50	39,508.60
Wm. E. Kyne	16,355.06	28,879.55
Masse Dito	14,583.90	10,093.33
Oscar Nelson	11,548.88	20,695.08
	$120,760.64	$136,632.65

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Menlo Club
Reserve for Depreciation

	Cost	Rate		Depreciation Allowable 1945		1946	Accumulated at 12-31-46
Assets acquired at purchase	$43,801.50	10%	(8 mo.)	$2,920.10		$4,380.15	$7,300.25
Improvements—1945	920.00	10%	(8 mo.)	61.33		92.00	153.33
Improvements—1946	2,355.16	9 yrs.			(6 mo.)	130.84	130.84
Neon Sign—1945	500.00	5 yrs.	(6 mo.)	50.00		100.00	150.00
Totals				$3,031.43		$4,702.99	$7,734.42
Depreciation Claimed on Returns				$4,277.72		$ 200.00	$4,477.02
Depreciation Allowed				$4,277.72		$4,702.99	$8,980.71

Reserve for Amortization of Lease

	Cost	Term		Allowance 1945	1946	Accumulated at 12-31-46
Exhibit 53	$100,000.00	10 yrs.	(8 mo.)	$6,666.67	$10,000.00	$16,666.67

[Endorsed]: Filed January 9, 1952.

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PLAINTIFF'S EXHIBIT No. 168

Day Nite Cigar Store

Reconciliation Net Worth Per Books and Exhibit

	Books	Exhibit	Increase 12/31/43	Books and Exhibit 12/31/44	12/31/45
Cash—1943, 1944, 1945—[Figures shown were crossed out on original].					
Equipment	$10,400.00	$ 2,100.00	$ 8,300.00	$ 8,300.00	$ 8,300.00
Inventory—1943 & 1944—Account missing.					
1945	22,479.12	23,694.59			(1,215.47)
Depreciation Reserve—1943	208.33		(208.33)		
1944	333.30	245.84		(87.46)	
1945	541.62	454.16			(87.46)
Unaccounted for difference in total balances			(1,666.27)	(120.87)	(108.12)
Net excess net worth per books and exhibit			$ 6,410.25	$10,570.72	$ 6,589.32

[Endorsed]: Filed January 11, 1952.

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PLAINTIFF'S EXHIBIT No. 169

B-R Smoke Shoppe

Assets and Liabilities

December 31, 1943, December 31, 1944, December 31, 1945, and December 31, 1946

Assets	December 31 1943	1944	1945	1946
Cash on Hand—Bankroll—Exh. 111-A	$15,000.00	$15,000.00		
Pritchitt's test			$20,000.00	$20,000.00
Bank of America Day & Night Br.—Exh. 29	913.38	324.56		
Crocker First National Bk.—Exh. 23 (B & R)		406.91	11.27	
Crocker First National Bk.—Exh. 24			833.39	793.39
Cost of business purchased from Sherwood per testimony of Kyne	2,500.00	2,500.00	2,500.00	2,500.00
Total Assets	$18,413.38	$18,231.47	$23,344.66	$23,293.39
Liabilities	None	None	None	None
Net Worth	$18,413.38	$18,231.47	$23,344.66	$23,293.39

[Endorsed]: Filed January 11, 1952.

PLAINTIFF'S EXHIBIT No. 172

E. Remmer—Account No. 10

Personal Account With Cal-Neva Lodge, Inc.

Adjustment of Book Balances at December 31, 1943, 1944, 1945, and 1946

	December 31			
	1943	1944	1945	1946
Balances Per Books (Debits)	$10,652.77	$17,886.66	$25,361.68	$18,148.22
Add (Deduct)—				
(a) Credit to E. Remmer in 1943 for payment not received until 1944	2,500.00			
(b) Credit to E. Remmer in 1943 for payment not received until 1944	2,000.00			
(c) Credit to E. Remmer in 1945 for amount charged to him in error in 1944		(24.98)		
(d) Credit to E. Remmer on 4-30-45 for cash advanced in prior year		(7,500.00)		
(e) Debit to E. Remmer on 4-30-45 for loans to Albert Vellaudy in 1941 and 1943	8,000.00	8,000.00		
(f) Debit to E. Remmer on 4-30-46 for cash advanced to him in 1945			51,086.34	
(g) Credit to E. Remmer on 4-30-46 for bad checks included in cash received by him			(2,215.69)	

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	December 31			
	1943	1944	1945	1946
(h) Debit to E. Remmer on 4-30-46 for amount charged to Bank Club in error in 1945			7,000.00	
(i) Credit to E. Remmer on 4-30-47 for cash advanced by him in 1946				(20,000.00)
(j) Debit to E. Remmer on 4-30-47 for items credited to him in error in 1946				97,300.00
(k) Credit to E. Remmer on 4-30-47 for additional cash contributed by him in 1946				(34,705.83)
Balances as Corrected (Debits)	$23,152.77	$18,361.68	$81,232.33	$60,742.39

E. Remmer—Account No. 10

Personal Account With Cal-Neva Lodge, Inc.

Explanations of Corrections Made to Book Balances

(a) Under date of Dec. (or Feb.) 29, 1943, this account is credited with ..... $ 2,500.00

The cash receipts book (CR 27) shows this amount as received in February, 1944. This is in accord with a deposit on 2-23-44 to Cal-Neva's bank account of $2,527.08 which as shown by recordak film and record of cashier's checks purchased was the total of a deposit which included cashier's check #6646918 dated 2-18-44 payable to Cal-Neva Lodge, for $2,500.00 and purchased by Wm. E. Kyne at Bank of America, Day & Night Office (11-177).

(b) Under date of 4-30-43 this account is credited with the amount of ..... $ 2,000.00
The cash receipts book (CR 27) shows this amount as received in March, 1944, and there is a deposit of $2,000.00 currency in the bank account on 3-30-44. No deposits were made in April, 1943.

(c) The correcting entry made 4-30-45 (J 35) states that the amount of ..... $ 24.98
Was charged to Remmer in error. The original charge was made 7-31-44.

(d) Under date of 4-30-45 this account is credited with the amount of ..... $ 7,500.00
With the explanation: "Cash advanced by Remmer." The first deposit to Cal-Neva's bank account in 1945 was made on July 6, 1945. Therefore the cash advance referred to here must have been made in 1944.

(e) Under date of 4-30-45 loans to Albert Vellaudy in the amount of ..... $ 8,000.00
Were charged to Mr. Remmer as personal loans. This indicates that these were personal loans when made in 1941 and 1943, and should be so reflected in the balances of this account prior to 1945.

(f) Under date of 4-30-46 this account is debited in the amount of $51,086.34
With the explanation that this amount represents cash advances to Mr. Remmer during the 1945 season. Therefore, this amount should be reflected in the balance of this account at December 31, 1945.

(g) Under date of 4-30-46 this account is credited in the amount of ..... $ 2,215.69
With the explanation: "To credit E. Remmer's account for bad checks which were included in the cash received by him. Since this entry appears immediately after the one above (f) undoubtedly reference is made to the same cash received during the 1945 season. Therefore, the balance of this account at 12-31-45 should be corrected for this amount.

(h) Under date of 4-30-46 there is a debit to this account in the amount of ..... $ 7,000.00
With the explanation that it is to correct for an erroneous charge to the Bank Club in 1945 (check #7163 dated 11-8-45). Since the error was made in 1945 the correction should be reflected in the 12-31-45 balance of this account.

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(i) Under date of 4-30-47 this account is credited in the amount of $20,000.00
With the explanation, "Cash advanced by Remmer." At the date of this entry Cal-Neva Lodge was closed for the season. The book account showed the following deposits from 1-1-47 to 4-30-47:

January 20	$ 1.00
February 21	2,000.00 currency
March 28	5,000.00 Telegraphic trfr.

The telegraphic transfer is credited to Mr. Remmer's account under date of March 31, 1947. Therefore the $20,000.00 advanced must have been advanced in 1946 and should be reflected in the 12-31-46 balance of this account.

(j) Under date of 4-30-47 this account is debited in the amount of $97,300.00
With the explanation, "To correct items credited to Remmer in error." Since the original erroneous credits were made in 1946 this correction should be reflected in the balance of this account at 12-31-46.

(k) Under date of 4-30-47 this account is credited in the amount of $34,705.83
With the explanation: "Additional cash contributed by Remmer to make up deficit as per Mr. J. B. Jeffress' instruction." As the explanation under (i) above shows this sum could not have been received in 1947. Therefore, it must have been received in 1946 and should be reflected in the balance of this account at 12-31-46.

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E. Remmer—Account No. 10
Cal-Neva, Inc.

From Exhibit #146

Total Charges and Credits by Years, 1943 to 1946, Inclusive

Date	Charges	Credits
4/30/43	$ 12.32	
4/30/43	1.46	
4/30/43	2,500.71	
4/30/43	6,219.01	
5/14/43		$ 5,000.00
6/30/43	293.55	
7/30/43		2,000.00
11/30/43		8,500.00
2/../29		2,500.00
4/30/43		2,000.00
Totals	$9,027.05	$20,000.00
7/31/44	$ 24.98	
8/31/44	750.00	
9/30/44	1,740.91	
11/30/44	1,750.00	
12/31/44	2,968.00	
Totals	$7,233.89	

Date	Charges	Credits
4/30/45		$ 24.98
4/30/45		7,500.00
4/30/45	$ 8,000.00	
7/31/45	2,000.00	
8/31/45	5,000.00	
Totals	$15,000.00	$ 7,524.98
4/30/46	$ 2,500.00	
4/30/46	51,086.34	
4/30/46		$ 2,215.69
4/30/46	7,000.00	
6/30/46		83,732.33
9/30/46		50,000.00
10/31/46		47,300.00
7/31/46	7,724.11	
8/30/46	7,724.11	
9/30/46	100,000.00	
Totals	$176,034.56	$183,248.02

Computation of Balances Per Books at Calendar Year Ends

Date		Charges	Credits	Debit Balance at Dec. 31
11/30/42	Balance—No further entries in 1942			$21,625.72
1943	Total of all entries (as above)	$ 9,027.05	$ 20,000.00	10,652.77
1944	Total of all entries (as above)	7,233.89		17,886.66
1945	Total of all entries (as above)	15,000.00	7,524.98	25,361.68
1946	Total of all entries (as above)	176,034.56	183,248.02	18,148.22

[Endorsed]: Filed January 28, 1952.

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PLAINTIFF'S EXHIBIT No. 174

Elmer F. Remmer
50 - 52 Mason Street, San Francisco

Office Improvements, Fixtures, and Equipment

Exibit No.	Date	Payee	Testimony Page No.	Amount
132(d)	8/18/45	Fred W. Schell—Contractor—new office	1213	$2,500.00
133(d)	10/ 4/45	Fred W. Schell—Contractor—new office	1217	1,050.00
133(e)	11/12/45	Fred W. Schell—Contractor—new office	1218-1219	2,303.00
133(f)	11/12/45	Saltzman-Stanley Co.—Furniture	1219	1,075.14
133(h)	11/20/45	John Hagen—carpenter work	1221	56.44
133(i)	11/26/45	Habenicht & Howlett—Glass	1221	22.87
133(l)	11/26/45	American District Telegraph Co.—burglar alarm	1222-3	340.85
133(m)	11/26/45	John Hagen—carpenter work	1223	76.46
133(o)	11/28/45	John Hagen—Carpenter	1223	65.00
		Total		$7,489.76
134(d)	3/ 6/46	W. C. Finley, Jr.—furniture	1227	$ 644.00
135(a)	3/22/46	John Hagen—Carpenter	1232	178.71
135(d)	3/31/46	United Studios—electrical work	1235	79.60
135(e)	3/31/46	Saltzman-Stanley Co.—refrigerator	1235	208.13
		Total		$1,110.44
		Total paid with Menlo checks		$8,600.20

Checks referred to above were identified by Mr. Maundrell as being drawn on the account of "Harold H. Maundrell or Elmer Remmer" at the Crocker First National Bank. (Purpose—page 1218.)

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Summary

1944 Acquisitions—Safe (Exhibit 139)	$425.00			
12/31/44 Balance		$ 425.00		
1945 Acquisitions (above)		7,489.76		
12/31/45 Balance			$7,914.76	
1946 Acquisitions			1,110.44	
12/31/46 Balance				$9,025.20

Reserve for Depreciation

Date Acquired	Cost	1944 Depreciation	1945 Depreciation	Accumulated to 12/31/45	1946 Depreciation	Accumulated to 12/31/46
1944	$ 425.00	(6 mos.) $21.25	$ 42.50	$ 63.75	$ 42.50	$ 106.25
1945	7,489.76		(6 mos.) 374.48	374.48	748.97	1,123.45
1946	1,110.44				(6 mos.) 55.52	55.52
		$21.25		$438.23		$1,285.22

[Endorsed]: Filed January 28, 1952.

PLAINTIFF'S EXHIBIT No. 175

Elmer F. Remmer

Gallagher & Burton Whiskey

Equity at December 31, 1943, 1944, 1945, and 1946

	First Carload		Second Carload	
	No. of Cases	Amount	No. of Cases	Amount
Invoice Cost F.O.B. shipping point @ $24.44	1197	$29,254.68	1194	$29,181.36
Freight ($1,002.09) and demurrage ($4.53)		1,006.62		1,006.62
State tax @ $1.20 a case		1,436.40		1,432.80
Handling charge @ $1.20 a case		1,436.40		1,432.80
Drayage to Nevada Transfer & Whse. Co.		.....		50.00
Total cost	1197	$33,134.10		$33,103.58
Cost per case		$27,680.95		$27,724.94

	Total Amount	First Carload			Second Carload		
		No. of Cases	Per Case	Amount	No. of Cases	Per Case	Amount
November, 1943—Cost as above		1197	$27.68095	$33,134.10	1194	$27.72494	$33,103.58
Delivered in 1943		(1050)		29,065.00			
12/31/43 On Hand	$37,172.68	147	$27.68095	$ 4,069.10	1194	$27.72494	$33,103.58
1944—Floor stock tax		147	6.24700	918.31	1194	6.26400	7,479.22
		147	$33.92795	$ 4,987.41	1194	$33.98894	$40,582.80
Delivered in 1944					(200)		(6,797.79)
12/31/44 On Hand	$38,772.42	147	$33.92795	$ 4,987.41	994	$33.98894	$33,785.01
Delivered in 1945		(147)		(4,987.41)	(194)		(6,593.86)
12/31/45 On Hand	$27,191.15				800	$33.98894	$27,191.15
Received in 1946					100		3,398.89
Transferred in 1946					(900)		(30,590.04)
12/31/46 On Hand				.....			.....

Summary	1943	1944	1945	1946
Cost of liquor owned at December 31	$37,172.68	$38,772.42	$27,191.15	.....
Less—Amount owed to Sierra Wine & Liquor Co. on deal	3,978.26	4,896.57	.....	.....
Mr. Remmer's Equity at December 31	$33,194.42	$33,875.85	$27,191.15	

Above figures based on testimony of Messrs. Barengo and Stewart.

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PLAINTIFF'S EXHIBIT No. 175

Elmer F. Remmer
Gallagher & Burton Whiskey

Quantities Owned at December 31, 1943, 1944, 1945, and 1946

Date	First Carload	No. of Cases
11/14/43	First carload received by Sierra Wine & Liquor Co.	1200
	Broken in transit	(3)
11/15/43	Delivered to Palace Club	(500)
11/16/43	Delivered to Club 222	(50)
11/16/43	Delivered to Bank Club	(300)
11/16/43	Delivered to Silver Dollar Bar	(100)
11/1[illegible]/43	Delivered to Silver Dollar Bar	(100)
12/31/43	Balance	147
12/31/44	Balance	147
12/31/45	Balance	none
12/31/46	Balance	none

Above based on testimony of Mr. Barengo. He stated that 147 cases were held as security for payment of taxes, commission, etc., of $4,896.57 until Aug. 9, 1945. Upon payment on that date 147 cases were delivered to Bank Club.

Date	Second Carload	No. of Cases	
12/30/43	Testimony of Messrs. Barengo and Stewart that balance of 1200 cases (less 6 broken in transit) placed in storage at Nevada Transfer & Warehouse Co.	1194	
12/31/43	On Hand	1194	1194
6/30/44	Delivered to Cal-Neva Truck	(100)	
7/12/44	Delivered to Cal-Neva Truck	(100)	
12/31/44	On Hand	994	994
9/10/45	Delivered to Cal-Neva Truck	(194)	
12/31/45	On Hand	800	800
5/ 9/46	Received from Cal-Neva Truck	100	
5/ 9/46	Transferred to Bank Club	(900)	
12/31/46	On Hand	none	none

Above based on testimony of Messrs. Barengo and Stewart.

[Endorsed]: Filed January 28, 1952.

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PLAINTIFF'S EXHIBIT No. 183

Elmer F. Remmer and Helen L. Remmer
Reno, Nevada

Recomputation of Net Income Based on Net Worth Increases Plus Non-Deductible Expenses

Assets	1943	1944	1945	1946
1. U. S. Government Bonds	$ 5,062.50	$ 10,481.25	$ 17,081.25	$ 17,081.25
2. B-R. Smoke Shoppe, S.F.	18,413.38	18,231.47	23,344.66	23,293.39
3. 186 Club Corp'n, S.F.	.....	.....	.....	.....
4. Day-Nite Cigar Store, S.F.	17,675.40	39,494.37	30,390.47	28,643.47
5. One Ten Eddy St., S.F.	32,674.91	39,998.52	44,321.40	33,210.35
6. Menlo Club, S.F.	.....	.....	183,647.94	192,836.47
7. Transit Smoke Shop, S.F.	.....	.....	.....	32,641.46
8. Cash on hand	.....	.....	.....	65,000.00
9. The Cal-Neva Inc.	.....	.....	.....	466,666.66
10. Mountain City Consolidated Copper Co.	.....	.....	.....	2,400.00
11. Gallagher & Burton Whiskey	33,194.42	33,875.85	27,191.15	.....
12. Loan to Brice & Silverman	.....	.....	12,000.00	4,000.00
13. Loan to Hazel Harris	.....	.....	1,250.00	250.00
14. Moraga Estates Prop.	19,166.19	19,166.19	19,166.19	19,166.19
15. Richmond Annex Prop.	25,154.90	25,154.90	37,296.25	37,296.25
16. Loan to P. R. Badovinatz †	.....	.....	.....	.....
17. Bank of America—Tracy Br. Bk. of Amer.	366.90	1,576.90	1,966.15	1,403.69
18. 21 Club, El Cerrito	7,676.53	13,004.93	10,417.97	11,513.85
19. San Diego Social Club, El Cerrito	3,404.76	3,598.88	7,436.96	6,619.38
20. Bank of Amer.—Grand Lake Br.—Helen L. Remmer	.....	.....	485.90	439.75
21. Moraga Highlands	.....	.....	10,000.00	20,119.00
22. 50 - 52 Mason St. Office	.....	.....	7,489.76	8,600.20
Safe	.....	425.00	425.00	425.00

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23. Due from Bank Club for 900 cs. of G&B Whiskey	.....	.....	.....	29,979.00
24. Loan to Albert Vellaudy	8,000.00	5,400.00	3,400.00	3,400.00
25. Cash in Safe Deposit Boxes	?	?	?	?
Total Assets	$170,789.89	$210,408.26	$437,311.05	$1,004,985.36
Liabilities				
26. Due to Menlo Club for 50 - 52 Mason St. Office	.....	.....	$ 7,489.76	$ 8,600.20
27. Due to Cal-Neva Inc.	23,152.77	18,361.68	81,232.33	60,742.39
28. Notes Payable—Bk. of Amer. on Moraga Estates Prop...	4,000.00	3,000.00	.....	.....
29. Due to Graham & McKay on Purchase of Cal-Neva	.....	.....	.....	366,666.66
30. Due to Ogden F. Monahan	1,800.00	1,800.00	.....	.....
31. Due to William Graham	.....	.....	.....	10,000.00
32. Reserve for Depreciation of Office Equip & Safe	.....	21.25	438.23	1,285.22
33. Due to Gene Schriber on Menlo Lease	.....	.....	100,000.00	75,000.00
Total Liabilities	$ 28,952.77	$ 23,182.93	$189,160.32	$522,294.47
Net Worth	$141,837.12	$187,225.33	$248,150.73	$482,690.89
Increase in net worth		$ 45,388.21	$ 60,925.40	$234,540.16
Plus: Federal income taxes paid		5,359.70	10,140.00	19,745.26
Living expenses		?	?	?
Total income		$ 50,747.91	$ 71,065.40	$254,285.42
Income reported		19,000.00	59,318.36	22,489.58
Difference		$ 31,747.91	$ 11,747.04	$231,795.84

[Endorsed]: Filed February 4, 1952.

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DEFENDANT'S EXHIBIT A-1

Property Management
50 Mason Street
San Francisco, California

Promissory Note

September 27th, 1946.

For Value Received, I promise to pay to Robert L. Jeffres, or to his order, the sum of Fifty Thousand Dollars ($50,000.00), with interest thereon at the rate of Six Percent (6%) per annum until paid.

Witness my hand and seal, the day and year above first written.

/s/ ELMER F. REMMER.

[Endorsed]: Filed December 28, 1951.

DEFENDANT'S EXHIBIT D-1 (For Identification)

Know All Men by These Presents:

That I, Elmer Remmer, of Reno, Nevada, for valuable consideration, the receipt whereof is hereby acknowledged, do sell, assign and transfer unto J. B. Scarlett, sometimes known as "Jack Sullivan," the sum of Twenty-Five Thousand Dollars ($25,000.00) lawful money of the United States from such funds as may be held for my credit by the Trust Department of the First National Bank of Nevada, at Reno, Nevada, under the terms of an agreement between Elmer Remmer of Reno, Nevada, therein referred to as "Seller" and Cal-Neva Lodge, Inc., therein referred to as "Buyer," said agreement being dated the 10th day of June, 1948. The said First National Bank of Nevada is instructed, authorized and directed from such monies as may be due me under the terms of the said agreement to first pay and deliver to the said J. B. Scarlett the sum of Twenty-Five Thousand Dollars ($25,000.00) in cash upon the said J. B. Scarlett delivering to you a certain check given him by me drawn upon the First National Bank of Nevada and dated October 24, 1948, payable to Jack Sullivan in the sum of Twenty-Five Thousand Dollars ($25,000.00) and signed by Elmer Remmer.

/s/ ELMER REMMER.

Dated: October 21, 1948.

[Endorsed]: Filed February 6, 1952.

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DEFENDANT'S EXHIBIT E (For Identification)

Amended Return Page 1

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

Form 1040—Treasury Dept., Internal Revenue Service. 1944

U. S. Individual Income Tax Return
For Calendar Year 1944

or fiscal year beginning ....., 1944, and ending ....., 1945

Name Helen L. Remmer.

Address Cal-Neva, Lake Tahoe, Nevada.

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Filed on $10,000 Each 1944.
Amended $3,000 additional 1944 Each.
B&L Smoke Shop, 50 Mason, San Francisco.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 ..... $3,760.00

7. How much have you paid on your 1944 income tax?
(B) By payments on 1944 Declaration of Estimated Tax. Paid on original taxpayers figures.....Enter total here 2,570.00

8. If your tax (item 6) is larger than payments (item 7) enter Balance of Tax Due here..... $1,190.00

9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here.....Int. 166.60

$1,356.60

If you filed a return for a prior year, what was the latest year? 1943.

To which Collector's office was it sent? Reno.

To which Collector's office did you pay amount claimed in item 7 (B), above? Reno.

Is your wife (or husband) making a separate return for 1944? Yes.

If "Yes," write below:

Name of wife (or husband) Elmer F. Remmer.

Collector's office to which sent Reno.

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DEFENDANT'S EXHIBIT A-1

Property Management
50 Mason Street
San Francisco, California

Promissory Note

September 27th, 1946.

For Value Received, I promise to pay to Robert L. Jeffres, or to his order, the sum of Fifty Thousand Dollars ($50,000.00), with interest thereon at the rate of Six Percent (6%) per annum until paid.

Witness my hand and seal, the day and year above first written.

/s/ ELMER F. REMMER.

[Endorsed]: Filed December 28, 1951.

DEFENDANT'S EXHIBIT D-1 (For Identification)

Know All Men by These Presents:

That I, Elmer Remmer, of Reno, Nevada, for valuable consideration, the receipt whereof is hereby acknowledged, do sell, assign and transfer unto J. B. Scarlett, sometimes known as "Jack Sullivan," the sum of Twenty-Five Thousand Dollars ($25,000.00) lawful money of the United States from such funds as may be held for my credit by the Trust Department of the First National Bank of Nevada, at Reno, Nevada, under the terms of an agreement between Elmer Remmer of Reno, Nevada, therein referred to as "Seller" and Cal-Neva Lodge, Inc., therein referred to as "Buyer," said agreement being dated the 10th day of June, 1948. The said First National Bank of Nevada is instructed, authorized and directed from such monies as may be due me under the terms of the said agreement to first pay and deliver to the said J. B. Scarlett the sum of Twenty-Five Thousand Dollars ($25,000.00) in cash upon the said J. B. Scarlett delivering to you a certain check given him by me drawn upon the First National Bank of Nevada and dated October 24, 1948, payable to Jack Sullivan in the sum of Twenty-Five Thousand Dollars ($25,000.00) and signed by Elmer Remmer.

/s/ ELMER REMMER.

Dated: October 21, 1948.

[Endorsed]: Filed February 6, 1952.

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DEFENDANT'S EXHIBIT E (For Identification)

Amended Return Page 1

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate Instructions for filling out return.

Form 1040—Treasury Dept., Internal Revenue Service. 1944

U. S. Individual Income Tax Return
For Calendar Year 1944

or fiscal year beginning ....., 1944, and ending ....., 1945

Name Helen L. Remmer.

Address Cal-Neva, Lake Tahoe, Nevada.

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

Filed on $10,000 Each 1944.
Amended $3,000 additional 1944 Each.
B&L Smoke Shop, 50 Mason, San Francisco.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 ..... $3,760.00

7. How much have you paid on your 1944 income tax?
(B) By payments on 1944 Declaration of Estimated Tax. Paid on original taxpayers figures.....Enter total here 2,570.00

8. If your tax (item 6) is larger than payments (item 7) enter Balance of Tax Due here..... $1,190.00

9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here.....Int. 166.60

$1,356.60

If you filed a return for a prior year, what was the latest year? 1943.

To which Collector's office was it sent? Reno.

To which Collector's office did you pay amount claimed in item 7 (B), above? Reno.

Is your wife (or husband) making a separate return for 1944? Yes.

If "Yes," write below:

Name of wife (or husband) Elmer F. Remmer.

Collector's office to which sent Reno.

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Tax Computation—For Persons Not Using Tax Table on Page 2

1.	Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$13,000
2.	Enter Deductions (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000 or more and deductions are not itemized, enter the standard deduction of $500)	500
3.	Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$12,500
4.	Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	500
5.	Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income	$12,000
6.	Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here	$ 3,400
7.	Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$12,500
8.	Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)	500
9.	Subtract line 8 from line 7, and enter the difference here	$12,000
10.	Enter here 3 percent of line 9. This is your Normal Tax	$ 360
11.	Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)	$ 3,760
15.	Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax	$ 3,760

[Endorsed]: Filed December 6, 1951.

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DEFENDANT'S EXHIBIT E-1 (For Identification)

Final Escrow Receipt and Release
Reno, Nevada, March 2, 1949

Escrow No. 1541

(Names of parties to escrow) Cal Neva - Adler.

The undersigned hereby acknowledge receipt of the following:

(1) Cashier's check No. 17849 in the sum of $25,000.00, payable to the order of J. B. Scarlett.

in full settlement of all moneys and/or documents due them under the above-entitled escrow, and declare the purposes of this escrow completely fulfilled, acknowledging that all of their rights, interest and equities arising out of said escrow, or otherwise, have been fully observed by the First National Bank of Nevada, Reno, Nevada.

Main Branch, Reno, Nevada.

The undersigned hereby release the said First National Bank of Nevada, Reno, Nevada, from all liability and responsibility thereunder.

/s/ J. B. SCARLETT.

[Endorsed]: Filed February 6, 1952.

DEFENDANT'S EXHIBIT F

May 23, 1945.

Mr. G. E. Simmons
313 San Pablo Avenue
El Cerrito, California

Dear Mr. Simmons:

Will you please let me know the amount of the distributive share of Mr. E. F. Remmer's partnership return for the 21 Club in El Cerrito for the year 1944. We have to have these figures as I may have to file an amended Income Tax Form 1040.

Thanking you for your prompt attention in this matter. I might add that I was in your office about a year ago with Mr. Willie Kyne. With the writer's kindest personal regards.

Sincerely yours,

PAT MOONEY,
Chief Field Deputy.

PM:kc

[Endorsed]: Filed December 6, 1951.

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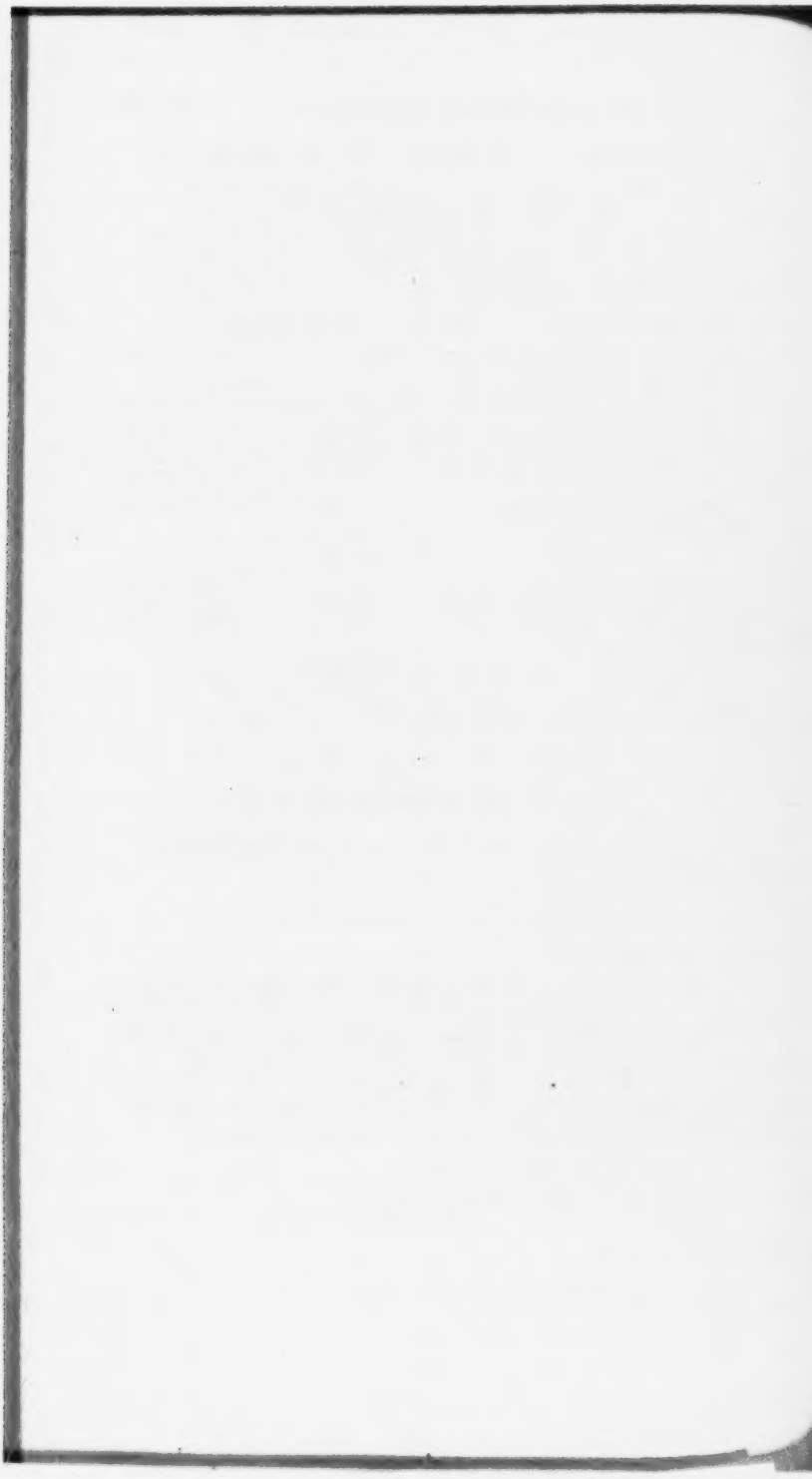

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DEFENDANT'S EXHIBIT F-1 (for identification)
[Endorsed]: Filed February 6, 1952.

BANK OF NEVADA No. 17849

MAR 2 1949 19

$ 25,000.00

DOLLARS

PAY

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DEFENDANT'S EXHIBIT G

C.F.D. May 10, 1946.

Mr. G. E. Simmons
Public Accountant
313 San Pablo Ave.
El Cerrito, California

Dear Mr. Simmons:

I was unable to contact Mr. Lewis, 333 Montgomery St., San Francisco, regarding the partnership returns of Elmer F. Remmer for the 21 Club in El Cerrito.

You may have the returns in your possession at this time and no doubt you can give me the distributive share of Mr. Remmer's net income. It is necessary for me to have these figures in order to complete Mr. Remmer's return.

Thanking you for your courtesy in this matter,

Very truly yours,

....., Chief Field Deputy.

PM/m

[Endorsed]: Filed December 6, 1951.

DEFENDANT'S EXHIBIT G-1

April 8, 1948.

We have examined Mr. Remmer's income tax returns for the years 1943 through 1946 and we have talked with Mr. Remmer at some length and also with his accountant, Mr. Maundrell.

After such examination and discussion we are of the opinion that Mr. Remmer has made an honest return of all taxable income for the years 1942 through 1947. We have been informed by the agents of the Bureau of Internal Revenue that there were no specific charges against Mr. Remmer as to any acts of income tax avoidance or evasion and the agents refuse to state in what particulars, if any, that Mr. Remmer had failed to make a return of taxable income.

Under these circumstances, we do not feel that Mr. Remmer should make any statement to agents of the Bureau or submit to questioning by such agents as to any matters pertaining to his returns for the years 1942 through 1947. At such time as the Bureau, or its agents, in the course of their investigation are ready to state that Mr. Remmer has not returned certain income as taxable, then Mr. Remmer will make a full statement to meet any such charge or charges.

[Endorsed]: Filed February 7, 1952.

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DEFENDANT'S EXHIBIT H

March 7, 1947.

Willie Kyne
50 Mason St.
San Francisco, California

Re: Elmer F. Remmer

Dear Willie:

With Herb Caen's permission we are enclosing Income Tax Extension blanks for Mr. Remmer and Helen L. Remmer for both their signatures.

While we are discussing taxes find out the exact cost to Bones of the Menlo Club. As he may take part of his cost over the period of his lease. In other words, to recover his Capital Investment. Then we will file an amended return for the eight months he owned the club in 1945. We may be able to save him quite a little money over the taxable years. On the other hand, he may have deducted this. Item on the partnership return filed for year 1945. You may make the statement that your books are not fully made up for the year 1946 as a reason for the extension.

With kindest regards to Bones and yourself.

Sincerely,

PAT MOONEY.

[Endorsed]: Filed December 6, 1951.

DEFENDANT'S EXHIBIT I (For Identification)

Amortization of Purchase Price Item 22:

Elmer F. Remmer purchased the Menlo Club San Francisco, on May 1, 1945, for the sum of $175,000.00; which included merchandise on hand $31,198.50; which after deducting the last mentioned amount leaves a capital investment of $143,801.50 spread over a five year lease period; Amortization, year 1946, $28,760.15.

Item 24:

Laundry	$ 997.62
General Miscellaneous Expenses	85.30
Bank Charges and Returned Checks	2,960.43
Garbage Collection	80.00
Supplies, Janitor and Miscellaneous	745.31
Light and Power	1,115.46
Telephone and Telegraph	285.48
Playing Cards	12,332.34
Poker Chips	1,000.00
Stationery and Printing	151.45
Water	139.51
Total Item 24	$19,892.90

[Endorsed]: Filed December 6, 1951.

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DEFENDANT'S EXHIBIT L-1 (For Identification)

Form 872—Treasury Dept., Int. Rev. Serv. Original

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

May 4, 1950.

In pursuance of the provisions of existing Internal Revenue Laws One Eighty Six Club, c/o Elmer F. Remmer, a taxpayer (or taxpayers) of 50 Mason Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended June 30, 1943, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1951, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

.....
Taxpayer.[1]

.....
Taxpayer.[1]

[Seal][2] By.....

.....
Commissioner of Internal Revenue.

By..... .....
(Date)

[1] This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2] If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

O'CONNELL.

[Endorsed]: Filed December 7, 1951.

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DEFENDANT'S EXHIBIT L-2 (For Identification)

Form 872—Treasury Dept., Int. Rev. Serv. Original

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

May 4, 1950.

In pursuance of the provisions of existing Internal Revenue Laws One Eighty Six Club, c/o Elmer F. Remmer, a taxpayer (or taxpayers) of 50 Mason Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended June 30, 1944, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1951, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

.....
Taxpayer.[1]

.....
Taxpayer.[1]

[Seal][2] By.....

.....
Commissioner of Internal Revenue.

By..... .....
(Date)

---

[1] This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2] If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

O'CONNELL.

[Endorsed]: Filed December 7, 1951.

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DEFENDANT'S EXHIBIT L-3 (For Identification)

Form 872—Treasury Dept., Int. Rev. Serv. Original

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

May 4, 1950.

In pursuance of the provisions of existing Internal Revenue Laws One Eighty Six Club, c/o Elmer F. Remmer, a taxpayer (or taxpayers) of 50 Mason Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended June 30, 1945, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1951, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

.....
Taxpayer.[1]

.....
Taxpayer.[1]

[Seal][2] By.....

.....
Commissioner of Internal Revenue.

By..... .....
(Date)

[1] This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2] If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

O'CONNELL.

[Endorsed]: Filed December 7, 1951.

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DEFENDANT'S EXHIBIT L-4 (For Identification)

Form 872—Treasury Dept., Int. Rev. Serv. Original

Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax

May 4, 1950.

In pursuance of the provisions of existing Internal Revenue Laws One Eighty Six Club, c/o Elmer F. Remmer, a taxpayer (or taxpayers) of 50 Mason Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended June 30, 1946, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1951, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

.....
Taxpayer.[1]

.....
Taxpayer.[1]

[Seal][2] By.....

.....
Commissioner of Internal Revenue.

By..... .....
(Date)

---

[1] This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

[2] If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

O'CONNELL.

[Endorsed]: Filed December 7, 1951.

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DEFENDANT'S EXHIBIT M-1

Accounting Statements, Prepared by Lawrence J. Semenza

Elmer F. and Helen Remmer

Comparison of Gross Income Reported in Individual Income Tax Returns With Income From Various Enterprises as Shown by Analysis of Books, Records, and Other Evidence Introduced in Case of U. S. vs. Remmer For Years 1944, 1945, and 1946

Source of Income	1944	1945	1946	Total
B-R Smoke Shop	$ 5,917.43	.....	($1,329.68)	$ 4,587.75
Day-Night Cigar Store	1,092.51	$ 1,303.77	803.47	3,199.75
110 Eddy Street	3,170.29	5,532.50	(827.31)	7,875.48
Menlo Club	.....	40,254.90	36,876.36	77,131.26
Transit Smoke Shop	.....	.....	1,046.01	1,046.01
21 Club and San Diego Social Club	(184.34)	25,932.73	(3,353.09)	22,395.30
311 Club	1,257.18	584.92	.....	1,842.10
186 Club (salary)	.....	1,350.00	.....	1,350.00
Net gambling gains	.....	.....	5,000.00	5,000.00
Total	11,253.07	74,958.82	38,215.76	124,427.65
Gross income included in individual income tax returns	20,000.00	71,808.27*	37,254.31	129,062.58
(Understatement) or overstatement	$8,746.93	($3,150.55)	($961.45)	$4,634.93

* Includes commissions paid to employees in the total amount of $5,948.91, as shown in income tax return filed.

Elmer F. and Helen Remmer

List of Assets and Liabilities, to the Extent Shown by Evidence in U. S. vs. Remmer, at December 31, 1943, 1944, 1945, and 1946

Item	Assets	12/31/1943	12/31/1944	12/31/1945	12/31/1946
1.	Bank of America, Tracy Branch	$ 366.90	$ 1,576.90	$ 1,966.15	$ 1,403.69
2.	Bank of America, Grand Lake Branch, Oakland, Calif.	.....	.....	485.90	439.75
3.	United States Government Bonds	5,062.50	10,481.25	17,081.25	17,081.25
4.	Due from Hazel Harris	.....	.....	1,250.00	250.00
5.	Due from Mayris Chaney	2,500.00	.....	.....	.....
6.	Due from Albert Villaudy	8,000.00	5,400.00	3,400.00	3,400.00
7.	Equity in B-R Smoke Shop	1,706.69	1,817.61	4,165.71	1,216.58
8.	Equity in Day-Nite Cigar Store	13,661.68	27,949.53	30,310.27	31,113.74
9.	Equity in 110 Eddy Street	28,956.18	35,765.14	25,647.64	24,820.33
10.	Equity in Menlo Club	.....	.....	95,127.59	113,433.39
11.	Equity in Transit Smoke Shop	.....	.....	.....	15,966.57
12.	Equity in 21 Club and San Diego Social Club	11,081.29	16,603.81	17,854.93	18,133.23
13.	Cal-Neva, Inc., capital stock	.....	.....	.....	466,666.66
14.	Mountain City Consolidated Copper Co., stock	.....	.....	.....	2,400.00
15.	Gallagher and Burton whiskey	33,194.42	26,728.63	22,179.95	24,952.44
16.	Moraga Estates property	19,166.19	19,166.19	19,166.19	19,166.19
17.	Richmond Annex property	25,154.90	25,154.90	37,296.25	37,296.25
18.	Moraga Highlands property	.....	.....	10,000.00	20,119.00
19.	Autos	.....	468.40	468.40	2,185.31
20.	Cash in safe deposit boxes and safes	?	?	?	?
	Total assets	$148,850.75 Plus cash	$171,112.36 Plus cash	$286,400.23 Plus cash	$800,044.38 Plus cash

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Item	Liabilities				
21.	Due to Cal-Neva, Inc.	23,152.77	18,361.68	83,732.33	60,742.39
22.	Notes payable to Bank of America on Moraga Estates	4,000.00	3,000.00	.....	.....
23.	Due to Graham and McKay on purchase of Cal-Neva, Inc., stock	.....	.....	.....	366,666.66
24.	Due to Ogden F. Monahan	1,800.00	1,800.00	.....	.....
25.	Due to William J. Graham	.....	.....	.....	10,000.00
26.	Due to R. L. Jeffress	.....	.....	.....	50,000.00
27.	Due to Gene Schriber	.....	.....	125,000.00	75,000.00
28.	Due to Wm. Remmer	358.15	1,028.06	1,084.49	9,592.88
29.	J. B. Scarlett	.....	.....	.....	?*
	Total liabilities	29,310.92	24,189.74	209,816.82	*572,001.93
	Net worth	$119,539.83 Plus cash	$146,922.62 Plus cash	$ 76,583.41 Plus cash	$228,042.45 Plus cash

*Liabilities would be increased and net worth decreased by any liability determined to be due Mr. Scarlett at December 31, 1946.

Elmer and Helen Remmer
Changes in Net Worth, 1944 to 1946, Inclusive

	1944	1945	1946	Three Years Combined
End of period	$146,922.62 Plus cash	$ 76,583.41 Plus cash	$228,042.45 Plus cash	$228,042.45 Plus cash
Beginning of period	119,539.83 Plus cash	146,922.62 Plus cash	76,583.41 Plus cash	119,539.83 Plus cash
Increase or (decrease)	$ 27,382.79 Plus or min's ch'ge in cash	($70,339.21) Plus or min's ch'ge in cash	$151,459.04 Plus or min's ch'ge in cash	$108,502.62 Plus or min's ch'ge in cash

Schedule No. 1

B-R Smoke Shop
Assets, Liabilities, and Net Worth December 31, 1943, 1944, 1945, and 1946

Assets	12/31/1943	12/31/1944	12/31/1945	12/31/1946
Cash on hand—bankroll (Pritchett's testimony)	.....	.....	$ 5,000.00	.....
Markers in bankroll*	.....	.....	.....	.....
Bank of America, Day & Night Branch (Ex. 29)	$ 913.38	$ 324.56	.....	.....
Crocker First National Bank (Ex. 23)	.....	406.91	11.27	.....
Crocker First National Bank (Ex. 24)	.....	.....	833.39	$ 793.39
Cost of business purchased from Sherwood, per testimony of Kyne	2,500.00	2,500.00	2,500.00	2,500.00
Safe (Ex. 139)	.....	425.00	425.00	425.00
Office improvements, fixtures, and equipment (Maundrell's testimony)	.....	.....	7,489.76	8,600.20
	$3,413.38	$3,656.47	$16,259.42	$12,318.59

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Liabilities				
Due Menlo Club	.....	.....	$ 7,489.76	$ 8,600.20
Depreciation reserve (Ex. 174)	.....	$ 21.25	438.23	1,285.22
	.....	$ 21.25	$ 7,927.99	$ 9,885.42
Net worth	$3,413.38	3,635.22	8,331.43	2,433.17
	$3,413.38	$3,656.47	$16,259.42	$12,318.59

*According to testimony of Pritchett, there were $15,000.00 of markers in bankroll at December 31, 1945. On a cash basis, if the markers represented unpaid bets, they would not be considered an asset at December 31, 1945. On an accrual basis, the markers would be considered an asset as long as they were collectible.

Partners' Capital Accounts				
Remmer	$1,706.69	$1,817.61	$4,165.71	$1,216.58
Kyne	853.34	908.81	2,082.86	608.29
Lando	853.35	908.80	2,082.86	608.30
	$3,413.38	$3,635.22	$8,331.43	$2,433.17

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Schedule No. 2

Day-Nite Cigar Store

Balance Sheet and Partners' Capital Accounts
December 31, 1943, 1944, 1945, and 1946

Balance Sheet

Assets	12/31/1943	12/31/1944	12/31/1945	12/31/1946
Bank of America	($ 973.87)	$ 2,383.26	$ 161.07	$ 1,069.51
Cash on hand	.....	965.25	.....	.....
Cash change fund	.....	200.00	200.00	202.20
Prepaid insurance	226.70	165.70	434.00	.....
Prepaid licenses and taxes	234.10	191.00	49.00	.....
Deposits	104.50	104.50	104.50	104.50
Inventory	11,889.00	24,747.27	23,694.59	22,466.44
Accounts receivable				
186 Club	.....	.....	3,588.95	3,418.07
50 Mason Street	.....	.....	616.44	620.16
Equipment	10,400.00	10,400.00	10,400.00	10,400.00
	21,880.43	39,156.98	39,248.55	38,280.88

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Liabilities				
Accrued sales tax	111.97	282.36	218.80	.....
Accrued payroll tax	417.58	310.45	504.68	.....
Accrued miscellaneous expense	.....	62.00	.....	.....
Sales tax collected	254.06	.....	.....	.....
Reserve for depreciation	208.33	333.30	541.62	751.62
Due—110 Eddy Street	.....	.....	.....	(123.70)
				880.67
	991.94	988.11	1,265.10	1,508.59
Net worth	$20,888.49	$38,168.87	$37,983.45	$36,772.29
Partners' Capital Accounts				
Wm. E. Kyne	$ 2,835.27	$ 3,927.78	$ 2,981.55	$ 222.52
Sylvan Lando	2,835.27	3,927.78	5,231.55	6,035.02
Elmer F. Remmer	13,661.68	27,949.53	30,310.27	31,113.74
	$19,332.22	$35,805.09	$38,523.37	$37,371.28

Day-Nite Cigar Store

Balance Sheet and Partners' Capital Accounts
December 31, 1943, 1944, 1945, and 1946

Partners' Capital Accounts

	Wm. E. Kyne	Sylvan Lando	Elmer Remmer*	Total
Balance, December 31, 1943	.....	.....	$15,705.00	$15,705.00
Distribution of 1943 profit	$2,835.27	$2,835.27	2,835.26	8,505.80
	2,835.27	2,835.27	18,540.26	24,210.80
Less: Drawings—1943	.....	.....	4,878.58	4,878.58
Balance after adjustments, December 31, 1943	2,835.27	2,835.27	13,661.68	19,332.22
Net capital contributions—1944	.....	.....	20,097.71	20,097.71
Distribution of 1944 profit	1,092.51	1,092.51	1,092.51	3,277.53
	3,927.78	3,927.78	34,851.90	42,707.46
Less: Drawings—1944	.....	.....	6,902.37	6,902.37
Balance, December 31, 1944	3,927.78	3,927.78	27,949.53	35,805.09
Net capital contributions—1945	.....	.....	3,960.29	3,960.29
Distribution of 1945 profit	1,303.77	1,303.77	1,303.77	3,911.31
	5,231.55	5,231.55	33,213.59	43,676.69
Less: Drawings—1945	2,250.00	.....	2,903.32	5,153.32
Balance, December 31, 1945	2,981.55	5,231.55	30,310.27	38,523.37
Distribution of 1946 profit	803.47	803.47	803.47	2,410.41
	3,785.02	6,035.02	31,113.74	40,933.78
Less: Drawings—1946	3,562.50	.....	.....	3,562.50
Balance, December 31, 1946	$ 222.52	$6,035.02	$31,113.74	$37,371.28

*In view of Kyne's testimony that Remmer provided the capital, the Wm. E. Kyne investment account has been included in the Remmer capital account.

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Schedule No. 2—Page 3

Day-Nite Cigar Store

Statement of Income and Expense for Year Ended December 31, 1945

les		$104,095.49
st of Sales		84,662.46
Gross profit on sales		19,433.03
erating Expense		
Accounting	$ 495.00	
Insurance	614.27	
Bank charges	8.45	
Laundry	23.20	
Light, gas, and power	401.05	
Rent	1,800.00	
Repairs	37.20	
Scavenger	45.00	
Supplies	100.50	
Taxes and licenses	1,405.03	
Telephone	147.83	
Wages	11,554.77	
Water	38.34	
Window cleaning	36.00	
Miscellaneous expense	91.06	
Depreciation	208.32	17,006.02
Net operating income		2,427.01
her Income		
Miscellaneous income		1,484.30
Net income for period		$ 3,911.31

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Schedule No. 2—Page 4

Day-Nite Cigar Store

Statement of Income and Expense for
Year Ended December 31, 1946

Sales		$98,529.66
Cost of Sales		
Inventory, January 1, 1946	$ 23,694.59	
Purchases	78,640.31	
	102,334.90	
Less: Inventory, December 31, 1946	22,466.44	79,868.46
Gross profit on sales		18,661.20
Operating Expense		
Supplies	74.69	
Window washing	33.00	
Laundry	22.89	
Repairs	34.59	
Wages	11,811.29	
Rent	2,400.00	
Light, power, and water	867.50	
Telephone and telegraph	203.46	
Taxes	952.42	
Bank charges	8.83	
Office expense	425.00	
Donations	125.00	
Services	15.87	
Insurance	461.69	
Depreciation	210.00	
Payroll taxes	249.13	17,895.36
Net operating income		765.84
Other Income		1,644.57
Net income for period		$ 2,410.41

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Schedule No. 3

110 Eddy Street

Net Worth and Partners' Capital Accounts
December 31, 1943, 1944, 1945, and 1946

Assets	12/31/1943	12/31/1944	12/31/1945	12/31/1946
Bank of America—110 Eddy Street account	$ 3,946.62	.....	$ 6,141.46	($1,803.65)
Bank of America—Wm. E. Kyne account	3,565.51	$ 216.43	.....	.....
Bad check account	.....	376.62	26.10	.....
Cash change fund	400.00	1,600.00	1,400.00	1,400.00
Inventory	22,510.00	28,131.45	25,059.62	26,775.00
Furniture, fixtures, and equipment	10,495.90	11,759.61	13,496.39	13,496.39
Prepaid taxes	547.75	552.75	1,050.00	525.00
Prepaid insurance	333.93	160.00	428.36	328.36
Prepaid rent	210.00	210.00	210.00	.....
Liquor license	1,000.00	1,000.00	1,000.00	1,000.00
Due from Day-Nite Cigar Store	.....	.....	365.29	880.67
				(123.70)
	$43,009.71	$44,006.86	$49,177.22	$42,478.07

Liabilities	12/31/1943	12/31/1944	12/31/1945	12/31/1946
Accounts payable	$ 4,375.64	.....	.....	.....
Accrued expenses	.....	.....	$ 68.50	.....
Accrued payroll taxes	508.35	$ 735.71	844.93	.....
Accrued sales tax	203.81	227.01	.....	.....
Depreciation reserve	1,637.00	2,459.00	3,341.00	$ 4,361.00
	6,724.80	3,421.72	4,254.43	4,361.00
Net worth	36,284.91	40,585.14	44,922.79	38,117.07
	$43,009.71	$44,006.86	$49,177.22	$42,478.07
Capital Accounts—Per Books				
Wm. E. Kyne	.....	$ 3,170.29	$ 6,250.03	$11,782.53
Frank Cavani	.....	3,170.30	3,582.18	7,391.40
Clarence Bent	($3,206.02)	.....	.....	.....
Thos. C. Turner	.....	3,170.29	613.13	5,415.85
Elmer F. Remmer	.....	3,170.29	3,292.03	8,824.53
Wm. E. Kyne, trustee account	24,322.33	19,728.23	5,985.34	5,985.34
1942 undistributed profits	5,474.18	2,268.16	2,268.16	2,268.16
1943 net profit	10,275.73	10,275.73	.....	.....
1945 undistributed profits	.....	.....	22,130.00	.....
1946 undistributed loss	.....	.....	.....	(3,309.24)
	$36,866.22	$44,953.29	$44,120.87	$38,358.57

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110 Eddy Street

Net Worth and Partners' Capital Accounts
December 31, 1943, 1944, 1945, and 1946

Capital Accounts—As Adjusted	12/31/1943	12/31/1944	12/31/1945	12/31/1946
Wm. E. Kyne	$ 3,877.79	($1,184.69)	$ 3,212.92	$ 2,385.61
Frank Cavani	3,121.74	6,292.04	9,114.68	6,564.09
Clarence Bent	.....	.....	.....	.....
Thos. C. Turner	910.51	4,080.80	6,145.63	4,588.54
Elmer F. Remmer	28,956.18	35,765.14	25,647.64	24,820.33
	$36,866.22	$44,953.29	$44,120.87	$38,358.57

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Partners' Capital Accounts

	Clarence Bent	Wm. E. Kyne	Frank Cavani	Thos. C. Turner	Elmer F.* Remmer	Total
Balance, December 31, 1943	($3,206.02)	.....	.....	.....	$24,322.33	$21,116.31
Distribution of 1942 profit	3,206.02	$ 756.05	.....	.....	1,512.11	5,474.18
Distribution of 1943 profit	.....	3,121.74	$3,121.74	$ 910.51	3,121.74	10,275.73
Balance after adjustments, December 31, 1943	.....	3,877.79	3,121.74	910.51	28,956.18	36,866.22
Drawings—1944	.....	8,232.77	.....	.....	9,182.33	17,415.10
	.....	(4,354.98)	3,121.74	910.51	19,773.85	19,451.12
Capital contributions—1944	.....	.....	.....	.....	12,821.00	12,821.00
Distribution of 1944 profit	.....	3,170.29	3,170.30	3,170.29	3,170.29	12,681.17
Balance, December 31, 1944	.....	(1,184.69)	6,292.04	4,080.80	35,765.14	44,953.29
Drawings—1945	.....	1,134.89	2,709.86	3,467.67	15,650.00	22,962.42
	.....	(2,319.58)	3,582.18	613.13	20,115.14	21,990.87
Distribution of 1945 profits	.....	5,532.50	5,532.50	5,532.50	5,532.50	22,130.00
Balance, December 31, 1945	.....	3,212.92	9,114.68	6,145.63	25,647.64	44,120.87
Drawings—1946	.....	.....	1,723.28	729.78	.....	2,453.06
	.....	3,212.92	7,391.40	5,415.85	25,647.64	41,667.81
Distribution of 1946 loss	.....	827.31	827.31	827.31	827.31	3,309.24
	.....	$2,385.61	$6,564.09	$4,588.54	$24,820.33	$38,358.57

*In view of Kyne's testimony that Remmer provided the initial investment and cost of improvements, the Wm. E. Kyne trustee account has been included in the Remmer capital account.

Schedule No. 3—Page 3

110 Eddy Street
Profit and Loss Statement for the
Year Ended December 31, 1946

Income			
Sales		$59,863.07	
Less: Sales tax		1,455.03	$58,408.04
Cost of sales			
Inventory—January 1, 1946		25,059.62	
Purchases			
Merchandise	$ 1,605.57		
Beer and wine	5,709.97		
Liquor	14,084.52	21,400.06	
		46,459.68	
Less: Inventory—December 31, 1946		26,775.00	19,684.68
			38,723.36
Miscellaneous income			9.11
			38,732.47
Expenses			
Payroll		22,450.00	
Miscellaneous expenses		621.93	
Repairs and replacements		1,173.08	
Light, power, heat, and water		572.36	
Telephone and telegraph		185.29	
Cash over and short		(2.15)	
Rent		2,310.00	
Taxes and licenses		1,136.50	
Laundry and linen		370.08	
Supplies		194.90	
Advertising and printing		93.83	
Other expense (office, etc.)		1,190.98	
Donations		250.00	
Payroll taxes			
Social security	$225.87		
California unemployment tax	598.94	824.81	
Transfer of state liquor license		262.50	
Revenue stamps		57.30	
Insurance		798.84	
Depreciation		1,020.00	
Legal and accounting		3,098.18	
A.D.T. service		233.28	36,841.71
			1,890.76
Less: Salary of Frank Cavani			5,200.00
Loss for period			$ 3,309.24

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Schedule No. 4

Menlo Club
December 31, 1945, and December 31, 1946
Assets, Liabilities, and Net Worth

Assets	December 31, 1945		December 31, 1946	
Petty cash and change funds				
Menlo Bar } testimony Maundrell	$ 300.00		$ 300.00	
Tiny's Restaurant } p. 1270	500.00	$ 800.00	500.00	$ 800.00
Bankroll—Club—cash (Ex. 114 and 114 (a))		1,497.00		2,503.00
Bankroll—Club—markers (Ex. 114 and 114 (a))		8,503.00		7,500.00
Advances for construction and furniture at 50 Mason Street		7,489.76		8,600.20
Deposits, Pacific Gas & Electric Co. (Ex. 132 (b) and Ex. 133 N)		1,030.00		1,030.00
Deposit on lease (Ex. 132 A)		4,000.00		4,000.00
Merchandise inventories (Ex. 89, 90, 91, and Def. Ex. Y)		25,337.77		28,539.09
Cost of 10-year lease		100,000.00		100,000.00
Cost of other assets at acquisition	75,000.00			
Inventory at purchase (Ex. 89)	31,198.50	43,801.50		43,801.50
Neon sign (Ex. 132 C)		500.00		500.00
Equipment (Ex. 133 K)		920.00		920.00

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Crocker First National Bank (Ex. 27)	5,492.69		10,632.87	
Adjustment for outstanding checks and deposits in transit (Ex. 162 and 162 (a))	4,779.39	713.30	7,963.51	2,669.36
Improvements and replacements in 1946 (Ex. 134 (c), 135 (i), 136 (a), (b), (c), (d), (e), (f) (see Note 1)				2,355.16
Bank of America NT&SA—Menlo Club account (Ex. 34)				15,265.54
		$194,592.33		$218,483.85
Liabilities				
Reserve for amortization of lease		$ 6,666.67		$ 16,666.67
Reserve for depreciation (schedule attached)		5,951.53		15,139.34
Liability for checks issued in January, 1946, and January, 1947, which were entered in December, 1945, and December, 1946, disbursement record (Ex. 127, 128, and 129)		26,464.18		17,264.58
Total liabilities		39,082.38		49,070.59
Net worth		155,509.95		169,413.26
		$194,592.33		$218,483.85

Note 1. Some of the items included in this sum might also have been handled as expense. The testimony is not too clear on the individual items.

Menlo Club
December 31, 1945, and December 31, 1946
Partners' Capital Accounts

	Remmer	Kyne	Dito	Maundrell	Nelson	Fricker	Turner	Total
Investment in assets acquired May 1, 1945	$175,000.00							$175,000.00
Net profit for 1945 as revised	40,254.90	$15,095.59	$10,063.73	$10,063.73	$10,063.73	$10,063.73	$5,031.86	100,637.26
	215,254.90	15,095.59	10,063.73	10,063.73	10,063.73	10,063.73	5,031.86	275,637.26
Withdrawals in 1945	120,127.31							120,127.31
Balance, Dec. 31, 1945	95,127.59	15,095.59	10,063.73	10,063.73	10,063.73	10,063.72	5,031.86	155,509.95
Net profit for 1946 as revised	36,876.36	10,057.19		6,704.79	10,057.19		3,352.39	67,047.92
	132,003.95	25,152.78	10,063.73	16,768.52	20,120.92	10,063.72	8,384.25	222,557.87
Withdrawals in 1946	17,382.56	16,005.50	4,490.57	3,997.80	3,378.29	3,599.56	2,130.33	50,984.61
Contributions	1,188.00	324.00		216.00	324.00		108.00	2,160.00
	18,570.56	16,329.50	4,490.57	4,213.80	3,702.29	3,599.56	2,238.33	53,144.61
Balance, Dec. 31, 1946	$113,433.39	$ 8,823.28	$ 5,573.16	$12,554.72	$16,418.63	$ 6,464.16	$6,145.92	$169,413.26

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Reserve for Depreciation

	Cost	Rate	Depreciation 1945	Depreciation 1946	Accumulated Reserve Dec. 31, 1946
Assets acquired at May 1, 1945	$43,801.50	*20% (8 mos.)	$5,840.20	$8,760.30	$14,600.50
Equipment acquired—1945	920.00	10% (8 mos.)	61.33	92.00	153.33
Improvements and replacements—1946	2,355.16	20%	.... (6 mos.)	235.51	235.51
Neon sign—1945	500.00	20% (6 mos.)	50.00	100.00	150.00
			$5,951.53	$9,187.81	$15,139.34

*The assets acquired at May 1, 1945, consist of an on sale liquor permit as well as bar, restaurant, and club room equipment. In view of the fact that the equipment acquired was used, an estimated remaining life of five years has been used for depreciation purposes. This estimated life is based on the fact that restaurant operators acquiring new equipment commonly use an estimated life of eight years; therefore, an estimated life of five years for used equipment is reasonable.

The depreciation for each year is, however, overstated due to the fact that the liquor permit is not an asset subject to depreciation. No evidence has been submitted as to the value of the permit at date of acquisition.

Menlo Club
December 31, 1945, and December 31, 1946

Computation of Revised Net Income and Determination of Cash Withdrawn From Business Year Ended December 31, 1945

Gross income per return and amended return filed		$266,164.50
Expenses per return as amended excluding depreciation and amortization of leasehold	$141,182.14	
Depreciation as adjusted	5,951.53	
Amortization of leasehold	6,666.67	153,800.34
Net income for year as revised		112,364.16
Less: Salaries of partners		11,726.90
Net income to be allocated to partners		$100,637.26

Cash to Be Accounted for at December 31, 1945

Net profit as shown above		$100,637.26
Add back non-cash items		
Depreciation	$ 5,951.53	
Amortization of leasehold	6,666.67	
Reduction in inventory between May 1, 1945, and December 31, 1945	5,860.73	
Checks issued in January, 1946, recorded as December, 1945, disbursements but not shown as outstanding at December 31, 1945	26,464.18	44,943.11
		145,580.37

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Less: Following cash funds and assets for which cash was used during year		
Petty cash funds	800.00	
Bankroll	10,000.00	
Advances to 50 Mason Street	7,489.76	
Deposits—Pacific Gas & Electric Co.	1,030.00	
Deposit on lease	4,000.00	
Neon sign	500.00	
Equipment	920.00	
Balance in Crocker National Bank	713.30	25,453.06
Cash to be accounted for		120,127.31
Cash withdrawn from business by Remmer		120,127.31
Balance on hand December 31, 1945		.....

Menlo Club
December 31, 1945, and December 31, 1946

Computation of Revised Net Income and Determination of Cash Withdrawn From Business Year Ended December 31, 1946

Gross income per return and amended return		$369.781.85
Expenses per return excluding depreciation and amortization	$274,225.28	
Less: Items of repairs and replacements considered to be capital items rather than expense	2,355.16	
	271,870.12	
Depreciation	9,187.81	
Amortization of leasehold	10,000.00	291,057.93
Net income		78,723.92
Less: Partners' Salaries		11,676.00
		$ 67,047.92

Cash to Be Accounted for at December 31, 1946

Net profit as shown above		$ 67,047.92
Add back non-cash items		
Depreciation	$ 9,187.81	
Amortization of leasehold	10,000.00	
Checks issued in January, 1947, recorded as December, 1946, disbursements but not shown as outstanding at December 31, 1946	17,264.58	36,452.39

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Less: Following items for which cash was used during year			
Advances for 50 Mason Street		1,110.44	
Difference between inventories January 1, 1946, and December 31, 1946		3,201.32	
Increase in balance on deposit in Crocker National Bank during year		1,956.06	
Improvements and replacements capitalized in 1946		2,355.16	
Deposit in Bank of America at December 31, 1946		15,265.54	
Partners' drawings			
Dito	$ 4,490.57		
Nelson	3,378.29		
Maundrell	3,997.80		
Turner	2,130.33		
Fricker	3,599.56		
Kyne	16,005.50	33,602.05	
Donations		2,160.00	
Increase in bankroll		3.00	
Checks paid in 1946 entered in 1945		26,464.18	86,117.75
Withdrawn by Remmer			$ 17,382.56

Schedule No. 5

Transit Smoke Shop

Balance Sheet
December 31, 1946

Assets		
Cash		$ 627.04
Advances		585.25
Merchandise inventory		8,676.28
Furniture, fixtures, off sale permit and lease	$22,000.00	
Less: Depreciation reserve	33.33	21,966.67
		$31,855.24
Liabilities and Net Worth		
Liabilities		.....
Net worth		
Gordon Partee, capital		($ 77.89)
Wm. E. Kyne, capital		15,966.56
E. Remmer, capital		15,966.57
		$31,855.24

Analysis of Partners' Capital Accounts

	Remmer	Kyne	Partee	Total
Investment, November 1, 1946	$16,005.51	$16,005.50	.....	$32,011.01
Net profit—1946	1,054.81	1,054.81	$2,109.61	4,219.23
	17,060.32	17,060.31	2,109.61	36,230.24
Less: Withdrawals	1,000.00	1,000.00	2,000.00	4,000.00
Donations	93.75	93.75	187.50	375.00
	1,093.75	1,093.75	2,187.50	4,375.00
Capital accounts, Dec. 31, 1946	$15,966.57	$15,966.56	($77.89)	$31,855.24

Schedule No. 5—Page 2

Transit Smoke Shop

Statement of Income and Expense
November 1, 1946, Through December 31, 1946

Gross Receipts	$21,952.15
Less: State sales tax	367.02
	21,585.13

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Cost of Sales		
Inventory—November 1, 1946	$ 8,511.01	
Purchases	12,912.34	
	21,423.35	
Less: Inventory—December 31, 1946	8,676.28	12,747.07
Gross profit		8,838.06
Operating Expenses		
Advertising	5.00	
Insurance	88.85	
Lights and water	62.71	
Operating supplies	93.09	
Payroll taxes	107.03	
Telephone	31.48	
Rent	1,000.00	
Salaries	2,886.30	
Services	44.00	
Repairs	100.87	
Depreciation	33.33	
Miscellaneous expense	138.44	
Bank charges	7.73	
Bad checks	20.00	4,618.83
Net income for tax purposes		4,219.23
Less: Donations		375.00
Net income for period		$ 3,844.23

Determination of Cash at December 31, 1946

Receipts—November 1 through December 31, 1946		
E. Remmer		$ 1,500.00
November receipts		10,658.39
December receipts		11,293.76
		23,452.15
Less: Disbursements		
November	$10,922.94	
December	11,902.17	22,825.11
Cash at December 31, 1946		$ 627.04

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Cal-Neva, Inc. Schedule No. 6

Analysis of Elmer Remmer Account No. 10
Giving Effect to Entries as of Years in Which Transactions Occurred Rather Than as of Date of Entries in Cal-Neva, Inc., Records May 1, 1937, to April 30, 1948 (Ex. 146)

Date		Debit	Credit	Debit or (Credit) Balance
5/ 1/1937	Balance brought forward	$ 5,292.40		$ 5,292.40
9/20/1937	Cash advance	600.00		5,892.40
8/ 2/1937	Cash advance	1.50		5,893.90
9/30/1937	Flowers for Blight funeral	15.45		5,909.35
10/31/1937	Advance—San Francisco News	1.12		5,910.47
10/31/1937	Collection from A. Larsen not turned in to office	175.00		6,085.47
8/12/1938	Advance by check No. 3337	1,000.00		7,085.47
9/30/1938	Advance by check No. 3626	1,500.00		8,585.47
11/30/1938	Collector of Internal Revenue for E. Remmer income tax	430.00		9,015.47
9/30/1939	Cash advances during 1939 season	2,530.00		11,545.47
11/29/1939	Placer County taxes—E. Remmer	4.98		11,550.45
2/29/1940	Telegraphic transfer to E. Remmer at Kansas City	750.00		12,300.45
	Telegraph charges	3.86		12,304.31
4/30/1940	Credit E. Remmer for funds he advanced for account of McKay and Graham		$ 400.00	11,904.31
10/30/1940	Cash advances during 1940 season	3,650.00		15,554.31
11/21/1940	Payment made on purchases at J. C. Penney Co.	39.00		15,593.31

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Date		Debit	Credit	Debit or (Credit) Balance
9/ 2/1941	Payment made to J. B. Sullivan	2,000.00		17,593.31
9/30/1941	Cash advances	27.96		17,621.27
	Cash advance	4,000.00		21,621.27
9/30/1942	Placer County taxes—E. Remmer	4.45		21,625.72
4/30/1943	Payment to S. B. Denton, County Treasurer	12.32		21,638.04
	Cash advance	1.46		21,639.50
	Cash advance	2,500.71		24,140.21
4/30/1943	Balance due on liquor sold E. Remmer, less amount previously paid	6,219.01		30,359.22
5/14/1943	Cash advanced by E. Remmer—currency		5,000.00	25,359.22
			Schedule No. 6—Page 2	
	Balance brought forward			25,359.22
6/19/1943	Payment to Transcontinental and Western Air Lines	293.55		25,652.77
7/18/1943	Advance by E. Remmer—check on 11-177		2,000.00	23,652.77
11/26/1943	Advance by E. Remmer—check on 11-177, $7,500.00; check on 11-1, $1,000.00		8,500.00	15,152.77
12/31/1943	[1]Loans made to Albert Villaudy in 1941 and 1943 charged to E. Remmer on April 30, 1945	8,000.00		23,152.77
2/23/1944	Advance by E. Remmer—check on 11-177		2,500.00	20,652.77
3/30/1944	Advance by E. Remmer—currency		2,000.00	18,652.77

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Date		Debit	Credit	Debit or (Credit) Balance
7/14/1944	Payment to T.W.A.	23.98		18,676.75
	Paid out of petty cash	1.00		18,677.75
8/23/1944	Paid to Federal Reserve Bank	750.00		19,427.75
9/ 1/1944	Collector of Internal Revenue	1,740.91		21,168.66
11/22/1944	Paid to Bank Club—Remmer account	1,750.00		22,918.66
12/30/1944	Paid to Bank Club—Remmer account	2,968.00		25,886.66
12/31/1944	[2]To reverse entry of July 14, 1944, made April 30, 1945		24.98	25,861.68
	[3]Cash advanced during 1944 season		7,500.00	18,361.68
7/19/1945	Check to Helen Remmer	2,000.00		20,361.68
8/ 8/1945	Collector of Internal Revenue	5,000.00		25,361.68
12/31/1945	[4]Charge Remmer with payment on loan to Mayris Chaney not remitted to corporation (advanced August 28, 1944, collected 1945 season)	2,500.00		27,861.68
	[5]To charge E. Remmer with cash advanced to him during 1945 season	51,086.34		78,948.02
	[6]To adjust prior entry for bad checks which adjusts unaccounted for cash		2,215.69	76,732.33
12/31/1945	[7]To charge E. Remmer with amounts that had been charged in error to Bank Club	7,000.00		83,732.33
5/15/1946	Currency		76,732.33	7,000.00
6/..../1946	Currency		7,000.00	.....
7/28/1946	Collector of Internal Revenue	7,724.11		7,724.11

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Date		Debit	Credit	Debit or (Credit) Balance
	Balance brought forward			7,724.11
8/31/1946	Collector of Internal Revenue	5,324.11		13,048.22
8/..../1946	Mountain City Consolidated Copper Co.	2,400.00		15,448.22
9/24/1946	W. J. Graham	50,000.00		65,448.22
9/24/1946	J. C. McKay	50,000.00		115,448.22
9/28/1946	Telegraphic transfer—Day-Night Branch		50,000.00	65,448.22
4/30/1947	Withdrawals during 1946 season	62,594.17		128,042.39
4/30/1947	Advanced by E. Remmer		20,000.00	108,042.39
10/26/1941	Currency deposited		47,300.00	60,742.39
1/16/1947	E. Remmer	20,000.00		80,742.39
2/ 8/1947	E. Remmer	20,000.00		100,742.39
	E. Remmer	15,000.00		115,742.39
3/28/1947	E. Remmer—telegraphic transfer		5,000.00	110,742.39
5/12/1947	Currency deposited		5,000.00	105,742.39
6/11/1947	Currency deposited		14,000.00	91,742.39
8/27/194.	Telegraphic transfer		15,000.00	76,742.39
9/16/1947	Currency deposited		25,000.00	51,742.39
10/ 7/1947	Telegraphic transfer		15,000.00	36,742.39
10/28/1947	Telegraphic transfer		15,000.00	21,742.39
1/26/1948	Currency deposited		6,000.00	15,742.39
2/13/1948	Check on First National Bank of Nevada, Main Office, Reno, Nevada		5,000.00	10,742.39
4/30/1948	Balance at close of corporation's fiscal year			10,742.39

Schedule No. 6—Page 4

Cal-Neva, Inc.

Analysis of Elmer Remmer Account No. 10
Giving Effect to Entries as of Years in Which Transactions Occurred Rather Than as of Date of Entries in Cal-Neva, Inc., Records May 1, 1937, to April 30, 1948 (Ex. 146)

Summary of Amounts Owed to Cal-Neva, Inc., by Elmer Remmer as of December 31, 1943, 1944, 1945, and 1946

Date	Amount Owed	Net Amount Borrowed or (Paid Back) During Year
December 31, 1943	$23,152.77	
December 31, 1944	18,361.68	($ 4,791.09)
December 31, 1945	83,732.33	65,370.65
December 31, 1946	60,742.39	(22,989.94)
Net amount borrowed during 1944, 1945, and 1946		$37,589.62

Notes

[1] On April 30, 1945, E. Remmer Account No. 10 was debited with the following loans made to Albert Villaudy:

December, 1941	$2,500.00
April, 1943	3,500.00
July, 1943	2,000.00
	$8,000.00

This adjustment was made on the basis that the amounts were loaned to Mr. Villaudy by E. Remmer rather than the corporation. Therefore, the amount due Cal-Neva, Inc., by E. Remmer at December 31, 1943, has been increased by the amount of these loans.

[2] To correct amounts charged improperly to E. Remmer on July 14, 1944, consisting of:

$23.98
1.00
$24.98

[3] To reflect cash advanced during 1944 season as having been made in that calendar year rather than as of April 30, 1945, the end of the corporate fiscal year, the date the amount was credited in the corporate records.

[4] To reflect the receipt of $2,500.00 by E. Remmer from Mayris Chaney in payment of loan made to her during 1944 season which she repaid during 1945 season and which was reflected in corporate records as of the close of the corporate fiscal year, April 30, 1946.

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[6] To reflect cash advanced to E. Remmer during 1945 season which was entered in corporate records as of April 30, 1946, the close of the corporate fiscal year.

[6] To adjust amount charged to E. Remmer for withdrawals during 1945 season due to bad checks which were included in determining cash received by him. This entry was entered in corporate records as of close of corporate fiscal year, April 30, 1946, rather than in calendar year 1945.

[7] To reflect entry charging E. Remmer for amounts paid out during 1945 season which were charged in error to Bank Club. This entry was entered in corporate records as of close of fiscal year, April 30, 1946, rather than during year 1945.

[Endorsed]: Filed February 11, 1952.

DEFENDANT'S EXHIBIT O

Form 1065—Treasury Dept., Internal Revenue Service 1944

United States
Partnership Return of Income
(To Be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)
For Calendar Year 1944
or fiscal year beginning ....., 1944, and ending ....., 1945

B-R Smoke Shoppe
50 Mason Street
San Francisco, California

[Stamped]: 94 Received April 14, 1947, Coll. Int. Rev., 1st Dist. Cal. 3.

[Shown in pencil on original]: 45-8704686; S. L. Ezralow O.R.A.

Gross Income
Amended

13. Total income in items 3 to 12.....$12,000.00

Deductions

26. Ordinary net income (item 13 less item 25).....$12,000.00

Schedule I.—Partners' Shares of Income and Credits.
(See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income less interest on Gov't obligations etc.
(a) Elmer Remmer, Orinda, California	$4,440.00
(b) Wm. F. Kyne, 975 Lawton Ave., San Francisco	5,340.00
(c) Sylvan Lando, 611 Marina Blvd., San Francisco	2,220.00
Totals	$12,000.00

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Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ WM. E. KYNE, partner, April 9-47.
975 Lawton Avenue, San Francisco.

/s/ A. B. SLATER, P.A., 4/5/47.
Name of firm or employer Self.

Subscribed and sworn to before me this 9th day of April, 1947.

[Seal] /s/ RUTH NATUSCH.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires Jan. 3, 1951.

[Endorsed]: Filed December 10, 1951.

DEFENDANT'S EXHIBIT X

March 12, 1947.

Mr. Pat Mooney
800 South Center Street
Reno, Nevada

Dear Pat,

I am enclosing the applications for extension of both Helen and Bones Remmer. I note in your letter that you have asked us what the cost of the Menlo Club was. The total payment is $175,000.00 of which $100,000.00 has been paid down. Up until this time no credit of any kind to cover the capital investment has been entered on the books. The Menlo Club, as you may know, is a partnership consisting of Bones, Wm. Kyne, Oscar Nelson, Thos. Turner and myself. If there is any further information I can give you kindly call upon me.

At the present time I have Bones' income taxes for the following places already filed, namely: Menlo Club, 110 Eddy St., Day-Nite Cigar Stand, and the Transient Cigar Store. Any time you are ready for the figures I will be glad to forward them to you. With my kindest personal regards, I remain

Sincerely yours,

HAROLD H. MAUNDRELL.

HHM/ed

[Endorsed]: Filed December 27, 1951.

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DEFENDANT'S EXHIBIT Y

Amended Return

Form 1065—Treasury Dept., Internal Revenue Service 1945

United States

Partnership Return of Income

(To Be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1945

year Beginning May 1, 1945, and ending Dec. 31, 1945

Menlo Club
30 Turk Street
San Francisco, California

Business or Profession Social Club.

File Code 1952.

[Stamped]: 94 Received May 15, 1947, Coll. Int. Rev., 1st Dist. Cal., 59; Internal Revenue Agent in Charge, San Francisco, Received June 1, 1948.

[Shown in pencil on original]: Morgan; 8704459.

Gross Income

1.	Gross receipts from business or profession		$558,632.00
2.	Less cost of goods sold:		
	(a) Promotion Expense	$286,837.75	
	(d) Total of lines (a), (b) & (c)	$286,837.75	
	(e) Less inventory at end of year		286,837.75
3.	Gross profit (or loss) from business or profession (item 1 less item 2)		$271,794.25
4.	Income (or loss) from other partnerships, etc. Tiny's Waffle Shop: Loss		*(5,629.75)*
13.	Total income in items 3 to 12		$266,164.50

[Italicized figures shown in red on original.]

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Deductions

14.	Salaries and wages (do not include compensation for partners)	$114,491.87
15.	Rent	5,200.00
16.	Repairs	1,059.14
18.	Taxes (explain in Schedule C)	4,679.45
21.	Depreciation (explain in Schedule E)	136.00
22.	Amortization of emergency facilities (attach statement)	19,173.52
24.	Other deductions authorized by law (explain in Schedule F)	19,893.40
25.	Total deductions in items 14 to 24	$164,633.38
26.	Ordinary net income (item 13 less item 25)	$101,531.12

Schedule C.—Taxes. (See Instruction 18)

Nature	Amount
Old Age Benefit	$1,262.19
Calif. Unem. Reserves	3,407.91
Personal Property	9.85
Total (enter as item 18, page 1)	$4,679.95

Schedule E.—Depreciation. (See Instruction 21)

1. Kind of property—Furniture and Fixtures.
2. Date acquired—5/1/45.
3. Cost or other basis—$2,000.00.
5. Depreciation allowed (or allowable) in prior years—8/12/45.
7. Estimated life used in accumulating depreciation—10 years.
8. Estimated remaining life from beginning of year—9 years.
9. Depreciation allowable this year—$136.00.

Total (enter as item 21, page 1) $136.00

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Schedule I.—Partners' Shares of Income and Credits.
(See Instruction for Schedule I)

1. Name and address of each partner	2. Ordinary net income etc. Total	3. Net short-term etc. Profit	4. Net long-term etc. Wages
(a) Elmer F. Remmer, Cal-Neva, Tahoe	$ 35,921.69	$35,921.69	
(b) Kyne, William E., 975 Lawton St., S.F.	13,470.64	13,470.64	
(c) Masse Dito, 1245 Ray Street, S.F.	12,660.94	8,980.42	$ 3,680.52
(d) Oscar F. Nelson, 180 Turk St., S.F.	9,625.92	8,980.42	645.50
(e) Harold H. Maundrell, 50 Mason St., S.F.	11,080.42	8,980.42	2,100.00
(f) Wm. E. Fricker, 30 Turk Street, S.F.	11,881.30	8,980.42	2,900.88
(g) Thomas C. Turner, 385 Grand Ave., Oakland, Cal.	6,890.21	4,490.21	2,400.00
	$101,531.12	$89,804.22	$11,726.90

Questions

1. Date of organization May 1, 1945.
2. Nature of organization Partnership.
3. Was a return of income filed for preceding year? No. If so, to which collector's office was it sent? No.
4. Check whether this return was prepared on the cash [X] or accrual [ ] basis.
5. State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market whichever is lower No Inventory.
6. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or of a personal holding company, as defined in section 501 of the Internal Revenue Code? No.
7. Was return of information of Forms 1096 and 1099, or Form W-2a, filed for the calendar year 1945? Yes.

Affidavit (See Instruction D)

I swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me, and to the best of my knowledge and belief is a true, correct, and complete return.

/s/ ELMER REMMER.

/s/ C. D. AYTON, P.A., 5/2/47.

Subscribed and sworn to before me this 15th day of May, 1947.

[Seal] /s/ JOHN A. BURNS.

Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires April 12, 1949.

Menlo Club
30 Turk Street, San Francisco

May 10, 1946.

The Collector of Internal Revenue,
San Francisco, California.

[Stamped]: 94 Received May 15, 1947, Coll. Int. Rev., 1st Dist. Cal., 59.

Dear Sir:

In submitting the accompanying Partnership Return, taxpayer desires to state that the daily records of the Cash Receipts and Promotion Expenses of the Menlo Club were inadvertently destroyed in mistake for other papers, and were consequently unavailable for computation. Disbursements for rent, salaries and wages, cards and all other expenses for which receipts were taken and recorded separately are available, and have been properly reported.

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In order to submit what is believed to be more than a fair return to the Government, the cash receipts and promotion expenses for a like period in the preceding year have been used as a basis of income after deducting an amount of $6,000.00 per month from the promotion expense; and since that period was the most profitable in the Club's history, and the income under the new owners has noticeably decreased; which is amply demonstrated by the reduction of players attending the morning shift.

Regretting the necessity for this method of filing, we are,

Very truly yours,
MENLO CLUB,
By ELMER REMMER,
Partner.

[Italicized figures shown in red on original.]

Tiny's Waffle Shop & Bar
18-24 Turk Street

Profit and Loss Statement
Period—May 1 to December 31, 1945

Income:			
Sales: Food			$126,588.08
Bar			43,152.89
Total Sales			169,740.97
Inventory—May 1, 1945:			
Beer and Liquor		$25,675.50	
Food		5,523.00	
Merchandise Purchases:			
Liquor	$ 7,851.32		
Beer	4,266.36		
Food	48,312.22	60,429.90	
		91,628.40	
Less Inventory December 31, 1945:			
Liquor and Beer and Food		25,337.77	
Cost of Sales			66,290.63
Gross Profit			103,450.34
Expense:			
Salaries and Wages		73,849.84	
Rent		8,000.00	
Sales Tax		4,159.50	
Advertising		541.10	
Ice		383.16	
Laundry		2,175.38	
Bar Supplies		664.36	

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Expense (continued): Carried Forward			89,773.34
House Supplies			1,846.40
Licenses and Federal Stamps			652.58
Garbage Disposal			431.00
Insurance			2,054.86
Social Security Tax			716.06
Unemployment Reserves Tax			1,933.38
Repairs and Maintenance			3,222.89
Telephone			158.41
Bar Service			128.71
Miscellaneous Expense			3,024.42
Light, Heat and Water			1,673.23
Office Supplies			39.24
Miscellaneous Taxes			244.35
Total Expense			105,898.87
Add—Depreciation:			
Tiny's Shop	3,870.00		
Neon Sign	100.00		
Furniture and Equipment	171.72	4,141.72	110,040.59
Net Loss From Operations			*(6,590.25)*
Other Income—From Coin Machines			960.50
Total Net Loss for Period			*(5,629.75)*

Menlo Club
30 Turk St., San Francisco

Income Tax
Period May 1 to December 31, 1945

Deductions: Item 24

Laundry	$ 997.62
General Miscellaneous Expense	85.80
Bank Charges and Returned Checks	2,960.43
Scavenger	80.00
Supplies, Janitor and Miscellaneous	745.31
Light and Power	1,115.46
Telephone and Telegraph	285.48
Playing Cards	12,332.34
Poker Chips	1,000.00
Stationery and Supplies	151.45
Water	139.51
Total Item 24	$19,893.40

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Depreciation 21

The Menlo Club was purchased by E. F. Remmer and associates on May 1st, 1945, for the sum of $175,000.00, which after deducting merchandise and certain fixtures on hand of $31,985.50 leaves a capital investment of $143,801.50. The term of the lease is five years and the investment spread over this period, makes a capital recovery as follows: eight months of 1945 the sum of $19,173.52 and for each year thereafter, the sum of $28,760.15 until 1950, when the remaining payment will be $9,586.76.

The Menlo Club is used primarily for the playing of cards and is known as a Card Club, the principal game being draw poker.

At the present time in San Francisco a new law is being drafted and if passed in its present form it would put the Menlo Club out of business, also, at this time a new proposed State Law has been presented to the State Legislature, which would outlaw all playing of cards for money, tokens, checks, etc., and this would do likewise to the club.

The Menlo Club is under the supervision of the Chief of Police of San Francisco and any disturbance on the part of any of the players in the club, which might bring any undue notoriety or disrepute, might mean the revocation of the Club's license, as a public nuisance. At the same time several law suits are pending against the Club, and a decision against the Club might result in its closing. There are a great many factors entering into the operation of a club of this nature and while, at the present time, draw poker is within the rights of all Club Members, there is a general antipathy on the part of the public to condemn and call all card rooms, "Gambling Houses," which makes their operation precarious business and one which is more or less intangible as to its existence. There are a great many elements working against Card Rooms and they may be closed or Legislated out at a moment's notice.

We firmly believe this property which was acquired through Capital outlay for the production of income is subject to depreciation:

(1) Because the production of income is limited in duration, because of a great many factors,

(2) That it is a sort of intangible property and the business may be legislated or closed out of existence at any time,

(3) That the estimated useful life of the property is five years.

[Endorsed]: Filed December 27, 1951.

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DEFENDANT'S EXHIBIT Z (For Identification)

San Francisco, California
March 7, 1949

To Whom It May Concern:

On April 30, 1945, the undersigned, Gene Schriber, received the sum of $25,000.00 cash, lawful money of the United States of America, from Joseph C. Haughey, who was at that time acting as attorney for Elmer Remmer, for and on account of moneys due the undersigned in connection with the purchase of "Tiny's Bar," situated at 18 Turk Street, "Tiny's Restaurant" situated 30 Turk Street, and the "Menlo Club" situated at 32 Turk Street, all in San Francisco, California.

Although the name of Joseph Billington was used in this transaction, Elmer Remmer was in truth and in fact the person who was purchasing said businesses.

Thereafter, in or about the month of August, 1945, Elmer Remmer approached me and stated that he had some partners associated with him in the operation of the foregoing described businesses and that he wanted his records to reflect the payment of the $25,000.00 theretofore paid to me in cash.

A few days later, on August 8, 1945, Elmer Remmer presented me with a check in the sum of $25,000.00 payable to my order, and I thereupon endorsed my name thereto and cashed the same and gave the $25,000.00 to Elmer Remmer. This check was not an additional payment on the purchase price of the Menlo Club but was merely an accommodation transaction for Remmer's record. A memorandum made by me at the time shows that this check was made, executed and endorsed on August 8, 1945.

Thereafter, and on September 8, 1945, Elmer Remmer paid to me the sum of $25,000.00 by check.

Subsequent to September 8, 1945, the liquor license of "Tiny's Bar" situated at 18 Turk Street was suspended by the State Board of Equalization because of the failure of the undersigned to effect a transfer of such license. Accordingly, "Tiny's Bar" was closed and the third payment which was due during the year 1945 was not made by Elmer Remmer because of the failure of the undersigned to deliver a Liquor License to said premises occupied by "Tiny's Bar" as per agreement.

This payment of $25,000.00 was thereafter made on February 28, 1946.

On May 1, 1946, I received a payment of $25,000.00 and thereafter on May 1, 1947, I received another payment of $25,000.00 from Elmer Remmer.

Between April 30, 1945, and May 1, 1947, I received a total of $125,000.00 from Elmer Remmer on account of the purchase of the said businesses and the leasehold interests upon said premises hereinabove described. Also, on July 1, 1949, I received

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from Elmer Remmer on account another $25,000.00 making a total received from April, 1945, to July, 1949, of $150,000.00.

/s/ GENE SCHRIBER.

The Undersigned, Elmer Remmer, has read the foregoing statement, and does hereby certify that the foregoing statement made by Gene Schriber is true and correct in all respects.

Dated at San Francisco, California, this ..... day of March, 1949.

/s/ ELMER REMMER.

[Endorsed]: Filed December 28, 1951.

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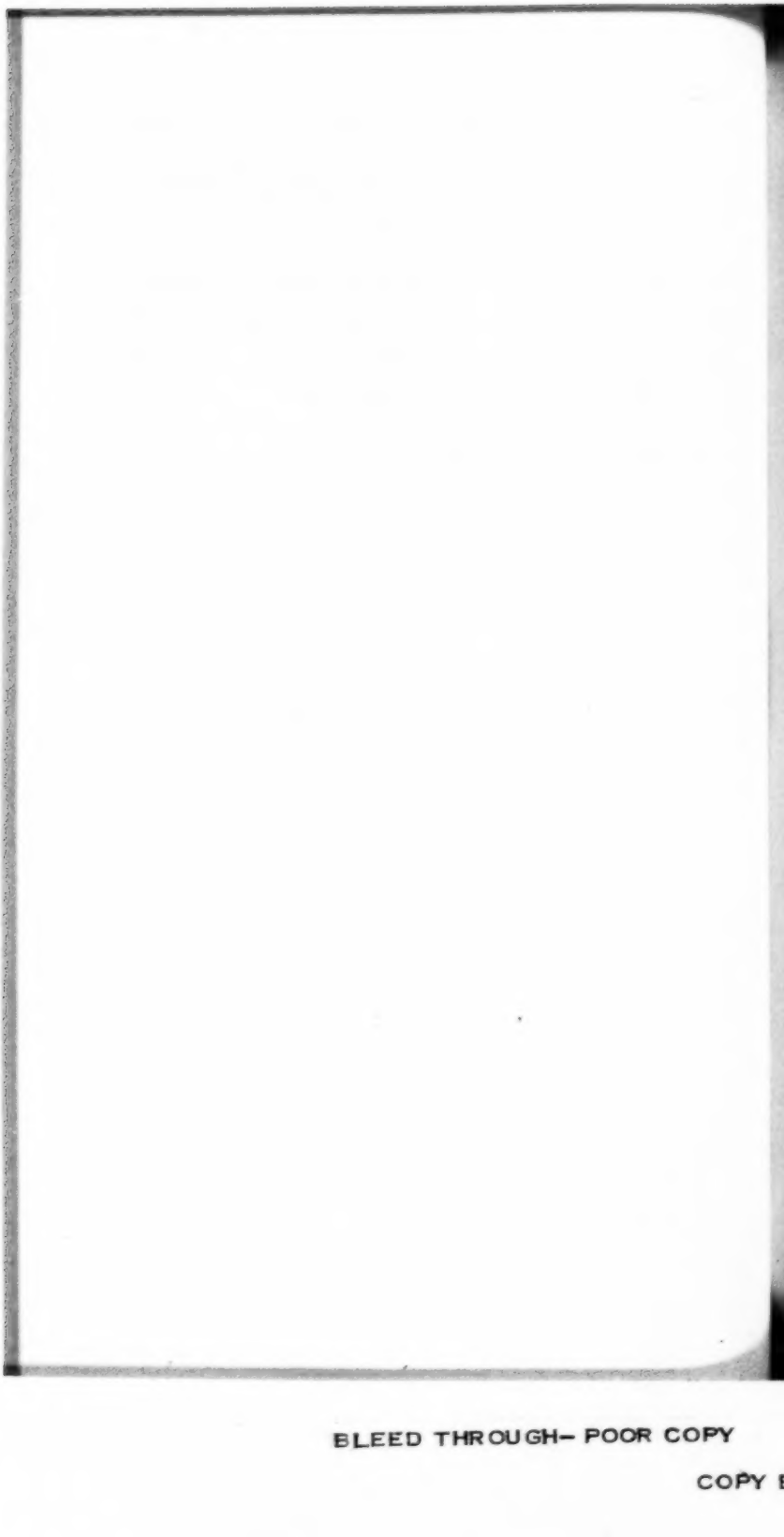

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No. 13281

United States
Court of Appeals
for the Ninth Circuit.

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record
Volume X
(Pages 3667 to 3746)

Appeal from the United States District Court for the District of Nevada.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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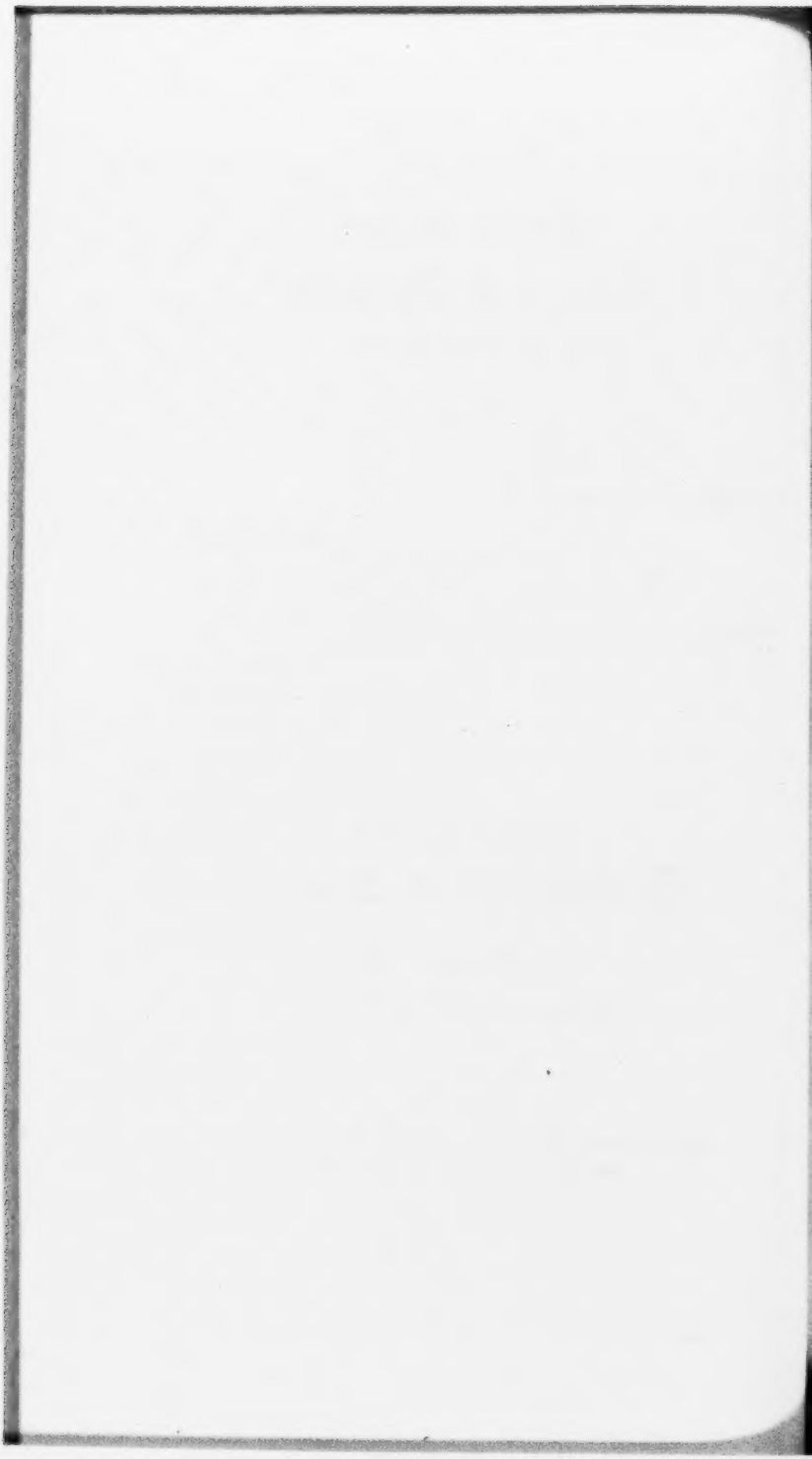

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Transcript of Proceedings—Selection of the Jury 3667

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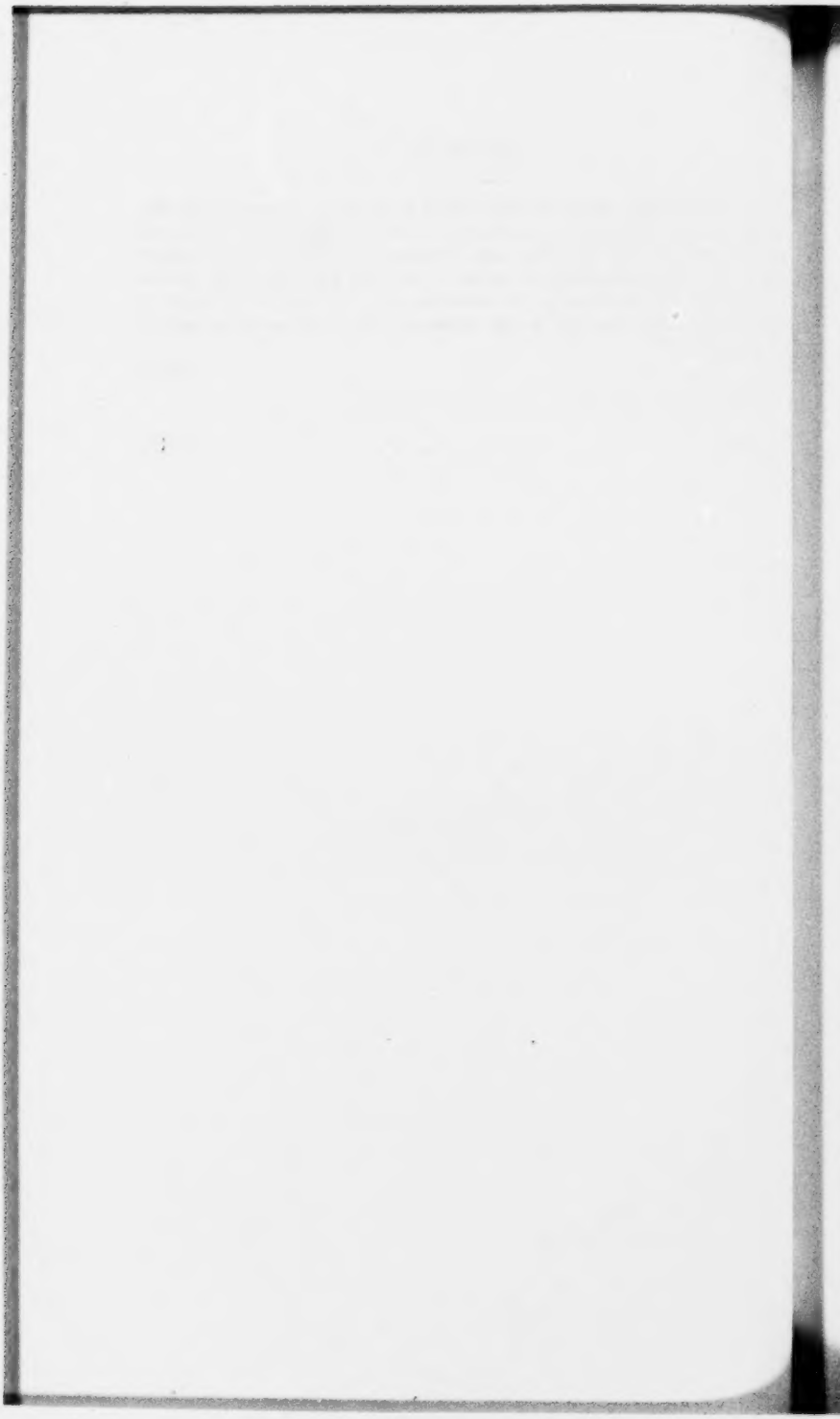

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In the United States District Court for the District of Nevada

No. 12,177

Before: Hon. Roger T. Foley, Judge.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMER F. REMMER,

Defendant.

JURY TRIAL

SELECTION OF THE JURY

Wednesday, November 28, 1951

The Court: In the case of United States of America vs. Elmer F. Remmer, No. 12,177. The record will show the presence of the defendant with counsel. Are you ready for trial?

Mr. Thompson: The government is ready.

Mr. Lohse: The defendant is ready, subject to adverse rulings which the Court has made with respect to bill of particulars and motion for discovery previously ruled upon by the Court and for relief as prayed for on various motions which your Honor has ruled upon as late as yesterday in this trial.

The Court: The clerk will call the roll of the venire. Before we proceed, I want to inform counsel, you may notice a good many names appear on

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the list [1*] of the venire who have not answered to their names. They have been excused for reasons the Court deems sufficient, sickness, one-man establishments and business and urgent family and business affairs.

Mr. Lohse: Your Honor, on behalf of the defendant, I would like to make inquiry with respect to list of trial jurors which we have. There seem to be some names on there that were neither excused or called.

The Clerk: Many were excused as late as this morning or yesterday.

Mr. Lohse: Every one whose name was not called was excused?

The Clerk: Excused or else the notice came back uncalled for.

The Court: The clerk will please call 12 names.

The following names were called:

1. Laverne Wittwer.
2. Otto Steinheimer, Jr.
3. I. J. Smith.
4. Mitchel Espassen.
5. Leslie S. Kofoed.
6. Richard Curnow.
7. John W. Humphrey.
8. Edward Colletti.
9. Mrs. Helen S. Mack. [2]
10. Herbert Hillygus.
11. Florence Sanford.
12. Norman Dickson.

The Court: Will the attorney for the govern-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

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ment please state the nature of this case for the guidance of the venire in the box and all others in the court room. Please give attention to this statement.

Mr. Pike: This is a criminal case, in which the United States of America is plaintiff and Elmer F. Remmer is the defendant. The formal charge, or indictment, is in six counts, each of which counts charges that for the particular calendar year involved referred to in that count the defendant violated a certain federal statute, which is referred to as Section 145(b) of the Internal Revenue Code, and the same section, Title 26, United States Code Annotated, which statute makes it an offense for any person to wilfully attempt, in any manner, to evade or defeat any tax.

As applied to this particular case, the charged violation against the defendant is that the particular calendar years 1944, 1945, and 1946 he wilfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him to the United States, by filing and causing to be filed, with the Collector of Internal Revenue for the Internal Revenue Collection District of Nevada, at Reno, Nevada, a false and fraudulent income tax return, wherein he stated that his [3] net income for the particular calendar year was in a certain specified amount and the amount of tax due and owing on that amount was a certain amount, whereas, according to this charge, as the defendant well knew, his net income for the calendar year, computed on a community property basis, was a

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larger amount than had been reported in the false income tax return and the amount of the tax due was larger than the amount that he had paid.

The first count of the indictment refers to the calendar year 1944 and alleges, in substance, what I have already stated, that the defendant Remmer filed a false and fraudulent tax return, stating that his income for that year that was taxable was the sum of $9,500 and the amount of tax due and owing on that amount was $2,570, when it is charged that he knew that his income was $33,734.61 and that the net income tax owed to the United States was $16,-295.54.

Mr. Golden: May I correct counsel. He stated $33,734.61 and that was $33,734.60, and also the amount he stated as alleged in tax owing was $16,-295.54. That is $16,259.54.

Mr. Pike: The copy I had was wrong as to one cent and as to the second item, I incorrectly read by transposing the figures, and the correct figure is $16,259.54. That is the amount due.

Mr. Golden: While I am on my feet, your Honor, may I at this time take exception and offer objection to the remark which [4] counsel made a few moments ago, in which he states that it is a false return. I object to stating it is a false return —it is alleged false return.

The Court: You may have an exception.

Mr. Pike: I am referring to the form of indictment. May I have the official copy, so there will be no further mistakes.

The second count on this formal charge, indict-

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ment, also refers to the calendar year 1944 and besides the substance already referred to, it charges that the defendant Remmer, who was then, during the calendar year 1944, married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade income tax for the calendar year 1944, by filing and causing to be filed, with the collector of Internal Revenue for the District of Nevada, a false and fraudulent income tax return for and on behalf of the said Helen L. Remmer, in which it was stated that her net income for the said calendar year, computed on the community property basis, was the sum of $9,500 and that the amount of tax due and owing thereon was the sum of $2,570, whereas he then and there well knew her net income for the said calendar year, computed on the community property basis, was the sum of $33,734.60, upon which net income there was owing to the United States an income tax of $16,259.54.

Now with reference to that second count, it is to be noted that the defendant is charged with filing, or causing to [5] be filed, a false and fraudulent income tax return for and on behalf of Helen L. Remmer, his wife, during the calendar year 1944, and has already been pointed out, Elmer F. Remmer is the only defendant in this case.

The third count refers to the income tax return filed by the defendant for the calendar year 1945 and charges that a false income tax return was filed, wherein the defendant stated that his net income for that year was $28,888.68, and that the amount of tax due and owing thereon was the sum

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of $13,072.02, when he knew that his net income for that calendar year, computed on the community property basis, was the sum of $37,157.10, upon which net income he owed to the United States an income tax of $18,586.83.

The fourth count of the indictment likewise refers to the calendar year 1945 and it charges that the defendant, then being married to Helen L. Remmer, during that calendar year, wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States for that calendar year, filed, and caused to be filed, with the Collector of Internal Revenue for this district a false and fraudulent income tax return for and on behalf of Helen L. Remmer, in which it was stated that her net income for that calendar year, computed on a community property basis—I might say all counts have that language—was the sum of $30,429.68 and the amount of tax due and owing was the sum of $14,074.29, [6] whereas the defendant knew that her net income so computed was the sum of $38,708.09, upon which said net income there was owing to the United States an income tax of $19,649.82.

The fifth count of the indictment relates to the calendar year 1946 and it charges that the defendant Remmer, so seeking and attempting to defeat and evade a large part of the income tax due and owing by him for that year, filed and caused to be filed with the Collector of Internal Revenue of this district a false income tax return, wherein he stated that his net income, so computed already referred

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to, was the sum of $11,244.79, and that the amount of tax due and owing thereon was the sum of $2,776.87 and that the defendant well knew that his net income for the calendar year referred to, that is 1946, was the sum of $94,235.84, upon which said net income he owed to the United States an income tax of $61,341.68.

The sixth and last count of this indictment, or formal charge against the defendant, relates also to the calendar year 1946 and it states and charges in substance that during the calendar year 1946 the defendant, Elmer F. Remmer, then being married to Helen L. Remmer, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by the said Helen L. Remmer to the United States of America for the calendar year 1946, by filing and causing to be filed, with the Collector of Internal Revenue for this district, a false and fraudulent income tax return for and on behalf of the [7] said Helen L. Remmer, in which it was stated that her net income for that calendar year, computed on the community property basis, was the sum of $11,244.79 and that the amount of tax was the sum of $2,776.87, whereas, as the defendant then and there well knew, her net income for said calendar year, that is, 1946, computed on the community property basis, was the sum of $94,235.84, upon which said net income there was owing to the United States of America an income tax of $61,341.68.

Now the reference I have made to the indictment is, of course, in no way evidence in the case and the

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indictment itself is the mere formal charge made by the government against the defendant in the case.

The Court: The Court now desires to inform the government and the defendant that if either the government or the defendant desires to challenge a juror, the challenge must be made when the juror appears and before he or she is sworn to try the case. The defendant has ten peremptory challenges, the government six peremptory challenges and I am going to try to arrange the matter this way, that as we approach selecting the jury, we will arrange and alternate the challenges so that toward the end there will be as near as possible an equal number remaining on each side of the peremptory challenges. Now I wish all members of the venire would give close attention, because what is being said here now will apply perhaps to you.

Mr. Gillen: May I interrupt, your Honor. According to [8] my notes, as I took them down, Mrs. Sanford should be in seat 11. She is in seat 12. (Mrs. Sanford takes seat No. 11) I thought it might cause some confusion later on.

The Court: Now, ladies and gentlemen of the jury, you have just heard a statement of the nature of this case. Have any of you heard anything other than the statement of this case. In other words, do you know anything about this case? Have you heard any one discuss this case? I want to be sure you understand this question. Have any of you heard about this case before you came into court today?

Juror Humphrey: I have read it in the paper.

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The Court: Did what you read amount to any more than what you have heard in this statement?

A. No, just about the same.

Q. Anything you read, did it leave with you an impression as to whether or not the charge was true, or any opinion as to whether the charge was true?

A. I am afraid I did form an opinion.

Q. You formed an opinion in the case from just what you read in the papers?

A. Yes.

Q. That is all you know about the case?

A. Yes, sir.

Q. Have you discussed the case with any one who knew anything of the facts? [9]

A. No, sir.

Q. Have you any idea what the evidence in this case will be? A. No, I do not.

Q. All you know is that the defendant is charged with this offense? A. Yes, sir.

The Court: Any one else here who has read about the case? I suppose several of you have, but the mere reading about this case, has that left with you an opinion as to the guilt or innocence of the defendant?

Juror Hillygus: I have heard gamblers at my bar.

Q. Did they claim to know anything about the evidence?

A. They thought they did. I don't know whether they did or not.

Q. And the conversation that you had with gamblers has left an impression on you, or an

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opinion one way or another? A. Yes, sir.

Q. It would be difficult then for you to sit in this case and listen to this evidence and free your mind from the opinion or impression you gained in your conversations with other people?

A. I don't know.

Q. From what you have heard, if you were asked to give a decision, could you give a decision one way or another at this time?

A. Well, from what I have heard, I think I could.

The Court: Any objection to excusing this juror? [10]

Mr. Thompson: We have no objection, your Honor.

The Court: Any challenge for cause?

Mr. Lohse: Your Honor, the defense has no objection to excusing of either Mr. Hillygus or Mr. Humphrey.

The Court: Mr. Hillygus, you will be excused until January third. Call another name.

(Frank Golden called and sworn.)

The Court: You heard the statement made by Mr. Pike? A. I have.

Q. Have you heard any conversations concerning this case or have you any knowledge of this case other than from what you found from Mr. Pike's statements? A. What I read in the papers.

Q. From what you have read, have you an opinion one way or another as to the guilt or innocence of the defendant? A. None whatsoever.

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Q. Your mind is open? A. Yes, sir.

The Court: Is there any one here now who has any opinion as to the guilt or innocence of the defendant? Mr. Humphrey, did I understand you to say that you have an opinion from what you read?

Juror Humphrey: I believe I have.

Q. Do you believe that impression you obtained from reading newspaper accounts would remain with you throughout the trial? [11]

A. I would try to think it out but I don't know whether I would be able to or not.

The Court: Now I want to see if this would apply to you. Forget this case for the time being. Consider any case and there is an article appearing in the press that so and so had been indicted for such and such an offense. In your opinion he is guilty, is that the idea? In other words, just because a man is indicted and the newspapers publish some account of the charge, that causes you to form in your mind some feeling that you can not be a fair and impartial juror if you happened to be selected in that case—is that your situation?

A. No, I don't believe it is.

The Court: Then why would your feeling be such as you say it is in this case? What is the difference? You can understand how difficult it would be to obtain a fair juror in any case if the average citizen, upon reading an article in the paper that such and such a case was pending, came into court with a fixed opinion. We just couldn't obtain jurors, could we? Now what is there about this case

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that makes it different from any other matter that you might read about? A. Well——

The Court (Interceding): You don't know anything about the evidence in this case? A. No.

Q. You don't know what to expect from any of the witnesses who [12] testify here, do you?

A. No, sir. The only way I can explain it, maybe that the occupation being gambling may have influence.

Q. Well, if you were selected as a juror, you would follow the instructions of the Court?

A. Yes, sir, I would.

Q. And you know when a man is charged with an offense, he is being tried only for the offense set forth in the indictment or information, that's all?

A. That's all, yes, sir.

Q. And just because something might appear during the course of this trial concerning some activity of the defendant, if it did occur, that did not seem just right to you, that wouldn't cause you or influence you in arriving at a verdict in this case, would it? A. No.

Q. You would be instructed by the Court, as the jury would be, that they are to decide this case entirely upon the evidence brought into court and that the charge against the defendant is the only issue before the Court, and if you are a juror, you are going to be asked to determine one question—is this charge true? Now don't you believe that you could be a fair and impartial juror in this case if you were sworn as a juror? A. Yes, sir, I do.

The Court: Now we have here the attorneys for

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the [13] defendant and the attorneys for the government. We have Mr. John R. Golden and Mr. Leslie C. Gillen and Mr. Spurgeon Avakian. These gentlemen, I understand, are from San Francisco; and Mr. Lohse and Mr. Fry. I don't see Mr. Fry here today but Mr. Lohse and Mr. Fry are associated—these are the attorneys representing the defendant in this case. Have any of these gentlemen recently acted as attorneys at law for any of you? Have you consulted any of them recently on any business or professional or legal matters?

Now on the other side of the table we have Mr. Pike, United States attorney, and Mr. Shelton from San Francisco, Mr. Bruce Thompson, Assistant United States Attorney and in that office they have Mr. Kane and Mr. McDonald. Mr. McDonald is in court here, and we have in Las Vegas, as a member of the United States attorney's staff, Mr. William Compton. Now have any of these gentlemen recently acted as attorneys at law for any of you? Have any of you consulted any one of these gentlemen or any of them on any legal or professional matters?

Juror: I have had a little business with Mr. Lohse regarding an account. He wasn't actually representing us, just a party who was liquidating his business and Mr. Lohse was taking care of his——

The Court (Interceding): How long ago?

A. In the past two months.

Q. That wouldn't influence you one way or another? [14] A. Not at all.

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The Court: Any ladies or gentlemen here who have had any business matters with any of these gentlemen representing the government?

Juror Smith: Some months ago I had occasion to consult with Mr. Fry, who is representing another party.

Q. Anything about that that would influence you one way or another? A. No, sir.

Juror Kofoed: In the field of insurance it is sometimes necessary to consult with an attorney and in the past year I have had occasion to consult with Mr. Lohse and Mr. Thompson, not directly in regard to fire of my own, but in regard to fire of my client.

The Court: Nothing about those conferences that would influence you one way or another?

A. No.

Mr. Lohse: At this time I thought your Honor was going to pursue the questioning of the prospective juror, J. W. Humphrey.

The Court: Just let me proceed here. Now I take it at the present time that we have no one in this jury box who has any idea or knowledge as to what the evidence in the case is going to be. We have no one in this jury box who has any opinion as to the guilt or innocence of this defendant. You have [15] heard some reference here to the indictment. The defendant has been indicted and you have heard Mr. Pike make some statements of the general nature of the indictment and of the charges contained in it. The indictment is merely the vehicle, the means, by which a person is brought into court

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for trial. It is a complaint. It is a charge, and by virtue of it, the defendant is here in court for trial. It is not evidence of his guilt and it must not be considereed as evidence in any degree of his guilt. You have heard people say—there are some people who thoughtlessly have such a view of these things —you meet a friend of yours and you hear him say, "I hear so and so has been arrested," or "So and so is on trial in court. Well, if he wasn't guilty, he wouldn't be there." Now that is such an unfair thing and any person who has such an idea just throws out the window all at once all the principles and purposes of our government. In other words, if we are the kind of people who think a man is guilty because he is charged with an offense, we are worse than the people we are having trouble with today and in this country, and in every free country, no one is deemed to be guilty of an offense by merely having been charged and no one can be considered and found guilty of an offense until his guilt is proven beyond a reasonable doubt.

Now there are two great principles that go hand in hand and are the bulwark of our liberty. They are in effect everything we have got. A defendant is presumed to be innocent [16] unless and until his guilt is proven beyond a reasonable doubt. Without those principles we wouldn't have any freedom whatever. So each of you must, and I am sure you will as American citizens, if you are selected as members of this jury, start out with the idea fixed

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in your mind that this defendant is innocent. That is the way you must approach this case and that idea must remain in your mind, unless and until the evidence in this case should convince you to the contrary beyond a reasonable doubt. Now that is the way we want this case tried and that is the way, I am sure, you, as good American citizens, would have it tried. So the defendant stands here in court indicted, that is true, but he is here as an innocent man and he must be considered and treated as innocent and he is innocent. This thing is a little more than a presumption, it is a substantial thing. The defendant is innocent, unless and until that event should occur, that he is proven guilty beyond a reasonable doubt.

Now what is a reasonable doubt? Our Nevada statute defines that term as concisely and as completely as any definition I have had had the opportunity to consider, in my own humble opinion. It is a rather difficult thing sometimes to understand, but the Nevada statute states: "A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the [17] entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable, must be actual and substantial, not mere possibility or speculation. The mind can not contain these two conditions at once. You can not have in your mind

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a reasonable doubt and at the same time have an abiding conviction of the truth of the charge." So, if after hearing the evidence in this case and after considering it, you have in your mind an abiding conviction of the truth of the charge, your work has been completed and all you have to do is to vote for a verdict of guilty. Now keep in mind during the course of the trial those two things—that the defendant is presumed to be innocent, that he is innocent unless and until the evidence in the case, if it should—I don't know whether it will or not, I don't know anything about the evidence, any more than you know about it—keep in mind those two principles, the defendant stands here and is to be considered and treated at all times as innocent and is innocent, unless and until the evidence in the case should put into your mind an abiding conviction of the truth of the charge.

Now at the conclusion of the taking of the testimony, the Court will be called upon to instruct you as to the law of the case. You are going to be the judges of the facts of the case. The judge will be called upon to rule on whether or [18] not evidence is admissible when objections are made. He will be called upon to state to you the principles of law which he believes applicable to this case and to the evidence, after the evidence is in. Now we may have a situation like this—we may have, during the course of this trial—we have a lot of lawyers here—they may be popping up all over this room with objections. The Court may sustain some of them and overrule others, but don't let that influence you

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in any way. The attorneys for the defendant have a duty to perform here. The attorneys for the government likewise have a duty to perform and they perhaps will be zealous to see that nothing goes into the record or before the jury that shouldn't go in, from their point of view. That is, they may have ideas that certain offered evidence is not material, not legal evidence, and are going to object. Sometimes during the course of the trial the judge gets awfully tired of that and so does the jury, but don't be influenced by it. Remember they are doing their duty to their clients, whether it is the government or the defendant. We have to make allowances for that and not have any prejudice against either the government or the defendant on account of what may seem to us an annoying conduct, when it isn't intended to be at all.

Now the Court will have to take care of questions of law. The jury has to find the facts. There is going to be no interference by the judge with the jury in its province of deciding [19] the facts of the case, no expressions from the Court and if any should be made or any matter should be stated by the judge in the course of this trial, I want you to remember that there is no intent on the part of the Court to show his inclination one way or another or that he has any inclination towards either side. The judge is not going to have anything to do with these facts. Those are matters for you to decide. On the other hand, questions of law are for the judge. Now there might be some instruction given, or there might be a ruling that the Court has made here on an offer

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of testimony and you might say, "Well, the judge was wrong in not letting that in," or "He shouldn't have let it in," one or another. You must not conjecture what might have been the effect of a ruling. Just take the rulings as they are given and let the thing go at that, and in the instructions there might be some principle stated in there that you might feel is not law at all, or if it is law, you might say to yourself, "Well, I don't like that kind of law. I won't follow it." You must not do that. You must follow the law as given you by the Court. There is a very plain reason for that and you will see how important it is that you accept without question the instructions of the Court. Now if the Court, in instructing the jury, should make a mistake—and that, of course, is possible—and one of the parties here, either the defendant or the government, was injured by that mistake, that party could take an appeal to a higher court. [20] There the matter could be corrected and remedied. If there was an error, the court could send it back to this court for a new trial so no harm would result from the judge's mistake as to the matter of law. But suppose a member of the jury refused to follow instructions and went on the idea that is not the law and if he should happen to make a mistake—and that might be possible—somebody would be hurt and there would be no way of remedying the injury, because there could be no appeal from that situation, so you see how important it is to follow the instructions of the Court.

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Now you have been informed that this case has something to do with income tax and we have all read in the papers recently a lot of things about income tax, but remember we are trying this case. We just have to keep our nose right into this case and have nothing to do with anything outside of it. Whether all this stuff you see about the Internal Revenue is true or isn't, has nothing to do with anything in this case. You must decide this case entirely upon its merits.

Jury duty is a great responsibility. It is perhaps the most important duty a citizen is called upon to perform off the firing line. To be called upon to judge important matters between fellow citizens' controversies is a great responsibility, a great responsibility to decide between the government and a citizen, where a person's liberty may be involved, but it has to be done. I am sure there is none of us enjoy doing it. I [21] don't believe there is any judge that enjoys it—I am sure there is no juror who does—but it is a duty that has to be done and there is only one way to do it, without fear, favor prejudice or sympathy, and when we do it that way, it isn't such a hard thing to do. It may not be pleasant to do, but it is not such a hard thing to do. All you have to do is to find out what the truth is. What is the truth? Is this charge true or isn't it true? If you believe, beyond a reasonable doubt, that it is true, find the defendant guilty. If you have not been convinced beyond a reasonable doubt that the defendant is guilty of the charge, or any one of the

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charges in this indictment, it is your duty to find him not guilty. So if you will keep out of your minds outside matters, this will not be a difficult task for you, but if you are going to be influenced by sympathy or prejudice, it is going to be a miserable, difficult job and it is going to be a job that is going to leave its mark with you. You are going to be sworn to try this case and render a true verdict according to the evidence. You are going to be sworn to take a solemn oath before your God that you will do what is right, and the only way you can do what is right in this case is to follow the evidence and follow the law as given to you by the Court, unaffected or uninfluenced by sympathy on the one hand or prejudice on the other. It is your duty, Mr. Humphrey, to keep out of your mind any thought you might have about any gambling or any of the rest of you. Keep those things [22] out of your mind. It has nothing to do with this case at all. I mention you, not to point you out but because you had some little thought there. Just decide this case on the facts. Is this defendant guilty or not guilty of the charge contained in this indictment?

Now it is necessary in our country and in every State that the law be administered as equally as possible. We are all human and we find some variance in the administration of law throughout the country, but we are all straining towards perfection and we never get there, of course, to see that there is an equal distribution of justice, so here we do not want a situation like this—we want a jury's verdict based

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upon the evidence alone and upon the law. Now if juries did not decide cases uninfluenced by outside matters, such as sympathy or prejudice, and if they went off on their own ideas, accepting what they thought was the law and it wasn't the law, you might find a situation like this—we in the northern end of the State have a defendant on trial or in Sacramento have another defendant on trial for the same thing, the same evidence. The jury down below finds him guilty and the jury here finds him not guilty, the same case and the same kind of evidence. What kind of a mess would that be and how unfair that would be. So in order to obtain as near as possible an equal and fair administration of justice, it is not hard to do, if you will decide the case entirely upon the evidence and keep out of your mind any suggestion [23] of sympathy or prejudice. Now we are all sorry for anyone who is accused of an offense. We are all sorry for him and many times those who are found guilty of offenses don't suffer nearly as much as their relatives or mothers or fathers or wives or parents. Those are matters that come up in every criminal trial, and this is a criminal trial, but we can't act on a thing of that kind. For instance, look at the situation we would have there. Some fellow who didn't have a friend in the world is up for a crime, convicted in five minutes and some fellow who has a mother, who suffers worse than he does, is turned loose. You can't consider those things. Stay away from any evidence of sympathy or prejudice. Now that might come into your mind, if the evidence disclosed some things—

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I don't know whether it will or what it will—about gambling. We are here to find out if this charge is true and we must not be prejudiced against this defendant because of anything else that might appear in this case except this charge.

Any further suggestions?

Mr. Lohse: May we have a moment?

Mr. Thompson: We have a question. We would like to have the Court inquire whether any juror now in the box is acquainted with the defendant, Elmer F. Remmer.

The Court: Yes, I forgot to do that. Are any of the jurors acqainted with the defendant?

Juror Golden: I do.

The Court: You have known him for how long a time? [24] A. About 20 years, I guess.

The Court: Any one else that knows him? Now the fact you have been acquainted with him for a long time, would that make it difficult for you to act as a juror in this case?

A. Your Honor, I met him in a business way over a period of 15 or 20 years. I would rather not serve. It wouldn't affect my judgment at all.

Q. Not one way or another? At present you have no opinion one way or another?

A. None whatsoever.

Q. And you would follow the evidence in the case? A. I would.

Q. And if the evidence convinces you beyond a reasonable doubt that the charge was true, you would vote for a verdict of guilty? A. Yes.

Q. And the fact you know Mr. Remmer wouldn't

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make any difference if the evidence convinced you beyond a reasonable doubt. A. It would not.

Q. And your acquaintance in this case wouldn't prejudice you in any way against him, would it?

A. No.

The Court: Very well. Any further questions?

Mr. Lohse: Would your Honor please inquire whether any of the jurors know Walter M. Campbell?

The Court: Are any of you ladies or gentlemen acquainted [25] with Mr. Campbell? He is connected with the United States attorney's office and with this case. Do any of you know him? He is not present in the court room.

Mr. Lohse: Or Mr. Brady, an accountant in similar employment, and Mr. Weaver?

The Court: I am not going to ask that. I am just going to ask these prospective jurors if they have any idea as to the evidence that is going to be introduced in this case. I am going to ask the jurors one question. I did not think it was necessary. We are all citizens of this country and I do not think there is a man here or a woman who does not believe in the principles we have been talking about, who does not believe, that the defendant should be, and is, considered innocent until he is proven guilty beyond a reasonable doubt. I do not believe there is a single man or woman here who would not require the government to prove its case beyond a reasonable doubt and if it proved it, I do not believe there is a person here who would not vote for a verdict of guilty and I do not believe

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there is a person here that would believe anybody's testimony just because he happens to know him, than anybody else because he comes in here and testified, and I do not believe there is any member on this jury that knows anybody that has to do with the preparation of this case in any way, shape, manner or form. Have you any acquaintance with any of the tax officials in San Francisco or in Los Angeles or any of the tax attorneys of the [26] United States. I think that will cover it. Any further questions.

Mr. Gillen: I think not, your Honor.

The Court: Any challenge for cause?

Mr. Lohse: Your Honor please, at this time we will challenge the juror Humphrey for cause. If the Court please, Mr. Humphrey expressed the opinion that he was prejudiced against gamblers particularly.

The Court: I did not hear him say so.

Mr. Lohse: I believe he did.

The Court: You did not make any such statement?

Juror Humphrey: Not at all.

Mr. Lohse: I understood so; perhaps it is erroneous.

The Court: Well, he did not.

Mr. Lohse: I thought he expressed an opinion he would not be able to fairly judge the defendant because——

Mr. Humphrey: I said I might, because of the occupation——

The Court (Interceding): You have heard what

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we tried to explain about duties of jurors. You would not find a man guilty unless you believed him guilty beyond a reasonable doubt?

Mr. Humphrey: I would not.

The Court: And you wouldn't find him guilty of the offense charged because he worked some place you didn't think [27] a good place to work?

Mr. Humphrey: No.

The Court: The challenge is denied.

Mr. Lohse: We note an exception, your Honor.

The Court: Yes. Any other challenges? Government's first peremptory challenge.

Mr. Pike: The government will excuse Mr. Golden.

(Walter J. Herz drawn and sworn.)

The Court: You have heard the discussion we have had this morning. Has anything you have heard suggested to you any reason why you could not be a fair and impartial juror if sworn to try this case? A. No, sir.

Q. Have you any idea as to what the evidence in this case is going to be? A. No, sir.

Q. Have you ever talked with any one about the case who pretended to know what the evidence was? A. No.

Q. Are you acquainted with the defendant?

A. No.

Q. And these attorneys, whose names we mentioned here, these gentlemen representing the government and the defense, have any of them acted as your attorneys recently? A. No, sir. [28]

Q. Have you consulted any of them on any

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business or professional matter? A. No.

Q. At the present time you have no opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. And you believe in the principle no one is to be found guilty unless proven guilty beyond a reasonable doubt? A. Yes, sir.

Q. And the defendant is presumed to be innocent at all times until that event occurs, if it does occur, that the evidence convinces you beyond a reasonable doubt to the contrary? A. Yes, sir.

Q. And the indictment itself is not evidence against the defendant? A. No, sir.

The Court: Any challenges for cause?

No challenge.

The Court: Defendant's first peremptory challenge.

Mr. Lohse: Excuse Mrs. Wittwer.

(John J. Lynch called and sworn.)

The Court: You have heard the discussion here this morning. Has anything you have heard suggested to you any reason why you could not be a fair and impartial juror if sworn to try this case? [29]

A. No, sir?

The Court: I am sure every other individual here in this jury box would be fair and impartial if selected as a juror to try this case. You believe in the principles we have been talking about?

A. Yes, sir.

Q. Do you know Mr. Remmer, the defendant?

A. No, sir.

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Q. Have you discussed this case with any one?

A. No.

Q. Do you know anything more about this case than you have heard in court? A. No.

Q. Have you any opinion one way or another as to the guilt or innocence of the defendant?

A. No, sir.

The Court: Any further questions suggested?

No questions.

The Court: Any challenges for cause?

No challenges.

The Court: Defendant's 2nd peremptory.

Mr. Lohse: Excuse Mr. Kofoed.

(Vernon Ennor called and sworn.)

The Court: You have heard the discussion we have had here. Anything you have heard today that would cause you to [30] feel that you could not be a fair and impartial juror? A. No, sir.

Q. If selected, you would be fair on both sides and would not convict the defendant unless you believed him guilty beyond a reasonable doubt, but if you did believe that beyond a reasonable doubt, after considering the evidence, you would vote for a verdict of guilty? A. Yes, sir.

Q. Do you know the defendant?

A. No, sir.

Q. Have you talked to anybody about this case who claimed to know any of the evidence?

A. No, sir.

Q. Do you know any of the evidence that might be introduced here? A. No, sir.

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Q. You have no knowledge of this case?

A. No, sir.

Q. Have you formed or expressed any opinion one way or another. A. No, sir.

Q. Your mind is open at this time and you know of no reason why you could not be a fair and impartial juror? A. I know of no reason.

The Court: Any other questions?

No questions.

The Court: Any challenges for cause?

No challenges. [31]

The Court: Government's 2nd peremptory challenge.

Mr. Pike: The government will excuse Mr. Colletti.

(Walter E. Parsons drawn and sworn.)

The Court: Have you ever heard of the case before? A. Only in the newspaper.

Q. You have heard the discussion we have had?

A. Yes, sir.

Q. Has anything you have heard suggested to you any reason why you could not be a fair and impartial juror if sworn to try this case?

A. No.

Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

A. No.

Q. Your mind is open at this time?

A. Yes, sir.

Q. You have no idea what to expect in the way of evidence here at all? A. No, sir.

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Q. You believe that the defendant is presumed to be innocent unless proven guilty beyond a reasonable doubt? A. That's right.

Q. And you would consider the defendant innocent and would vote for a verdict of not guilty if the government did not convince you beyond a reasonable doubt that he was guilty?

A. Yes, sir.

Q. And if the government convinced you beyond a reasonable [32] doubt by the evidence, and the evidence only, that the defendant is guilty, you would so decide the case? A. Yes, sir.

Q. And your decision in this case would be unaffected by any outside influence of prejudice on the one hand or sympathy on the other?

A. Yes, sir.

Q. You would try the defendant only for the offenses charged in the indictment and for no other matters that might appear during the trial?

A. Yes, sir. I would like to state that I know Mr. Fry.

Q. I forgot to ask you those questions. Any of these attorneys acting as attorneys for you?

A. Well, Mr. Pike has from a business standpoint and I am personally acquainted with Mr. Fry.

Q. Are your relations with Mr. Fry and Mr. Pike about the same? Is Mr. Pike acting as your attorney? A. Not as my personal attorney.

Q. Is he acting as attorney for some business matter or institution with which you are connected?

A. Which I was connected with.

Q. How long ago?

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A. About a year or so.

Q. At the present time there is no relation of attorney and client between you and Mr. Pike? [33]

A. Not at the present time.

The Court: Any further questions?

Mr. Golden: May we ask if he has ever served before as a juror?

The Court: I don't think so.

Mr. Golden: May we ask Mr. Parsons if he ever sat on a court martial of the United States army?

The Court: I won't ask that either. I can't see what difference that makes at all.

Mr. Golden: I wanted to ask your Honor just now whether it is necessary to note an exception to the refusal?

The Court: You can have an exception to all rulings of the court.

Mr. Golden: May we ask for whom Mr. Parsons conducts investigations?

The Court: I am not going into Mr. Parsons business affairs.

Mr. Golden: We want to know if he works for any of these people.

The Court: Are you working for Mr. Pike or the government?

Mr. Parsons: No, sir.

Mr. Golden: Has the gentleman ever worked for any of these gentlemen?

The Court: Have you done investigating work for the [34] government?

A. Yes, sir.

Q. How long ago?

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A. The last case was about a year ago.

Mr. Pike: I would like to have the Court ask if I had anything to do with that investigation, or the United States attorney's office?

The Court: Did the United States attorney's office have anything to do with it?

A. Only if the court—it was turned over to the court.

Q. What department of the government was that made for?

A. At that time I was connected with the Nevada State Police and dealt with the traffic.

The Court: Any further questions?

Mr. Golden: I would like to ask Mr. Parsons whether his investigating work is solely for federal and State or also private investigating.

The Court: I will not go into his business or ask it.

Mr. Golden: I would like to ask whether his employment with the government, and particularly the case to which he referred about a year ago, would affect his deliberations in this case?

The Court: Did you have any investigating work in regard to the defendant here?

A. No, sir. [35]

Mr. Golden: I would like to ask the prospective juror, your Honor, whether his investigating work, and/or his contact, whatever it may have been we don't know, with Mr. Pike about a year ago would make it more likely that he would believe the government's side of this case or would have more confidence in the prosecution than in the defense.

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The Court: I will ask you this question, Mr. Parsons. The fact you have engaged in work for the government, would it influence you one way or another in your decision in this case, if you were instructed by the Court that you should decide this case according to the evidence in this case and the evidence alone? Would the fact of your former employment get you off that track and cause you to go on something else in this case?

A. It would be definitely the evidence and instructions of the Court.

Mr. Golden: I would like to ask him whether or not he is hopeful or expectant in the future of further investigating work from the government.

The Court: I will not ask that question.

Mr. Golden: We note exceptions to all rulings.

The Court: Any further questions?

No questions.

The Court: Any challenges for cause?

Mr. Golden: We challenge Mr. Parsons for cause.

The Court: The challenge will be denied. [36] Defendant's 3rd peremptory challenge.

Mr. Golden: The defense will excuse Mr. Parsons.

(A. W. Ringlee called and sworn.)

The Court: You have heard the discussion here this morning? A. Yes, sir.

Q. Has anything you have heard suggested to you any reason why you could not be a fair and impartial juror if sworn to try the case?

A. No, sir.

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Q. Are you acquainted with the defendant?

A. No, sir.

Q. Have you talked with any one who claimed to know the facts? A. No, sir.

Q. Have you any opinion one way or another as to the guilt or innocence of the defendant?

A. No, sir.

Q. You understand and heard said many times, not only here but other places—you know as a matter of your education as an American citizen—a defendant is presumed to be innocent unless and until the evidence in the case should convince a member of the jury beyond a reasonable doubt of the contrary? Is that true? A. Yes, sir.

Q. You would follow that in this case? [37]

A. Yes, sir.

Q. You understand this indictment is merely the means by which this trial is initiated or started?

A. Yes, sir.

Q. You would try this defendant only for the offense charged in this indictment?

A. Yes, sir.

Q. Now we must keep our minds free of prejudice and sympathy. In other words, as I have tried to explain—I won't take the time to do it again—it is necessary for an equal and fair administration of justice that courts and juries decide cases only upon the evidence before it, legally admitted before it. You would do that in this case, wouldn't you, and decide the case according to the evidence and not outside influence of prejudice on the one hand or sympathy on the other, and stay with the charge

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contained in the indictment and not act on anything else? A. Yes, sir.

The Court: Any further questions?

No questions.

The Court: Any challenge for cause?

No challenge.

The Court: Defendant's 4th peremptory challenge.

Mr. Lohse: Excuse Mr. Herz.

(Fred Kolster drawn and sworn.) [38]

The Court: You have heard the discussion here today, have you not? A. Yes, sir.

Q. Have you discussed this case with any one?

A. No, sir.

Q. Have you any idea or expectation as to what the evidence in this case is going to be? You don't know what it is going to be, do you?

A. No, sir.

Q. Have you any opinion one way or another as to the guilt or innocence of this charge?

A. No, sir.

Q. You have heard everything that has taken place today? A. Yes, sir.

Q. You believe in the principles we have been trying to explain? A. Yes, sir.

Q. Do you know of any reason why you could not be fair, both to the defendant and to the government, if you are selected as a juror in this case?

A. No, sir.

Q. That is what you would try to be?

A. Yes, sir.

The Court: Any further questions?

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Mr. Thompson: None, your Honor.

Mr. Golden: Your Honor may have asked this question, [39] but I wanted to know if the gentleman knew any of the attorneys.

The Court: Do you know Mr. Pike?

A. Yes, I know Mr. Pike.

Q. Have any of these gentlemen, whose names I mentioned as attorneys for the government, acted as attorneys at law for you recently?

A. Never.

Q. So at the present time you have never consulted any of these attorneys on any business or legal matters? A. No, sir.

Q. Are you acquainted with the defendant?

A. No, sir.

Mr. Golden: I would like to know whether the gentleman's acquaintance with Mr. Pike is of a social nature?

The Court: Have you a very close social relationship with Mr. Pike? A. No, sir.

Q. You don't see him often? Just casually when he happens to be here in Carson City?

A. Yes, sir.

Q. And you don't converse with him every time you see him either, do you? A. No.

Mr. Golden: I respect the gentleman's judgment, but I am not quite clear how he knows him. Is it socially or through—— [40]

The Court: Well, we are in a small State, so I think most every one in the State knows some of us and just because we know people, we do not do everything that they tell us to do either.

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Mr. Golden: That is the first comforting thing I have heard. I might explain——

The Court (Interceding): Is there anything about your relationship with Mr. Pike that would influence in one way or another in this case?

A. No.

The Court: Any further questions?

No questions.

The Court: Any challenge for cause?

No challenge for cause.

The Court: Government's 3rd peremptory challenge.

Mr. Pike: The government will excuse Mrs. Sanford.

The Court: We will take a recess now. I want you all to listen to this admonition. It is very important. We do not know who is going to constitute this jury yet. It is very likely that some of you ladies and gentlemen in this box will be members of the jury. Some of you in the audience may be members of the jury. You must not discuss among yourselves, or with any one else, any matter connected with this case or form or express an opinion as to this case unless and until you should be selected as jurors, and then only after the case [41] has been submitted to you. Now do not permit any one to talk to you about the case. I do not have any idea that any one would attempt to do so, but if any one should—sometimes some curious individual attempts to talk the case over with members of the jury or any one who might be on the jury—now don't allow any one to talk to any of you about this

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case and if any one should persist in talking to you about the case after you have informed them that you are a member of the venire, you report that individual to the Court.

(Recess taken at 11:45.)

1:30 P.M.

The Court: Let the record show the presence of the defendant with counsel.

Two gentlemen now in the jury box spoke to me during the recess. Mr. Dickson, will you please state your situation?

Mr. Dickson: I work in the Wild Life and put out bait and it is important to get it out in the winter time, so I would like to be excused.

The Court: There is no one else can do it?

A. There are only 13 trappers in the State.

Q. Where is your district?

A. From Wellington to Tonopah and Ely.

Q. No one working in there now? A. No.

Q. And you are engaged in that work at the present time? [42]

A. Yes, sir.

Q. And you are a government employee. Well, I will excuse you, Mr. Dickson. Then there is Mr. Espassen. What is your employment?

Mr. Espassen: Well, I have a one-man business and I will have to close the place up for the duration of this trial.

The Court: You will be excused then. The clerk will call three names.

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(W. F. Carter, Louis C. Delamonica, and John Perri called and sworn.)

The Court: You have heard the statements made here this morning, have you not? Do you know anything about this case, any of you three gentlemen?

A. No.

Q. Have you ever heard anything about the case before you came into court this morning?

A. No.

Q. Are you acquainted with the defendant, Mr. Remmer? A. No.

Q. The attorneys here, Mr. Pike, Mr. Thompson, and Mr. McDonald, they are Nevada attorneys here. I take it you are not acquainted with the gentlemen who are from out of the State, and then there is Mr. Lohse and Mr. Fry—are any of these attorneys acting as lawyers for you now?

A. No. [43]

Q. Have any of them recently? A. No.

Q. Have you talked with any of them on any business or legal matters? A. No.

Q. Now I have tried to point out this morning that the defendant here is charged with the matters set forth in the indictment and that is all we are concerned with, is the charge here in this indictment. This indictment is not evidence in the case. It is merely the means by which the trial is brought on, the means by which the defendant is here before the court for trial, and at the beginning of the trial, and all through the trial, he is to be considered as an innocent man and he is so to be consid-

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ered as innocent unless the evidence that you would hear from this witness stand would convince you to the contrary beyond a reasonable doubt, and if, after hearing this evidence, you have in your minds an abiding conviction that the charge is true, then you should vote for a verdict of guilty. In other words, if that condition of your mind should result from the evidence, there is in your mind then no room for a reasonable doubt as to the guilt of the defendant. The presumption of innocence then no longer applies and the verdict should be guilty. Now on the other hand if, after hearing this evidence, you are not satisfied beyond a reasonable doubt, if, after hearing this evidence, you do not have in your minds a conviction, [44] abiding conviction, that the charge is true, then you should vote for a verdict of not guilty. In other words, it means just this—that it is the burden of the government to prove this case against this defendant beyond a reasonable doubt and if they fail to do that, then you should vote for a verdict of not guilty, and the case should be decided without any outside influence, be decided entirely upon the evidence brought into this court room, that you are not to be influenced by any feeling of prejudice. If anything like that should occur during the course of the trial, you must drive it out of your minds and decide the case entirely upon the evidence here and you are to decide this case without being influenced by any feeling of sympathy. We have to find out what the truth is and we must do that without being influenced by anything but the evidence. Now

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do you know of any reason why you could not be a fair and impartial juror, any of you, if you are selected to try this case? A. No.

Q. And if you were selected to try this case, you would decide this case entirely upon the evidence, wouldn't you? A. Yes.

Q. I am in the same position you are. I have no idea or knowledge of what the evidence in this case is to be. It doesn't make any difference how we feel towards any kind of business or occupation and if it should occur during this trial, or the [44a] evidence in this trial should point to certain things concerning this defendant or any of his activities that we might not like, we must remember that we are not concerned with any questions concerning those things. We are concerned only with the case set forth in this indictment. Now I do not know as anything like that will appear here, but if it does, our duty would be, under our oath, to leave that out of our deliberations and consideration. Now some of us might have a prejudice against gambling; some of us might have a prejudice against gambling that might be conducted in a State where gambling is prohibited by law. If it should appear by this evidence that this defendant has engaged in such activities, those activities have nothing whatever to do with this case, so far as arriving at your verdict is concerned.

Now is there any member of the jury—assume, just for the sake of consideration here that such events might appear in this evidence, and you will be instructed by the Court to decide the case upon

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the evidence alone—is there any one here who would feel they could not do that and would be influenced by any such outside activities? Is there any one here who would be influenced or tempted to decide the case against the defendant if any such conditions appear here? I take it that none of you would and it is right that you should not. You must keep in mind at all times that we are here just to try the issues set forth in this indictment. The defendant is either [45] guilty or not guilty. The charge is either true or not true, and the jury will have the duty of coming to that decision.

The Court: Any further questions that you would like to suggest to the Court?

Mr. Thompson: We would like to inquire by whom Mr. Carter is employed.

The Court: Mr. Carter, whom are you employed by?

A. No one at present. I do a little contracting work.

The Court: Any further questions suggested?

No questions.

The Court: Now is there any challenge for cause?

Mr. Golden: Of those three, your Honor?

The Court: Well, I want to explain that now. When you are considering your peremptory challenges, you are not bound as to any in the box whom you have passed. You are at liberty to exercise all your peremptory challenges to any person in the box at any time. Now any challenge for cause?

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Mr. Golden: Not as to the last three occupants of the box, your Honor.

The Court: I want to ask another question of all of you. This is addressed to every one. Is there any one here in this jury box at this time who has an opinion one way or another as to the guilt of this defendant, as to the truth or untruth of this charge?

None. [46]

The Court: Any challenge for cause?

No challenge.

The Court: Defendant's 5th peremptory challenge.

Mr. Lohse: Excuse Vernon Ennor.

(Darwin K. Ellis drawn and sworn.)

The Court: Have you ever heard of this case before you came into court room this morning?

A. Only what I read in the papers.

Q. You understand the indictment here is not evidence in the case? A. I understand.

Q. It is merely the means of bringing the case to trial. You heard the statement Mr. Pike made this morning? A. Yes.

Q. Did you gain any information from reading in the newspapers anything in addition to what you heard Mr. Pike say this morning?

A. Nothing that would influence me one way or the other.

Q. At the present time you know of no reason why you could not be a fair and impartial juror?

A. I know of no reason.

Q. At the beginning of the trial, and throughout

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the trial, the defendant is presumed to be innocent, you understand that? A. I understand.

Q. And that presumption remains with the defendant unless and [47] until, if the event should occur, that the evidence in the case should convince you beyond a reasonable doubt that he was guilty, you understand that? A. Yes, sir.

Q. You understand if the evidence is such that you have in your mind an abiding conviction that the charge is true, then there is no room in your mind for a reasonable doubt, and in that event the verdict should be guilty. The burden of proof is upon the government to prove its case beyond a reasonable doubt. At the present time if you were selected as a juror, you would enter upon the case with an open mind, would you not?

A. Yes, sir.

Q. And it would be your purpose to be fair and impartial to both the government and the defendant? You would be fair to the government and to the defendant? A. Yes, sir.

Q. Now the defendant should not be convicted unless the evidence in the case should convince the jury that he is guilty beyond a reasonable doubt. On the other hand, if the evidence should convince the juror beyond a reasonable doubt that the defendant is guilty, the verdict, under the juror's oath, should be guilty. The laws of our government must be upheld and they must be upheld in every particular, regardless of whether you like this or that law, and you would be governed by those ideas if you were selected as a juror in this case? [48]

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A. Yes, sir.

The Court: Any challenge for cause?

Mr. Pike: No challenge. I am not sure if the Court inquired about the relation of attorneys.

The Court: I will do that. Are you acquainted with the defendant? A. No.

Q. Are you acquainted with the attorneys here? Now we have Mr. Golden, Mr. Gillen and Mr. Avakian of San Francisco, representing the defendant, with Mr. Lohse of the firm of Lohse and Fry. Are any of these gentlemen at present acting as attorneys at law for you? A. No, sir.

Q. On the other side, we have Mr. Pike, Mr. Thompson, Mr. McDonald and Mr. Kane as members of the United States attorney's office in Reno, Mr. Compton as a member of the United States attorney's office in Las Vegas and Mr. Walter Campbell of San Francisco is attorney in regard to tax matters and he may or may not appear here in this case later. Have any of these gentlemen acted as attorneys at law for you? A. No, sir.

Q. And you told me you were not acquainted with the defendant and you have no opinion as to the case. Any further questions?

Mr. Gillen: I suppose some jurors know Mr. Lohse as the [49] Reno attorney?

Mr. Pike: I think that was stated repeatedly.

Mr. Gillen: I have not heard it stated at all.

The Court: Mr. Lohse is a member of the Nevada Bar and the rest are from San Francisco.

Mr. Pike: I may be in error, but I am not defi-

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nite whether or not some questions with reference to attorneys——

The Court: I will ask every one on the jury. You have heard the names just mentioned of different attorneys. Are any of those gentlemen now acting as attorneys at all for any person in the jury box, and one gentleman told me some time back Mr. Lohse had. Any one else in this jury box who has any business affairs now in the hands of, or pending before, any of these attorneys mentioned on either side, and is there any one here in this jury box who is acquainted with the defendant? Any further questions?

Mr. Gillen: No questions.

The Court: Any challenge for cause?

Mr. Gillen: No challenge for cause.

The Court: Defendant's 4th peremptory challenge.

Mr. Pike: Excuse Mr. Perri.

(James H. Hardy, Jr. called and sworn.)

The Court: Are you acquainted with the defendant in this case, Mr. Remmer?

A. No, I am not. [50]

Q. And you perhaps are acquainted with some of the attorneys for the government, Mr. Pike, Mr. Thompson, Mr. McDonald, Mr. Kane, Mr. Compton? A. No.

Q. Are you acquainted with any of the attorneys for the defendant? You have probably heard the names mentioned a little while ago, the three gentlemen from San Francisco and two from Reno, Mr.

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Lohse and Mr. Fry. Are you acquainted with any of those gentlemen? A. No.

Q. You heard the discussion here in the courtroom today. Have you anything in mind that would cause you to believe that you could not be a fair and impartial juror if selected to try this case?

A. No.

Q. You believe generally in the principles that we have been speaking of? A. Yes.

Q. You would be guided entirely upon the evidence? No outside influence of any nature, prejudice against the defendant or against the government, or sympathy for one or the other would have any weight with you at all in deciding this case?

A. No.

The Court: Any other questions.

Mr. Golden: May we inquire—this gentleman lives in [51] Sparks and he is a driver?

A. Yes, sir.

Mr. Golden: May we inquire for whom he drives? A. Reno Bus Lines.

The Court: Street transportation.

Mr. Golden: I would like to know if the gentleman has read about this case and formed any opinion concerning it.

The Court: Have you any opinion as to this case one way or another? A. No, I have not.

Q. You have heard about it before?

A. Just what I have read in the papers.

Q. And you understand that the defendant is presumed to be innocent and that presumption remains with him all during the trial, unless the evi-

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dence in the case should convince you beyond a reasonable doubt to the contrary, you understand that? A. Yes.

Q. Now could you, if you are selected as a juror, enter upon this case with an open and free mind, without any opinion one way or another?

A. Yes.

Q. So the matters you have read in the paper haven't left any opinion with you, have they?

A. No.

The Court: Any other questions? [52]

No questions.

The Court: Any challenge for cause?

No challenge.

The Court: Defendant's 6th peremptory.

I want to say to members of the panel, in questioning some of the new arrivals that came into this venire, if anything in any question or discussion suggests anything to you which might cause you to believe there would be some obstacle in your purpose to be a fair and impartial juror, please don't hesitate to so state. Defendant's 6th peremptory.

Mr. Golden: The defense will excuse Mr. Hardy.

(Donald Anderson drawn and sworn.)

The Court: You have heard everything that has taken place here? A. Yes sir.

Q. Do you know of any reason why you could not be a fair and impartial juror if selected to try this case? A. No.

Q. Are you acquainted with any attorneys you heard mentioned here, Mr. Pike, Mr. Thompson, Mr. McDonald——

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A. Yes, I know him.

Q. Have any of these gentlemen acted as attorney at law for you? A. No, sir.

Q. And Mr. Lohse and Mr. Fry are Reno attorneys, the other [53] gentlemen are all from San Francisco, representing the defendant. None of those gentlemen have acted in any way for you?

A. No.

Q. The fact you might be acquainted with some attorneys for the government would not influence you in any way? A. No, sir.

Q. I think you understand the matters I have gone over, you have heard them? A. Yes, sir.

Q. And you believe in those principles?

A. Yes, sir.

Q. And if you were selected as a juror, it would be your purpose to be fair to both the government and the defendant? A. Right.

Q. And you know the verdict, in order to be an honest one, must be based entirely upon the evidence? A. Right.

Q. And we all want to be honest, don't we?

A. Yes.

Q. Are you acquainted with the defendant?

A. No.

Q. And you have no opinion as to the case at all? A. No.

Mr. Golden: Your Honor explained once before with another gentlemen. I would like to know how he knows Mr. Pike, [54] whether socially or in his office?

Mr. Pike: It was Mr. McDonald.

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The Court: Did you see Mr. McDonald very often? A. I did when I worked in town.

Q. You would see him around town?

A. Yes.

Q. Just like any one? A. Yes.

Q. Mr. McDonald was stationed in the Attorney General's office here. You would see him here quite often? A. Yes.

The Court: Any other questions?

No questions.

The Court: Any challenge for cause?

Mr. Golden: No, your Honor.

Mr. Pike: No challenge for cause.

The Court: Defendant's 7th peremptory challenge.

Mr. Gillen: I feel we have reached the point our next action will depend upon the legal matter taken up with your Honor and we are going to ask if your Honor would at this time take a brief recess and consider that matter. It may facilitate further action of the case.

The Court: I can't see why we should, Mr. Gillen. I am going to ask a few more questions. I tried to cover it here a little while ago, the same thing. [55]

Now we want on this jury people who will be fair, people who will be fair to the defendant and fair to the government. We do not want any one on this jury who is going into the case with a fixed opinion. We expect the decision of this case will be based on something that the jury doesn't know anything at all about now, it will be based upon the

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evidence coming from the witnesses and from the documents that are introduced here in evidence, so at the outset of the trial each juror should have an open mind on this case. If the case was submitted to the jury right now, there is only one verdict that could be rendered and that would be not guilty, because the defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt by the evidence, and you have heard no evidence and I pointed out a little while ago that there might be matters coming into this case as to the activities of the defendant which some of you might not approve of, or you might, I don't know. I don't know what they are. Even if something should come into this case as to the activities of the defendant that you might not do yourself if you were in his position or wouldn't approve of them, remember that those matters having nothing whatever to do with the case. Now if anything like that should happen, any testimony of that kind should come into the case, is there any member of this jury who, for that reason and on that basis, would be influenced against this defendant to the extent that it would cloud or interfere with the juror's purpose to be fair and decide the case entirely [56] upon the evidence that comes into court. That is rather involved and probably difficult to understand, the way I so cumbersomely expressed it, but what I am trying to get at is, no matter what happens or appears here, this defendant should not be found guilty unless the evidence proves that he is guilty of the material

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facts charged in the indictment. Is there any one here at this time who has that feling, he could not decide on that basis and decide the case entirely on the basis of the evidence on the charge in this case?

The defendant has exercised six peremptory challenges and has four remaining. The government has exercised four of its challenges and has two remaining. Defendant's next peremptory challenge.

Mr. Gillen: My motion, I made inquiry, your Honor, as respecting the juror, has been denied?

The Court: I did not consider it as a motion.

Mr. Gillen: I intended it as a motion and may it be considered as a motion?

The Court: I will, and I will permit you to renew the challenge. I understand your motion was motion to renew the challenge?

Mr. Gillen: That is correct.

The Court: I will grant the motion. Now you will renew the challenge.

Mr. Gillen: Then, may it please the Court, I challenge [57] Mr. Humphrey for cause.

The Court: You traverse?

Mr. Pike: That is correct.

The Court: What is the cause?

Mr. Gillen: Some expressions Mr. Humphrey made in the course of examination by your Honor. It is my recollection Mr. Humphrey stated—and it is no reflection on Mr. Humphrey, we appreciate Mr. Humphrey's frankness and truthfulness in expressing his state of mind to your Honor; it was a very fair thing for him to do and I hope my challenge does not in any wise make Mr. Humphrey feel he should be embarrassed by it. We are simply

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trying to get a jury that has no fixed opinion in mind about the matter and we are all human and can't help develop opinions in our minds from things we read about here. Now it is my recollection, may it please the Court, and I believe the record will bear me out, that Mr. Humphrey first said he read about this matter in the newspaper and as a result of such reading he had formed an opinion in his mind, and it is my recollection that subsequently he said it would be difficult for him to remove that opinion from his mind, and it is my recollection further, and I am ready to be corrected or either have him confirm it or otherwise by the record, that he also said he would have some fear there would be some deterrent effect—I am not quoting verbatim--because it would come to his attention that the defendant was engaged in [58] activies involving gambling, which in my humble opinion, and the opinion of my associates, means that first of all the gentleman did form an opinion here on more than evidence that came into his purview by reason of the newspaper account—and I might say we all know newspaper accounts are not accurate.

The Court: That is your challenge?

Mr. Gillen: Yes.

The Court: Let us find out. Mr. Humphrey, at this time, from any source whatever have you an opinion as to the guilt or innocence of this defendant?

Mr. Humphrey: No, sir, I have not, as to his guilt or innocence.

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Q. Do you know of any reason, Mr. Humphrey, why you could not, if you are selected as a juror in this case, decide the case entirely upon the evidence that would be brought into court here?

A. No; the things told me and heard this morning, and in giving all these things consideration, I feel that I would be fair and would consider everything as to the evidence and make my decision in accordance with the evidence put before me.

Q. Now if evidence should appear here of gambling activities—the charge that we have here is set forth in this indictment, that is what the defendant is being charged with and you are to decide the case entirely upon the evidence, and you [59] understand that? A. Yes.

Q. Now take those two propositions together, that the defendant is charged with certain specific offenses in this indictment and that we are to decide the case entirely upon the evidence and that there may or may not be some evidence here of gambling activities, have you such a feeling that if there was evidence of some gambling activities that might have occurred in a State where gambling is not legal, could you decide the case without consideration of those matters?

A. Yes, sir, I believe I could.

Q. You would decide the case entirely upon the evidence here, without regard to those matters of gambling? A. Yes, sir, I believe I could.

The Court: The challenge is denied.

Mr. Gillen: May I propose two other questions?

The Court: Yes.

Mr. Gillen: One question I would like to pro-

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pose, the question respecting that your Honor ask this gentleman what he meant when he said he had formed an opinion from what he read, and also what he meant when he said he would be affected by the fact when he heard the defendant had been engaged in gambling activities.

The Court: I am not concerned with that. I am concerned only with his present state of mind, that is all. I [60] will not ask that.

Mr. Gillen: My last question was intended to develop this, what did he mean by reference to gambling activities, that it would be more difficult to presume innocence of the defendant who had been in the gambling business than a defendant who had been in some other line of business?

The Court: I am only interested in his present state of mind and I think I have covered the ground very fully and what he meant by some expression he made here a short time ago, I do not think we are concerned with.

Mr. Gillen: That is the only way we get at a person's state of mind.

The Court: We asked him now what he means. I am not going over it again and I think it is clear here that this juror would decide the case entirely upon the evidence.

Mr. Gillen: If your Honor knows what he meant, I certainly do not and neither do my associates.

The Court: Sometimes a person gets an impression when he reads something in the paper.

Mr. Gillen: That is true.

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The Court: And it may at the time have some influence with him.

Mr. Gillen: That's true.

The Court: And we know, I think, as a matter of law, that opinions formed from newspaper articles and ordinary [61] rumor are not of the character that will stand a challenge for cause.

Mr. Gillen: If they remain, they have.

The Court: Have you any opinion now—I asked the question a little while ago and I will ask you again—have you an opinion from any source whatever now as to the guilt or innocence of this defendant? A. No, sir.

Q. And at the time you read those newspaper articles, did you form an opinion as to the guilt or innocence of the defendant?

A. Not as to the guilt or innocence, no.

Mr. Gillen: As to what then?

The Court: We are not concerned with anything else.

Mr. Gillen: If he formed an opinion about this case, it may be of great interest to us.

The Court: The challenge is denied.

Mr. Gillen: May we have an exception.

The Court: Yes.

Mr. Pike: Your Honor, I do not like to take the time, but I do think——

The Court (Interceding): There is nothing before the Court. Let us get along. Defendant's 7th peremptory.

Mr. Gillen: Excuse Mr. Humphrey.

(Lawrence A. Hill called and sworn.) [62]

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The Court: Mr. Hill, do you know any reason why you could not be a fair and impartial juror?

A. No.

Q. Have you formed or expressed any opinion as to the guilt or innocence of this defendant?

A. No.

Q. At the present time your mind is open on the question? A. Yes.

Q. Are you acquainted with the defendant?

A. No, I am not.

Q. You are probably acquainted with some of these Reno attorneys, Mr. Pike, Bruce Thompson, Mr. McDonald, Mr. Lohse and Mr. Fry, his partner?

A. I know Mr. Pike, Mr. Thompson, and Mr. Lohse. I don't believe I know Mr. Fry.

Q. The other gentlemen are from San Francisco. Have any of these gentlemen acted as attorneys at law for you? A. No.

Q. Have any of the San Francisco attorneys had any business affairs with you? A. No, sir.

Q. Mr. Walter Campbell, have you had business affairs with him or acquainted with him?

A. No, sir.

Q. If you are selected as a juror, you would decide this [63] case entirely upon the evidence, unaffected or uninfluenced by any outside matter, such as sympathy or prejudice of any kind?

A. Yes, sir.

Q. You understand the defendant is presumed to be innocent until the evidence offered by the government should prove him guilty beyond a reason-

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able doubt? You believe in those principles?

A. Yes, sir.

Q. And you would not hesitate to decide the case upon the evidence and find the defendant guilty if the evidence convinced you beyond a reasonable doubt, and you would not hesitate to vote for a verdict of not guilty in the event the evidence did not convince you beyond a reasonable doubt?

A. No, sir.

The Court: Any further questions?

No questions.

The Court: Any challenge for cause?

No challenge for cause.

The Court: The government's next peremptory, 5th.

Mr. Pike: The government will excuse Mr. McCauley.

(Nahum Tinkham called and sworn.)

The Court: Are you acquainted with the defendant in the case?

A. No. [64]

Q. Are you acquainted with any of the attorneys for either side? A. Yes.

Q. Which of the attorneys?

A. I know Mr. Fry and Mr. Thompson and Mr. Pike.

Q. Any of those gentlemen at the present time acting as attorneys at law for you?

A. No, sir.

Q. Have you consulted with any of them on any business matters? A. No, sir.

Q. We won't go over the whole ground again. You have heard what took place? A. Yes, sir.

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Q. You believe generally in these things we have been talking about? A. Yes.

Q. And you understand it is absolutely necessary that we have fair and impartial jurors and that is what you would be if selected as a juror, would you not? A. Yes.

Q. You would decide the case entirely upon the evidence? A. That is right.

Q. You have no opinion one way or another, or have you? I don't want to put words in your mouth.

A. No. [65]

Q. You know of no reason why you could not be a fair and impartial juror if selected as a juror to try this case? A. No, sir, I do not.

The Court: Any further questions?

No questions.

The Court: Any challenge for cause?

No challenge for cause.

The Court: Defendant's 8th peremptory challenge.

Mr. Gillen: May I make an inquiry? I might state we apologize, because in our federal district the procedure is different, there we exercise alternately—and may inquire at this time, to enable us to use more intelligently this balance of our challenges, what is the Court's practice in regard to whom the remaining, the last challenge, is with?

The Court: We have never had that situation come up that way.

Mr. Gillen: Ordinarily the prosecution has the first challenge and the defense the last.

The Court: That is the way it will be. I am going to try to handle it so it will come down to the

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final situation with the government exercising their last challenge first.

Mr. Gillen: Very well.

The Court: Defendant's 8th peremptory.

Mr. Gillen: I wonder if we might ask your Honor to take a brief recess. I think we could facilitate the matter [66] of determining our final decision.

(Jury admonished and 15 minute recess taken at 2:30 P. M.)

2:45 P. M.

The Court: The record will show the presence of the defendant with counsel. It is the 8th peremptory challenge of the defendant.

Mr. Golden: The defense will excuse Mr. Steinheimer.

(Sarah Noble Parker called and sworn.)

The Court: You have been here all day and heard the discussions we have had?

A. Yes, sir.

Q. Are you acquainted with the defendant?

A. No, sir. I know no one here.

Q. While you have been sitting here and listening, has anything occurred to you, or reason suggested itself to you, why you could not be a fair juror if selected to decide this case?

A. I would be fair.

Q. You would decide the case entirely on the evidence? You wouldn't be influenced by any outside matters? A. No, sir.

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Q. You heard us talk about certain activities that might develop, but you want to bear in mind we want to try this case on what is in the indictment and you would be governed by it and decide the evidence as that would be considered by you and nothing else outside the case? [67]

A. Yes.

Q. You have no opinion or any impression of any kind as to the guilt or innocence of this defendant? A. No.

Q. And you believe in these principles, a defendant in every court in this country is presumed to be innocent until the State or government proves he is guilty beyond a reasonable doubt?

A. Yes, sir.

Q. Of course, this applies to this defendant and every defendant. A. Yes, sir.

Q. Are you acquainted with Mr. Pike, Mr. Thompson or Mr. McDonald of the United States attorney's office? A. None of them.

Q. Or Mr. Lohse, the defendant's counsel?

A. No, sir.

Q. And the other gentlemen are members of the San Francisco Bar, or are you acquainted with Mr. Walter Campbell, a government attorney?

A. No, sir.

The Court: Any further questions?

Mr. Pike: This may be going far afield, but I ask the Court to inquire who owns the Circle L Ranch, where her husband is foreman?

A. Mr. Cord. [68]

Mr. Pike: The man we have heard about who

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is a very wealthy man, an automobile manufacturer?

A. I think that is the same man.

Mr. Pike: Have you seen him lately?

A. I wouldn't know him if I did see him.

The Court: Has any one ever talked to you about this case?

A. Oh no, I haven't read the newspapers.

Q. You haven't? A. No, sir.

The Court: Any further questions suggested?

No questions.

The Court: Any challenge for cause?

No challenge for cause.

The Court: Defendant's 9th peremptory challenge.

Mr. Golden: If the Court please, the defendant will excuse Mr. Lynch.

(Stanley J. Smith called and sworn.)

The Court: State your name and residence and occupation please.

A. Stanley J. Smith; Reno; my employment is Harold's Club.

Q. Have you heard this case discussed, Mr. Smith? A. Just what I read in the paper.

Q. Are you acquainted with the defendant, Mr. Remmer? A. I am not. [69]

Q. Have you formed any opinion as to the guilt or innocence of the defendant? A. No, sir.

Q. You have heard everything that has taken place here this morning? A. Yes, sir.

Q. I have tried to point out how necessary it is to have an equal administration of justice and that

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is what we are striving to have in our country. It is necessary that juries and judges decide cases upon the evidence offered and admitted in court and nothing else, so we must not be influenced by any outside matters, sympathy on the one hand or prejudice on the other. We must decide our cases entirely upon the evidence. Do you know of any reason why you could not do that in this case? Is there any outside matter that you think of that might make it difficult for you to decide this case entirely upon the evidence? A. No.

Q. The attorneys who are seated here, Mr. Pike, Mr. Thompson, Mr. McDonald, are our Nevada attorneys and we have Mr. Shelton sitting next to Mr. Pike there, who is a government attorney from San Francisco. We have Mr. Gillen, Mr. Golden, Mr. Lohse and Mr. Avakian. Have you heard of any of these attorneys?

A. Yes, I know Mr. Lohse and Mr. [70] McDonald.

Q. You are acquainted with those who live in Nevada? A. Yes.

Q. Any of those at the present time acting as lawyers for you? A. No, sir.

Q. Have you consulted any of them recently on any business or professional matters?

A. No, sir.

Q. So you feel if you are selected as a juror you could be fair to both the government and the defendant? A. Yes, sir.

Q. You would require the government to prove its case beyond a reasonable doubt?

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A. Yes, sir.

Q. And if the government failed to prove its case beyond a reasonable doubt, you would vote for a verdict of not guilty? A. Yes.

Q. On the other hand, if the evidence convinces you beyond a reasonable doubt, you would vote for a verdict of guilty? A. Yes.

Q. Would you hesitate to do that? A. No.

Q. Would you hesitate to vote for a verdict of not guilty if the evidence did not convince you beyond a reasonable doubt that the defendant was guilty? A. No. [71]

Q. You would follow the instructions given you by the Court and apply them to the facts as you understand them? A. Yes, sir.

The Court: Any further questions suggested?

No questions.

The Court: Any challenge for cause?

No challenge for cause.

The Court: The government's 6th peremptory.

Mr. Pike: Did the Court inquire of the last veniremen whether or not he was acquainted with the case?

The Court: I think you told me, Mr. Smith, that you are not acquainted with Mr. Remmer?

A. Yes, sir.

Q. You have not discussed the case with any one who purported to know the facts?

A. No, sir.

Q. All you know is what you read in the paper?

A. Yes.

Q. You would decide the case upon the evidence and on nothing else and follow the instructions of

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the Court as to the law covering the case?

A. Yes, sir.

The Court: Any other questions?

No questions.

The Court: Any challenge for cause? [72]

No challenge for cause.

The Court: Government's 6th and last peremptory.

Mr. Pike: The jury is satisfactory to the government.

The Court: It will be the defendant's 10th peremptory.

Mr. Gillen: Do I understand your Honor's policy, since the government has accepted the jury as it now stands, the remaining challenge that there is in the hands of the government can only be exercised against any new venireman?

The Court: No, I made that plain a little while ago. I addressed it to the defendants, that I do not want them to feel bound to accept any persons in the box and still have remaining challenges. I am going to allow each side to exercise its full allotment of challenges.

Mr. Gillen: It is perfectly all right, only I understand your Honor to mean if you pass a challenge it does not prevent you to go back.

The Court: That has been the practice in Nevada for years, but I think the Ninth Circuit held against that practice and I think the fair thing to do is when the statute gives you 10 peremptory, you can exercise 10 peremptory challenges.

Mr. Gillen: I was just inquiring. It does not

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make a great deal of difference, I just want to know how we stand.

The Court: So the government can exercise its last peremptory challenge as to any one in the box, and likewise the defendant. Now the government has accepted the jury—wait a [73] minute—maybe I was wrong. I think in view of the fact the government has accepted the jury, their remaining peremptory challenge should be used only as to any new venireman in the box.

Mr. Gillen: That is right.

The Court: I think that would be fair. I didn't quite get the point. I understand now it is the defendant's 10th peremptory challenge.

Mr. Golden: The defense will excuse Mr. Kolster.

(Mrs. Helen S. Mack called and sworn.)

The Court: You have heard everything that has taken place in the courtroom?

A. Yes, I have.

Q. Are you acquainted with the defendant, Mr. Remmer? A. I am not.

Q. Has anything you have heard here that has taken place suggested to you any reason why you could not be a fair and impartial juror if selected to try this case? A. No.

Q. Have you any opinion one way or another as to the guilt or innocence of this defendant?

A. I have not.

Q. You may be acquainted with some of the attorneys here. We have Nevada attorneys and some San Francisco attorneys. Mr. Pike, Mr. Thompson

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and Mr. McDonald represent the government [74] and in that office we have Mr. Kane.

A. I know Mr. Pike.

Q. And Mr. Compton is in the Las Vegas office, and on the other side we have Mr. Lohse and his partner, Mr. Fry.

A. I know Mr. Lohse but I do not know Mr. Fry.

Q. These gentlemen are not acting now as attorneys at law for you? A. No, sir.

Q. Have you consulted any of them recently about any business? A. No, sir.

Q. And the gentlemen from the outside, you are not acquainted with them? A. No, I am not.

Q. You have not had any business matters with any of them? A. No.

Q. So if you were selected as a juror, you would try this case and decide it entirely upon the evidence? A. Yes.

Q. And you could arrive at a decision, could you not, based entirely upon the evidence, without any influence, or without being influenced by any outside matters, just the evidence? A. Yes, sir.

The Court: Any further questions?

No questions. [75]

The Court: Any challenge for cause?

Mr. Golden: Would your Honor ask Mrs. Mack whether she is associated with, or a member of any organization or society which has as its object the abolition of any of the things we have been talking about here?

The Court: No, I would not ask that question.

Mr. Golden: Will your Honor ask whether she

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has read about this matter in the newspaper?

The Court: Have you read about this in the paper? A. I have.

Q. From your reading have you formed or expressed any opinion as to the guilt or innocence of the defendant? A. No, sir.

Q. So if you were selected as a juror, you would be without any knowledge of what the evidence might be? A. Yes, sir.

Q. And you would be governed according to the evidence and nothing else? A. Yes, sir.

Mr. Golden: Will your Honor ask whether, in the event it appears there is some gaming or gambling concerned, whether that would make any difference?

The Court: Now, Mrs. Mack, you have heard me go over this matter with some other people in the jury box. We must keep in mind that the offense, or offenses—there are several [76] counts in this indictment—the matters with which we are concerned and which this defendant is concerned and with which the government is concerned are those matters in the indictment and nothing else. Now during the course of this trial it may be—and I have no more knowledge of what the evidence will be than you have—it may be that some activities of this defendant might appear, matters that are so completely connected with other facts of the case that it can't very well be avoided from appearing here. Some of those matters will be matters which you, or anybody else, would disapprove of. I don't know whether they would be of that character or wouldn't

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be and whether you would approve or did not approve, but regardless of that, what I am trying to get at is we must decide the case entirely upon the charges contained in the indictment, so if those other matters came into this case we must decide this case entirely upon the evidence and not be prejudiced against this defendant on account of any of those matters.

A. I can.

Mr. Golden: I don't know what the lady's acquaintance is with Mr. Pike.

The Court: You have lived in Reno a long time?

A. I have.

Q. You probably know Mr. Pike for a long time? A. For years. [77]

Q. And there is nothing about that acquaintance that would influence you one way or another?

A. It is practically civic work.

Q. It wouldn't influence you any more than any other lawyer and the time you have been living in Reno you probably do know a great majority of the lawyers who have lived there for any considerable period of time, don't you, and if any of those other gentlemen were in this case, it wouldn't make any difference, so far as the facts are concerned, so fas as Mr. Pike is concerned? A. No.

Mr. Golden: Thank you, your Honor.

Mr. Pike: The government is satisfied.

The Court: The jury will be sworn to try the case. Now we will proceed to the consideration whether or not we will have alternate jurors.

Mr. Pike: The trial may last over three weeks

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and under those circumstances I respectfully suggest to the Court we should have at least one and probably two alternatives.

The Court: What is the view of counsel for the defendants?

Mr. Golden: We believe we should have alternates.

The Court: Two?

Mr. Pike: I think one would be enough.

Mr. Gillen: I think two. [78]

The Court: All right, we shall have two. Under Rule 24 (Reads rule). I understand we are going to empanel two alternatives. Each side will have one challenge. So the clerk will call the name of another juror.

(Elton L. Morris called and sworn.)

(Albert Conton called and sworn.)

The Court: The gentleman who is connected with newspapers, in your work have you had anything to do with reporters or articles rather concerning news items?

Mr. Conton: No, your Honor.

Q. You have not conversed with any newspaper people about the case, have you? A. No.

Q. Or with any one else? A. No.

Q. And have you, sir, have you talked to anyone about the case?

A. No more than the average person—read it in the paper.

Q. But have you had any conversations with any one about the case? A. No.

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The Court: I am talking to both of you now. Have you any opinion, either one of you, as to the guilt or innocence of this defendant?

A. No. [79]

Q. Do you know anything about this case or heard anything about it, through your reading or any other source, in addition to what Mr. Pike said here this morning when he gave a brief statement of the nature of the case? A. No.

Q. You understand that the defendant is presumed to be innocent and he is to be considered innocent unless, from the evidence, it should appear to a juror that he is not innocent. In other words, at the outset of the trial the defendant is considered an innocent man and is to remain so in the minds of the jury, or an individual juror, unless and until the evidence should convince a juror beyond a reasonable doubt to the contrary. You understand that and you appreciate the necessity of striving—perhaps we will never be able to accomplish it but we are striving to have an equal and fair administration of justice throughout the country, and the only way that can be obtained is to see that courts and juries decide cases on the evidence and the law of the case along and without influence of any matter from outside. You understand that, don't you? A. Yes.

Q. And would you be so governed in this case, decide this case entirely upon the evidence?

A. Yes.

Q. Now it may be that one or both of you will be called upon [80] to act as jurors in the case if

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selected as alternative jurors. Do you know of any reason, either one of you, why you could not be a fair and impartial juror if selected as a juror in this case? A. No.

The Court: Any further questions?

Mr. Golden: May we inquire whether the gentleman would be influenced should it appear during the course of the trial that his paper takes a position one way or another in this case?

The Court: I am going to ask something right here now. I have a feeling that the average man and woman has respect for his oath. I think we all ought to have that feeling and I have it and I think we are all conscientious and we try to do what is right. Now I am going to ask this jury to do something that probably is going to be hard to do. I am going to ask every member of this jury, and each of the alternate jurors, not to read, during the course of this trial, any newspaper accounts of this trial. Will you promise you will not do that, each and every one of you? The reason for that is, you are to get your impressions and views of this case from the witnesses and from the documents which may be introduced in court. Now you are going to hear a certain witness testify, say, for example. You might read accounts of his testimony in the paper in the next four or five days, one right after [81] another or several papers. They would give undue emphasis to that individual's testimony. Do I make myself clear? In other words, you might give importance to one individual's testimony because the newspaper article which you might read

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would emphasize something about his testimony. You are to give emphasis to the testimony you hear here and be influenced by it as it appears to you and not by any newspaper articles. I think you understand. I am going to ask each and every one of you to avoid reading any newspaper articles of this trial. I do not say there would be anything in the paper not proper, I am not saying that, but it would give undue emphasis you are to give to this evidence as it comes in here. For the same reason I would not permit any juror to take any notes during the trial, and that is for the same reason. A juror might take notes and then when they get into the jury room it was a question as to what this witness said or didn't say, but somebody has a note. The person who has the note might have misunderstood but because he has notes, the jury might say, that is it, so I don't want any notes taken and I don't want you to read any articles in the papers, so I am going to ask you not to do that and I feel confident you won't. All we want is fair and impartial treatment given this defendant and the government and a fair trial. Now will you refrain—I ask you especially because you are connected with newspapers.

Mr. Golden: The question is whether working there, he [82] could hardly fail to know the paper's policy, whether that paper's policy would have any influence on an employee of that paper, that is the question.

The Court: Now has anyone connected with any of the newspapers, either employed or connected

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with or working with it, any idea as to how they stand on this case? A. No, your Honor.

Q. Have any of them talked to you about the case? A. No.

Q. If there is a policy by one or more of these newspapers about this case, do you know what it is? A. No, I do not.

Q. You are not going to talk to any of them about it? A. No.

Q. You are not going to permit any of these people to talk to you about it? A. No.

Mr. Golden: We again ask whether he has read the local papers of yesterday and this morning and whether from that he would have any opinion as to the policy of those papers?

The Court: Did you read the papers the other day?

A. This might sound strange to say sir, but three or four months ago, when I was made a member of the panel and saw a headline dealing with any case coming into federal court, I didn't read the [83] article.

Q. So up to this time you are not effected one way or another by anything that might have appeared in your paper? A. No, your Honor.

Q. Did you read these articles yesterday or the last few days concerning this case?

A. No, your Honor.

Mr. Golden: No further questions.

The Court: Have you any questions?

Mr. Pike: Yes. I don't believe the Court in-

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quired as to whether or not they are acquainted with the defendant.

The Court: Are either of you gentlemen acquainted with the defendant, Mr. Remmer?

A. No.

Q. Are any of these attorneys acting as lawyers for you? A. No, your Honor.

The Court: Any other questions, Mr. Pike?

Mr. Pike: None.

The Court: Any challenge for cause?

(No challenge for cause.)

The Court: Government's first peremptory challenge.

Mr. Pike: The two alternative jurors are satisfactory.

The Court: Defendant's peremptory challenge.

Mr. Golden: Excuse Mr. Conton.

(C. A. Tompkins called and sworn.)

The Court: Have you heard this case [84] discussed?

A. Read in the newspapers about it.

Q. From what you have read in the newspapers, have you formed or expressed any opinion?

A. No sir.

Q. Or from any other source have you formed or expressed any opinion as the guilt or innocence of the defendant? A. No.

Q. Do you know any reason why you could not be a fair and impartial juror if selected as a juror in this case?

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A. There is none in my mind.

Q. You have not talked to any one about the case?

A. Just reading the newspapers and comments made.

Q. You have had conversation after reading the paper with some one?

A. Yes, just ordinary conversation I would have with any one here.

Q. But did you talk with any one who had or thought they had some idea as to what the evidence in the case would be? A. No.

Q. You have heard the discussion we have had here all day, the necessity of having cases tried and decided on the evidence alone, and if you are selected as a juror in this case, would you and could you decide this case entirely upon the evidence brought into court? A. Yes, sir. [85]

Q. Regardless of any outside influence of any kind? A. Yes, sir.

Q. The defendant is presumed to be innocent until the contrary should appear beyond a reasonable doubt. If the government does not prove the case beyond a reasonable doubt, you should vote for a verdict of not guilty. If, on the other hand, you are convinced by the evidence beyond a reasonable doubt the charge is true, it is your sworn duty to vote for a verdict of guilty. You understand that?

A. Yes, sir.

Q. That is what you would do?

A. Yes, sir.

Q. Are you acquainted with the defendant?

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A. Yes.

Q. How long have you known him?

A. Just through my routine duties as cashier.

Q. You have seen him at different times?

A. I don't know him personally—see him come in and out.

Q. Have you had any personal transactions with him?

A. None whatsoever other than cashier.

Q. Other than cashier in the Bank Club?

A. No.

Q. You are not associated with him in any business? A. No, sir.

Q. You have no interest in any business [86] of his? A. No, sir.

Q. Have you any social acquaintance with him?

A. No, sir.

Q. Is there anything about that acquaintance, or as a result of that acquaintance, that would make it difficult for you to be a fair and impartial juror in this case?

A. I see no reason why I should not.

Q. It would not influence you for him or against him? A. No, sir.

The Court: Any further questions?

(No questions.)

Mr. Pike: At this time the government will excuse Mr. Tompkins.

(John H. Newman called and sworn.)

The Court: Do you know the defendant?

A. No, sir.

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Q. Are you acquainted with the attorneys, Mr. Pike, Mr. Thompson, Mr. McDonald, Mr. Lohse, Mr. Fry, and the other gentlemen from San Francisco, the gentlemen there seated, have you ever seen any of them before? A. No.

Q. And Mr. Walter Campbell, a government attorney may appear here later. Do you know him?

A. No.

Q. So none of these attorneys have been acting as attorney [87] for you? A. No, sir.

Q. Have you talked to anybody about this case?

A. No, sir.

Q. Do you know any more about it than you have heard in court this afternoon? A. No.

Q. Or from Mr. Pike this morning when he made a brief statement? A. No.

Q. You would decide this case, if you were selected as a juror—and you might be a juror in the event one of the other jurors should suddenly become ill—and you know of no reason why you couldn't decide this case entirely upon the evidence?

A. No, sir.

Q. You would not be influenced by any prejudice of any kind? A. No.

Q. Regardless of any circumstances, you would just decide the case entirely upon the evidence?

A. Yes.

The Court: Any questions?

(No questions.)

The Court: Any challenge for cause?

(No challenge for cause.)

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The Court: The alternate jurors will stand and be sworn. [88]

(Alternate jurors sworn.)

The Court: The clerk will read the indictment and state the plea of the defendant.

(Clerk reads indictment.)

(Jury and alternate jurors admonished and recess taken for 15 minutes at 3:35 p.m.)

3:50 P.M.

(Defendant present with counsel.)

(Presence of the jury and alternate jurors stipulated.)

(Opening statement by Mr. Pike.) [89]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had in the case entitled United States of America, Plaintiff, vs. Elmer F. Remmer, Defendant, No. 12,177, at the trial of the case commencing November 28, 1951, at Carson City, Nevada, and that the foregoing pages, numbered 1 to 89, inclusive, comprises a full, true, and correct transcript of my said shorthand notes of the proceedings

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of the selection of the jury on Wednesday, November 28, 1951, to the best of my knowledge and ability.

Dated at Carson City, July 14 ,1952.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed July 14, 1952.

[Endorsed]: No. 13281. United States Court of Appeals for the Ninth Circuit. Elmer F. Remmer, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed July 15, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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No. 13281

United States Court of Appeals

For the Ninth Circuit

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

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Proceedings Had in the United States Court of Appeals for the Ninth Circuit

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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, April 9, 1953.

Before: Mathews, Stephens and Orr,
Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal in above cause argued by Mr. Spurgeon Avakian, counsel for appellant, and by Mr. Joseph A. Sommer, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision, with leave to counsel for file further memorandum.

United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, May 28, 1953.

Before: Mathews, Stephens and Orr,
Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

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United States Court of Appeals
for the Ninth Circuit

No. 13,281

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

May 28, 1953

Appeal from the United States District Court
for the District of Nevada

Before: Mathews, Stephens and Orr,
Circuit Judges.

Orr, Circuit Judge:

OPINION

Appellant stands convicted on four counts of an indictment charging wilful attempts to defeat and evade taxes due and owing from him and his wife for the years 1944 and 1945 in violation of §145 (b) of the Internal Revenue Code, 26 U.S.C.A. § 145 (b).[1] He was sentenced to imprisonment for five

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[1] "26 U.S.C.A. § 145. Penalties.
* * *

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax

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years and a fine of $5,000 on each of the four counts, the sentences of imprisonment to run concurrently and the fines to be cumulative. The judgment is challenged upon numerous grounds.

I. Bill of Particulars.

Appellant first contends that the trial court erred in denying his motion for a bill of particulars made pursuant to the provisions of Rule 7 (f), Federal Rules of Criminal Procedure.[2] Particular stress is placed upon the fact that the indictment did not inform him as to the source or sources of his alleged net income, the item or items making up his alleged net income, and the method or methods by which the Government computed his alleged net income. An application for a bill of particulars is one addressed to the sound discretion of the

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imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

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[2]18 U.S.C.A. Federal Rules of Criminal Procedure.

III. Indictment and Information.

"Rule 7. The Indictment and the Information.

* * *

"(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

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court. Our inquiry: Was that discretion abused? Wong Tai v. United States, 273 U. S. 77 (1927); Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), cert. denied, 338 U. S. 860; Maxfield v. United States, 152 F.2d 593 (9th Cir. 1945), cert. denied, 327 U. S. 794. A bill of particulars should be granted where it is thought necessary (1) to protect the defendant against a second prosecution for the same offense, or (2) to enable the defendant to adequately prepare his defense and avoid surprise at the trial. In the instant case the indictment charged that appellant filed tax returns disclosing a certain net income and tax due, whereas, in fact the net income and tax due were of a specified greater amount. It is apparent that the offense charged is sufficiently defined to protect appellant from double jeopardy. We deem it significant that appellant has not contended that he was subjected to surprise during the trial by the nature of the Government's case and thus unprepared to meet the charges against him. See Himmelfarb v. United States, supra; Maxfield v. United States, supra. The situation is quite different from that in Singer v. United States, 58 F.2d 74 (3d Cir. 1932), upon which appellant relies, since there emphasis was placed upon the frequent interruptions of the trial that were necessary so that the prosecution could give the defendant information which would have been contained in a requested bill of particulars. Thus, the defendant in that case was in fact unable adequately to prepare his defense because of the failure to grant the bill. Moreover, the indictment

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in the Singer case failed to distinguish certain partnership gross income from partnership net income, an item upon which the defendant should have been advised and which could have been ascertained only from a bill of particulars. No such prejudice to appellant is evident in the instant case. The offense charged was specifically stated in the indictment. Appellant was in a position to know whether the facts alleged were true. The most to which appellant was entitled prior to trial was disclosure of the theory of the Government's case. United States v. Caserta, 199 F. 2d 905 (3d Cir. 1952). That the Government was proceeding upon a net worth theory was made known to appellant during the course of argument on the motion for a bill of particulars.[3] The District Court in the exercise of its discretion determined that granting the requested bill of particulars would merely apprise appellant of information in the hands of the prosecution to which he was not entitled. Under the circumstances, no abuse of discretion appears. A bill of particulars has been denied in prosecutions under similar tax evasion indictments. See United States v. Rainey, 10 F.R.D. 431 (W.D.Mo. 1950); United States v. Mangiaracina, 10 F.R.D. 415 (W.D.Mo. 1950); but see United States v. Kelly, 10 F.R.D. 191 (W.D.Mo. 1950).

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[3]Mr. Campbell, Government counsel, made the following statement:

"Mr. Campbell: Well, we are in this position, your Honor—as Mr. Golden is aware, the Government's case here is what is termed a net worth case."

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II. Accessibility of Records.

Appellant asserts that the trial court erred in denying the defense access to certain books, papers and documents in the possession of the Government. The following facts are pertinent to consideration of this contention.

Long prior to the filing of the criminal indictment in April of 1951, appellant knew that the Government was investigating his income tax liability. The Bureau of Internal Revenue issued 90-day letters in 1949 and prior to February of 1950 a federal income tax lien in excess of $800,000 was placed against his property. Numerous conferences were had subsequent to January 11, 1950, with various attorneys and accountants representing appellant in tax matters. Power of attorney was executed by appellant to counsel of record in the present litigation as early as March 10, 1950, for the purpose of representing appellant in tax conferences with the government. Other attorneys and accountants have represented appellant with the Treasury Department since early in 1949, powers of attorney filed with that department disclose.

During the course of its investigation, the Government acquired voluntarily from third parties certain books, papers and documents pertaining to businesses in which it was alleged that appellant had an interest.[4] Being advised, in the course of confer-

[4]In computing appellant's income for the years 1944 and 1945 the Government relied in part upon the net worth of the following businesses: B-R Smoke Shoppe, Day-Nite Cigar Store, 110 Eddy

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ences, that an audit of appellant's affairs was being conducted, the Government gave appellant's accountants complete access to the aforementioned records in its possession. An affidavit executed by one of these accountants stated that the material consisted of a "mass of original documents" and that "this material filled a packing box of approximately fifty cubic feet in volume plus several other smaller cartons." Although the accountants surveyed the material at this time, spring of 1950, no complete analysis of the records is said to have taken place since appellant did not make sufficient funds available for the task. At another time prior to the filing of the indictment in this case, accountant Lawrence Semenza sought permission to examine these records in connection with work he was doing for appellant in computing his civil tax liability subsequent to issue of the 90-day letters. Semenza was not only allowed to examine the business records in the possession of the Government, but was allowed to select any records he desired for use in his own office.

After the filing of the indictment, no request was made by appellant's counsel for examination of the records not previously selected by Semenza until October 22, 1951, more than six months after the filing of the indictment. The Government agreed to allow inspection of these records only on the compliance with certain conditions: a sufficient showing of appellant's interest and consent of the third

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Street, and Menlo Club, all in San Francisco; 21 Club and San Diego Social Club, both in El Cerrito, California.

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parties who had originally given the records to the Government.

Appellant first sought a court order on November 14, 1951, when a motion was made to inspect and take copies pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure.[5] In conjunction with this motion, appellant also sought a continuance of his trial until April 1, 1952, to enable sufficient time for examination of the requested records. In this regard, it should be noted that trial was set for November 28, 1951. The motions to inspect and take copies and for a continuance were denied by the trial court after a hearing.

The District Court properly exercised its discretion in denying these motions. As has been observed, at no time prior to the filing of the indictment was the freedom of appellant to examine the records

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[5]18 U.S.C.A. Federal Rules of Criminal Procedure.

IV. Arraignment and Preparation for Trial.

"Rule 16. Discovery and Inspection.

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

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in the possession of the Government in any way limited. At least three accountants representing appellant did in fact survey the material in question and one accountant was allowed to take all records he thought necessary for the computation of appellant's tax liability.[6] Although it is true that accounting analysis of these records was at that time only for the purpose of settling appellant's civil tax liability, based on net income alleged by the government in its 90-day letters to be $136,718.94 for 1944 and $265,661.78 for 1945, analysis of the materials for that purpose would of necessity cover the same ground and consider the same sources of income as would analysis for the purpose of the present criminal proceedings where the Government alleged lesser sums as income: $67,469.21 for 1944 and $75,865.19 for 1945. The opportunity afforded appellant to examine the records in question was sufficient to

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[6]Mr. Semenza testified as follows concerning his acquisition of records which were in the possession of the Government:

"Q. [By Mr. Campbell]: At the time you obtained those records, isn't it a fact you were taken into a room where the records were and told you could have anything you wanted?

"A. That is true.

"Q. And you were the one who selected these particular records as they were the pertinent records having to do with the matter which you were then investigating, which was the liability of Mr. Remmer? A. That is right.

"Q. They were the only records you considered of any use to you in that connection?

"A. That's right."

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enable him to prepare an adequate defense. Furthermore, there is no adequate explanation as to why appellant waited more than six months after filing of the indictment to request permission of the Government to examine the records and first made his motion under Rule 16 two weeks before the trial was due to commence. The affidavits supporting the motion to produce and take copies conceded that accounting analysis of the records would probably take two or three months. One of appellant's counsel averred in his supporting affidavit that he first learned in October of 1951 that the Government had possession of various books and records of some of the business in which appellant had an interest.[7] But the facts to which we have already referred show that other representatives of appellant knew of the existence of the records, and at the very least had surveyed the material, many months earlier. The motion to produce and take copies therefore was not timely. To refuse to continue the trial until April 1, 1952, as requested, was not an abuse of the court's discretion in view of appellant's tardiness in bringing his motion.

Subsequent to denial of his motion to inspect and take copies under Rule 16, appellant on November 23, 1951, filed a motion for production and inspection under the provisions of Rule 17(c), Federal

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[7]However, another of appellant's counsel stated during oral argument of the motion that counsel learned at an "early stage in this case" that the Government had "quite an abundance of records."

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Rules of Criminal Procedure.[8] A subpoena duces tecum was served on Government counsel, which they thereupon moved to quash. After a hearing on the day before the trial was to commence, the trial court granted the Government's motion and denied appellant's motion. Because of the circumstances already discussed, the court did not err in determining that compliance with the subpoena would be unreasonable and oppressive.

The case of Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), is not authority for the proposition that the trial court's denial of the motion under Rule 17(c) was an abuse of discretion, as appellant has argued. The Supreme Court in that case held that the trial court had the power to order the Government to produce certain documents.

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[8] 18 U.S.C.A. Federal Rules of Criminal Procedure.

IV. Arraignment and Preparation for Trial.

"Rule 17. Subpoena.

* * *

"(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

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It did not hold that a refusal to grant the motion to produce would have been an abuse of discretion.

We think it important to stress, in considering whether denial of appellant's motions should be upheld, that the purpose of motions of this type is to expedite the proceedings and enable a defendant adequately to prepare his defense. No specific showing has been made by appellant as to how the denial of these sweeping motions calling generally for production of all records in the possession of the Government pertaining to businesses in which it was alleged appellant had an interest prejudiced the defense during the course of the trial. The court stated that appellant's counsel would be given ample opportunity during the trial to examine any document offered by the Government. Only once during the trial did appellant seek the production of particular papers, certain daily poker sheets from the 186 Club, and the request was granted.

We have referred to certain books, papers and documents given voluntarily by third parties to the Government, which were selected by appellant's accountant Semenza prior to the indictment and taken by him to his own office for use in computing appellant's tax liability. These records were given to Semenza upon the condition that he return them to the Bureau of Internal Revenue. Semenza later gave the records to Friedman, another accountant employed by appellant, who in turn gave the records to appellant's counsel. When subpoenaed before the grand jury, and later during the trial, Semenza said he was unable to produce the records because ap-

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pellant's counsel would not return them to him. The District Court then ordered appellant's counsel to deliver these records to the clerk of the court, the records to be available to both Government and defense counsel during the trial. Appellant thereupon made a motion under Rule 41(e), Federal Rules of Criminal Procedure,[9] for return of these records and suppression of their use as evidence. The motion was denied.

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[9] 18 U.S.C.A. Federal Rules of Criminal Procedure.

IX. Supplementary and Special Proceedings.

"Rule 41. Search and Seizure.

* * *

"(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

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Appellant contends that the trial court's order violated the Fourth and Fifth Amendments to the Constitution of the United States. We do not agree. The records given to Semenza were obtained by the Government from third parties rather than from appellant. Use of such records by the prosecution would not violate appellant's constitutional rights, even were it true that the third parties originally obtained the records from appellant illegally.[10] See Lustig v. United States, 338 U.S. 74, 78-79 (1949); Feldman v. United States, 322 U.S. 487, 492 (1944); Symons v. United States, 178 F.2d 615 (9th Cir. 1949). Since the Government's possession was such as properly to entitle it to use of the records as evidence, the condition that the records be returned was lawfully imposed when Semenza's request to select certain records for accounting analysis was granted. Such a promise to return the records was enforcable. Cf. Greenbaum v. United States, 280 Fed. 474, 478 (6th Cir. 1922). Appellant's counsel took the records subject to the imposed condition and therefore could not retain them by asserting so-

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[10]There is no indication in the record on appeal that the books and documents were ever taken from appellant's possession illegally. At the hearing on the motion for return of the books and documents and suppression of their use as evidence, appellant sought permission to adduce testimony as to the circumstances of the Government's original acquisition of the records. The District Court held that appellant's attempt to raise this question for the first time at that point in the proceedings was not timely, relying upon the last sentence of Rule 41(e), Federal Rules of Criminal Procedure.

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called constitutional rights of appellant. As the Supreme Court said in Hale v. Henkel, 201 U.S. 43 (1906) at 69-70: "The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person." (Emphasis added.) Nor was appellant in a position to assert constitutional rights, because appellant never acquired personal possession of the records after they were given by the Government to Semenza. "A party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913).

The case of People v. Minkowitz, 220 N.Y. 399, 115 N.E. 987 (1917), referred to for the first time by appellant during oral argument, is distinguishable. That case involved papers originally in the possession of the defendant which had been given to his attorney in the course of an attorney-client relationship. The court held that under those circumstances the possession of the attorney was the possession of the defendant, and the attorney therefore could not be compelled to produce the papers. In the present case, however, the records were not acquired by appellant's counsel from appellant in the course of an attorney-client relationship, but were instead received from the Government subject to the condition that they be returned.

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III. Sufficiency of the Evidence.

The Government's case is based upon the net worth method, the underlying theory of which is that where a person's net worth at the end of a particular year is greater than his net worth at the beginning of that year, and such increment is not attributable to gifts, devises, loans, or other non-income sources, an inference may be drawn that the increase in net worth represents income to the taxpayer. The net worth computations of the Government tended to show that appellant had failed to report taxable income of $31,747.91 in 1944 and $11,747.04 in 1945. No attempt was made by the Government in this case to increase this sum by the amount of appellant's non-deductible expenses during the years in question. The Government not only relied upon numerous documents and the testimony of more than fifty witnesses to establish the increment in appellant's net worth during the years 1944 and 1945, but also extensively investigated possible non-income sources of net worth in order to exclude their effect. The question of the sufficiency of the evidence was raised by appellant's motion for judgment of acquital made at the close of the case.

The net worth method of computing income may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income. See 26 U.S.C.A. § 41. The jury was so instructed in the present case, and the evidence is sufficient to sustain a finding that appellant's records were inadequate. Ray Weaver, the special agent in charge of the Bureau of Internal

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Revenue investigation, testified, as an expert, that in his opinion the records of the enterprises in question were not adequately kept. Specific illustrations of such inadequacy were given by Weaver and other witnesses.[11] As hereinbefore stated, appellant's accountants had made a survey of the records pertaining to appellant's business enterprises in the Government's possession prior to trial. Therefore, the alleged failure of the Government to introduce in evidence all such records in its possession is not significant since if any records adequately reflecting income were in existence appellant could have specifically requested their production during the trial.

Appellant attacks the accuracy of the Government's computation of his starting point net worth, that is, his net worth on December 31, 1943. It was necessary for the Government to establish appellant's net worth at the beginning of the period during which the alleged evasion occurred in order to compare his increment in net worth with the income actually reported by appellant on his and his wife's tax returns. The fundamental question presented is what quantum of evidence must be offered by the Government before a trial court can properly submit the case to the jury. Whether sufficient evidence has been introduced in a given case will of course

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[11]For example, William E. Kyne testified that he kept the records of the B-R Smoke Shoppe; that these records consisted of a single entry each day, whether the business had lost or won; that this daily entry was a net figure arrived at after all the expenses of doing business had been paid, including salaries.

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depend upon the facts of that particular case. In deciding whether the trial court properly denied appellant's motion for judgment of acquittal, the evidence must be taken in the light most favorable to the Government. Gendelman v. United States, 191 F.2d 993 (9th Cir. 1951). Proof of the exact amounts of unreported income is not required. The evidence is sufficient if the jury is justified in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes. United States v. Johnson, 319 U. S. 503 (1943); Goldbaum v. United States, ... F.2d .... (9th Cir. April 13, 1953).

In the instant case the Government thoroughly investigated appellant's potential sources of net worth. It was not incumbent upon the prosecution to prove appellant's net worth to a mathematical certainity before the case could be submitted to the jury. As the Fourth Circuit said in Bell v. United States, 185 F.2d 302 (4th Cir. 1950), cert. denied, 340 U.S. 930: "An estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under the statute to make and to preserve, and by its very nature it is an approximation; but it has been held in this and other jurisdictions to be an appropriate method to support a criminal prosecution under the statute * * *." (Emphasis added.) 185 F.2d at 308. See also Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951); Schuermann v. United States, 174 F.2d 397 (8th Cir. 1949), cert. denied, 338 U.S. 831.

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Reference was made during the trial to a certain safe deposit box in which appellant purported to keep money. Appellant contends that the possibility that substantial funds were kept in the box destroys the validity of the Government's net worth computations, yet appellant did not attempt in any way at the trial to prove that substantial funds were in fact kept in the box. Other evidence introduced at the trial, such as the fact that a judgment of $1800 obtained against appellant in 1938 was not paid until 1945, tended to show that appellant did not have substantial cash at the beginning of 1944. Requests by the Government to examine the contents of the safe deposit box were refused. If a defendant could prevent a case of this type from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated. Skillful concealment cannot be made an invincible barrier to proof. United States v. Johnson, supra, at 518. More than mere speculation is required to support a motion for judgment of acquital. The only affirmative evidence concerning the safe deposit box in question was the testimony of one witness that on December 3, 1943, he placed $17,000 in the box. Were we to assume that this money remained in the box on December 31, 1943, the Government's case would not fall since the net worth computations, including the additional $17,000 as part of opening net worth for 1944, would

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still show unreported income of $14,747.91 for the year 1944.

Reliance is placed by appellant upon the cases of Bryan v. United States, 175 F.2d 223 (5th Cir. 1949)[12] and United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949), where judgments of conviction were reversed because of the insufficiency of the evidence. This court, in Davena v. United States, 198 F.2d 230, 231 (9th Cir. 1952), questioned the "vitality" of the Fenwick case, and the majority opinion in the Bryan case was accompanied by a strong dissent. Although these decisions may well have been appropriate because of the particular facts there involved, we believe the general language of the opinions too narrowly limited the function of the jury as the triers of fact.

It is true, as appellant contends, that proof of increased net worth is only circumstantial evidence of taxable income.[13] The test to be applied on motion for judgment of acquital in such a case, however, is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but that of guilt, but rather whether as a matter of law reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt

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[12]The Supreme Court granted certiorari to examine a procedural issue not relevant to the instant case and affirmed the Fifth Circuit's holding on that issue. 338 U.S. 552 (1950).

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[13]The District Court, in its instructions to the jury, properly explained the nature and effect of circumstantial evidence.

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could be drawn from the evidence.[14] Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864. If reasonable minds could find that the evidence excludes every reasonable hypotheses but that of guilt, the question is one of fact and must be submitted to the jury. Curley v. United States, 160 F.2d 229 (D.C. Cir. 1947), cert. denied, 331 U.S. 837; Stoppelli v. United States, supra. Judged by this standard, the motion for judgment of acquital was properly denied in the present case.

Appellant argues in his reply brief that even if there was sufficient evidence to show a tax deficiency there was no evidence of fraud. A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances. A wilful intent to evade income taxes may be inferred from such factors as appellant's failure to include a substantial amount of income on his and his wife's tax returns, the failure to keep adequate books which would clearly reflect income, and the concealment of the ownership of property such as a safe deposit box, real estate interests, and business licenses. These factors, all present in the instant case, are but part of a general pattern of conduct engaged in by appellant from which the jury could infer the requisite intent. See Norwitt v. United States, 195 F. 2d 127, 132 (9th Cir. 1952).

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[14]We interpret Karn v. United States, 158 F. 2d 568 (9th Cir. 1946), as holding in that case's factual context that no reasonable jury could have found that the evidence excluded every reasonable hypothesis but that of guilt.

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The Government contended during the trial that certain unincorporated business enterprises of the appellant were to be treated as sole proprietorships for tax purposes, while appellant contended that they were partnerships.[15] The test for determining recognition of a partnership for federal income tax purposes is whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." Commissioner v. Culbertson, 337 U.S. 733, 742 (1949). The question is one of fact. Toor v. Westover, 200 F. 2d 713 (9th Cir. 1952); Harkness v. Commissioner, 193 F. 2d 655 (9th Cir. 1951), cert. denied, 343 U.S. 945. There is substantial evidence to support the Government's contention that the alleged partnerships should not be recognized for tax purposes. The record discloses, among other things, that the enterprises were financed by a single fund belonging to appellant, that appellant made the policy decisions, that the purported partners were not to acquire an interest in the assets of the business until appellant had withdrawn an amount equal to his original capital investment, that no profits were actually distributed during the years in question to persons other than appellant, and that in at least one instance a new partner

[15]The enterprises in question included the B-R Smoke Shoppe, Day-Nite Cigar Store, 110 Eddy Street, and the Menlo Club. The extent of appellant's interest in the 21 Club and the San Diego Social Club was not in dispute.

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entered the business without another partner knowing the terms.

Two further contentions are made by appellant which pertain only to Counts Three and Four, the counts based upon the year 1945.

(1) Appellant asserts that in computing closing net worth for the year 1945 the Government improperly included $15,000 in markers or IOU's as cash of the B-R Smoke Shoppe, one of appellant's enterprises. Regardless of whether such markers should technically be treated as cash or accounts receivable, they were properly included as part of the assets of the business. Appellant can hardly rely upon the fact that the enterprise was engaged in the illegal business of bookmaking, and that therefore, under California law, the markers were unenforceable. It is obvious that appellant accepted markers as a substitute for cash from his customers because he thought he could find certain effective if not legal means of enforcing them. He considered the markers to be assets of his business, capable of being reduced to cash. We do not believe as a practical matter he was mistaken.

(2) In computing closing net worth for the year 1945 the Government recognized a debt of $100,000 owed by appellant to Gene Schriber as part of the $175,000 purchase price of the Menlo Club. Appellant argues that actually a sum of $125,000 was owing at the end of 1945. His position is supported by the testimony of Schriber and what purports to be a page of the 1947 Menlo Club ledger, this

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ledger being part of the records given to appellant's accountant Semenza prior to the trial and subsequently impounded with the court clerk by order of the Court during the trial. The Government relies upon a photostat of a page of the 1945 ledger of the Menlo Club, stating that the original was part of the records given to Semenza, that this page was never returned, and that the alleged page of the 1947 ledger upon which appellant relies first made its appearance upon return of the records to the clerk of the court. Appellant seeks to explain the inconsistency in the ledgers by stating that the first payment of $25,000 was returned to appellant so that a check for the same amount could be substituted in order to enable appellant to keep a record of the transaction. It is said that the 1945 ledger is in error in that it treats this transaction as two separate payments. This was a question of fact for the jury; it was resolved against appellant.

IV. Admissibility of Evidence.

Complaint is made to a number of rulings by the trial court in regard to the admission and exclusion of evidence during the course of the trial. Appellant's contentions must be considered in conjunction with the salutary rule that the discretion of the trial court should not be disturbed in such matters unless the accused has been deprived of substantial rights. See Fed. R. Crim. P. 52(a). Upon reviewing the alleged errors in the light of the aforesaid principle of law, we cannot say that the District

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Court erred. See United States v. Johnson, 319 U.S. 503, 519-520 (1943).

Witness Agnes Badobinatz was allowed to testify over appellant's objection, that in February of 1947 her husband, now deceased, told her that he was going to repay $5,000 he had borrowed from appellant. Appellant argues that since there was no testimony as to when the obligation was incurred the Government failed to lay a proper foundation for Badobinatz's testimony. Admission of this testimony, however, could not have been in any way prejudicial to appellant since the Government's final computation of appellant's net worth did not include this $5,000 for any of the years in question.

Witness A. V. Brady, an agent of the Bureau of Internal Revenue, testified concerning the investigation of appellant's tax liability and the preparation of the net worth statement upon which the Government's case was based. Appellant objects to Exhibit No. 183, the financial statement prepared by Brady to reflect changes in appellant's net worth during the years 1944-1946, which was admitted in evidence during the witness' testimony. It is urged that there was insufficient evidence to support admission of the statement. We have already held that the Government's evidence was sufficient to take the case itself to the jury. The net worth statement in question was constructed from all the evidence in the case. There was, therefore, sufficient evidentiary basis in the record for admission of the statement. Brady's estimate of appellant's federal income tax liability based upon

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the net worth computation was also admissible, since he was testifying as an expert witness.

During the trial appellant had sought to prove that at the end of 1946 he owed Robert Jeffress the sum of $50,000. The Court ruled that testimony by Jeffress' wife that in July of 1947 her now deceased husband told her of the debt and that part of it had been repaid was inadmissible. Since the jury was unable to agree in regard to the counts of the indictment pertaining to the year 1946, the propriety of this ruling is not before us. We mention it, however, because of its connection with the following. Appellant told the Court that James Jeffress, the son of Robert Jeffress, was being called as a witness "to give testimony which raises the identical issue which was presented to your Honor in the matter of the testimony of Mrs. Jeffress, with relation to conversation with her late husband." Since at that particular time in the trial the prospective witness was unable to appear, appellant merely made an offer of proof, his counsel stating that he assumed the Court would make the same ruling as in the case of Mrs. Jeffress' testimony. The offer was rejected. In the course of the rather extended offer of proof there was one statement that in 1944 Robert Jeffress had told his son that he owed appellant the sum of $10,000 for money borrowed in 1943. Appellant now urges that the testimony of James Jeffress would have been admissible to show this fact. It seems clear to us that the offer of proof was at least primarily made to establish the debt of appellant to James Jeffress

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at the end of 1946 rather than a debt owed by Jeffress to appellant at the beginning of 1944. Appellant had a duty to make the purpose of his offer of proof clear. Evidence excluded for the only purpose for which it was offered cannot be properly asserted on appeal to be admissible for another purpose theretofore undisclosed. Flowers v. Bush & Witherspoon Co., 254 Fed. 519 (5th Cir. 1918). It is the duty of the party making the offer of proof rather than the Court to separate the various items of evidence embraced in a single offer. Lane v. United States, 142 F. 2d 249 (9th Cir. 1944).

Appellant also contends that the Court unduly restricted the cross-examination of witnesses Schriber, Weaver and Brady. The trial court may in the exercise of its sound discretion limit the extent of cross-examination. Todorow v. United States, 173 F. 2d 439 (9th Cir. 1949), cert. denied, 337 U.S. 925; Chevillard v. United States, 155 F. 2d 929 (9th Cir. 1946). No abuse of discretion appears.

V. Instructions to the Jury.

Appellant urges that the trial court failed adequately to instruct the jury on the law applicable to the case in that the charge did not contain certain supplementary instructions which had been proposed by appellant.[16] The instructions given by

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[16]The Government cites Ziegler v. United States, 174 F. 2d 439 (9th Cir. 1949), cert. denied, 338 U.S. 822, in contending that there could be no objection to any portion of the charge to the jury until the charge was given and that appellant has accordingly failed to satisfy the requirements of Rule 30,

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the Court in the present case are similar in substance to the instructions reviewed in Barcott v. United States, 16 F. 2d 929 (9th Cir. 1948), cert. denied, 336 U.S. 912, where we held that the charge fully and fairly presented the law of the case. Upon examination of the instant charge in its entirety, we find that the instructions given fully protected the rights of appellant.

The instructions of the Court as to the net worth method of proving tax evasion and the instructions as to the methods of accounting to be used by a taxpayer were adequate when considered as a whole with the instructions concerning the elements of the

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Federal Rules of Criminal Procedure. The facts in the Ziegler case were that the only objection made was at the time requested instructions were exchanged by counsel, and no objection was taken when the Court informed counsel of his proposed charge prior to final jury arguments. In the present case, on the other hand, objection was made by appellant to the instructions at the time provided by the Court, which was after the Court informed counsel of his proposed charge but prior to closing arguments to the jury. Since the record clearly discloses that the Court and counsel for both sides considered the procedure sufficient to satisfy Rule 30, and since the purpose of the rule has been served by giving the trial court opportunity to correct alleged errors in his charge, appellant's objections to the instructions have not been waived. Plain error in instructions should of course be noticed regardless of whether the matter was properly brought to the attention of the trial Court. Fed. R. Crim. P. 52(b); see such earlier cases as Screws v. United States, 325 U.S. 91, 107 (1945); Morris v. United States, 156 F. 2d 525, 527 (9th Cir. 1946).

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crime, the Government's burden of proof, and other basic principles of criminal law applicable to this case.

The jury was also properly instructed as to the test for determining the validity of a partnership for federal income tax purposes. The instruction requested by appellant, requiring the jury to find a valid partnership if certain testimony was believed, unduly emphasized particular phases of the evidence and would violate the rule that the question is one of fact to be decided from all the evidence.

Appellant was not entitled to an instruction as to a possible inference to be drawn from the Government's failure to introduce in evidence all of appellant's business records in its possession. The records were originally prepared by appellant's business associates, were accessible to appellant prior to trial, and were at least surveyed by his accountants subsequent to the commencement of the Government's investigation of appellant's income tax liability. As we have previously noted, if any specific records had been thought beneficial to his case, appellant could have requested their production.

VI. Fair Trial.

After the jury had returned its verdict, appellant moved for a new trial. The only new proposition asserted was that appellant had been substantially prejudiced and deprived of a fair trial by reason of certain conduct on the part of the jury, the

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Court, the prosecuting attorneys, and agents of the Federal Bureau of Investigation. Appellant's counsel averred in a supporting affidavit that the following facts were learned by them subsequent to the verdict of the jury: that in the early stages of the trial one of the jurors had been told by a person unknown to appellant's counsel that the juror could profit by bringing in a verdict favorable to appellant; that the juror thereupon reported this conversation to the trial judge; that the trial judge discussed the matter with the prosecuting attorneys, but did not at any time inform appellant's counsel of the incident; and that the Federal Bureau of Investigation was notified, conducted an investigation, and made a report to the trial judge. It is appellant's contention that the juror to whom the remark had been made would be apprehensive of being suspected of taking a bribe if he voted for a verdict in favor of appellant, and would therefore be prejudiced against appellant. The motion for a new trial requested the opportunity for a hearing to adduce evidence concerning the various conversations among the juror to whom the remark had been made, the trial court, and agents of the Federal Bureau of Investigation "in order to fully investigate the same to determine to what extent it had any effect upon the jury and was prejudicial to the defendant."

The District Court in denying the motion did not abuse its broad power to grant or deny motions of this type, since there was a failure on the part of appellant to show prejudice. The very newspaper articles upon which appellant relies, and which were

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made a part of his motion, disclose that the juror believed the statement had been made to him in jest and only notified the trial judge because of his admonitions not to discuss the case. The judge also believed the statement had not been made seriously, but took the precaution of requesting an investigation by the Federal Bureau of Investigation, which in fact substantiated his belief that the remark had been made in jest. These circumstances do not indicate prejudice to appellant. It is obvious that if in fact an attempt had been made by persons associated with the defense to bribe a juror disclosure of the planned investigation would have greatly decreased the likelihood that such investigation would be successful. Appellant relied solely upon the affidavit of defense counsel stating what counsel had learned through the newspapers. If any jurors had received communications from the trial court or the Federal Bureau of Investigation of a nature which would tend to prejudice them against appellant, or had been subjected to other extraneous influences, such fact could have been appropriately presented by submitting affidavits of the jurors themselves. See, for example, Clyde Mattox v. United States, 146 U.S. 140 (1892).

Judgment affirmed.

[Endorsed]: Opinion. Filed May 28, 1953. Paul P. O'Brien, Clerk.

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United States Court of Appeals
for the Ninth Circuit

No. 13281

ELMER F. REMMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 28, 1953.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Tuesday, June 30, 1953.

Before: Mathews, Stephens and Orr,
Circuit Judges.

ORDER DENYING PETITION FOR REHEARING, REHEARING EN BANC AND STAYING MANDATE

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed June 26, 1953, and within time allowed therefor by rule of court, for a rehearing and a rehearing en banc, be, and hereby is denied.

It Is Further Ordered that the issuance, under Rule 28 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 30, 1953. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

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United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 3779 pages, numbered from and including 1 to and including 3779, to be a full, true and correct copy of the entire record excluding original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this .. day of July, 1953.

[Seal] PAUL P. O'BRIEN,
Clerk.

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SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

ELMER F. REMMER, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed July 17, 1953

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 29, 1953.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of July, 1953.

[File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 304

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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HAROLD B. WILLEY

No. 304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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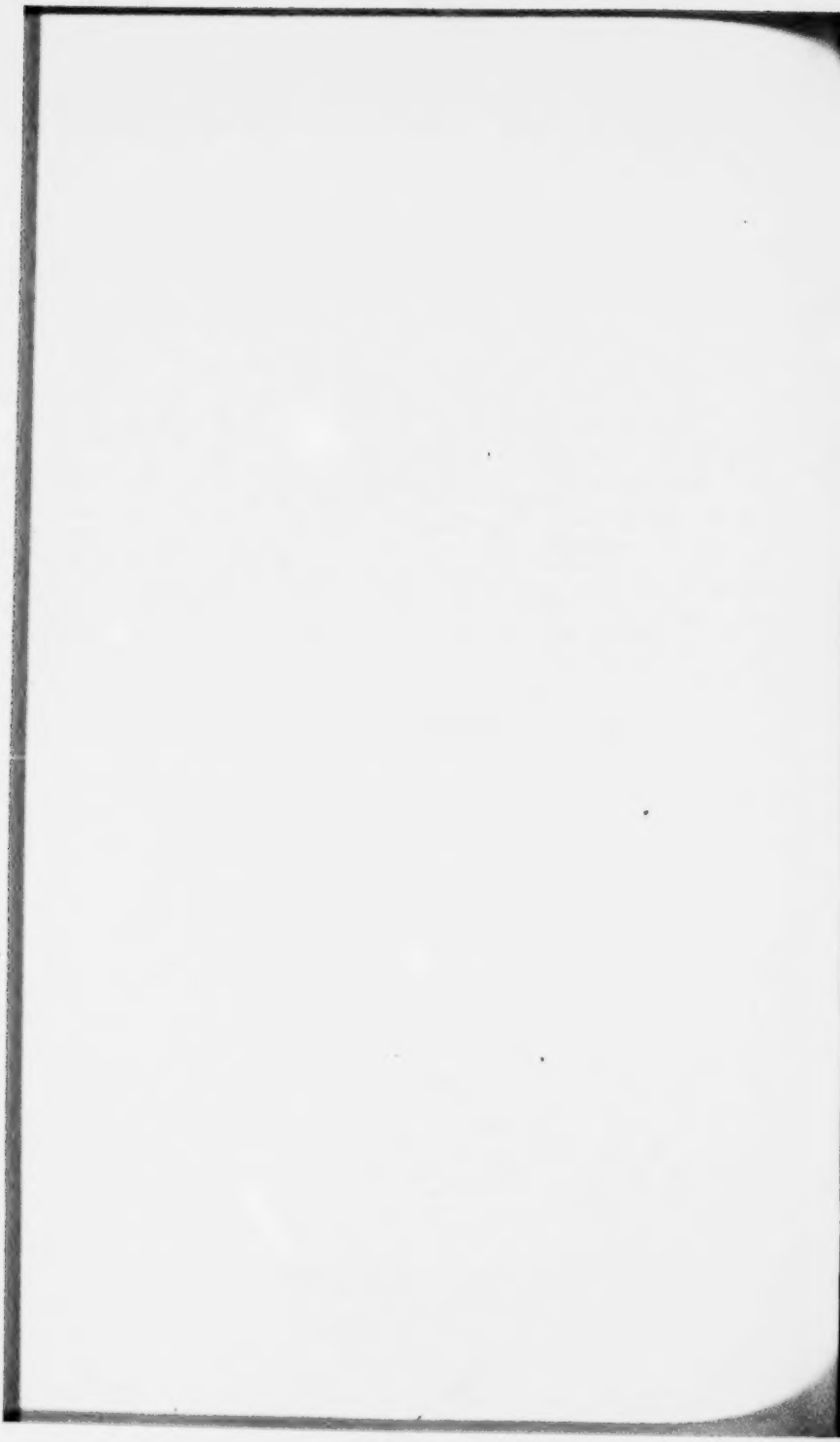

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Elmer F. Remmer, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Nevada.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 3748, 3777) is reported in 205 F. 2d p. 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778). An order denying a petition for rehearing, rehearing en banc, and staying mandate was entered on June 30, 1953 (R. 3779). On July 17, 1953, an order was entered by Mr. Associate Justice Tom C. Clark of this Court, extending the time for filing a petition for writ of certiorari to and including August 29, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254.

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QUESTIONS PRESENTED

1. Do mere errors in the taxpayer's books authorize the Commissioner to substitute another method of accounting?

2. Was the sufficiency of petitioner's accounting system a question for the jury?

3. Where all of the books and records are not in evidence, the court has denied petitioner's motion for discovery, and has quashed a subpoena requiring the Government to produce a mass of petitioner's original records, can a finding be made that petitioner did not keep adequate books which clearly reflect income, so as to permit a computation on the net-worth theory?

4. Where it is clear that a computation by the net-worth method has omitted an asset shown to have been in existence at the beginning of the indictment period, can any assumption be made that the difference between the net worth at the beginning of the year and the net worth at the end of the year represents taxable income received during the year?

(a) Without that assumption, does a net-worth computation establish a prima facie case of unreported income?

5. In computing income by the net-worth method, must the traditional basic distinction between the cash and accrual methods of accounting be observed or is the net-worth method independent of conventional accounting concepts?

6. May accounts receivable be included in a computation of net-worth on the cash basis?

7. Does the defendant have the burden of establishing the amount of a cash item which has been omitted from the Government's net-worth computation?

8. Are the tests for determining whether partnerships will be recognized for the purpose of computing civil lia-

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bility, equally applicable to the determination of liability for criminal penalties?

(a) Are the tests used in civil cases so clear and certain that a defendant in a criminal case can properly be charged with knowledge in 1945 and 1946 of the development of the law in this field up to the year 1949?

9. Does Rule 16 of the Rules of Criminal Procedure, providing for a motion for discovery and inspection "at any time after the filing of the indictment", authorize the denial of the motion on the ground that it is not timely?

(a) If timeliness is an element, does the Rule permit the time to be charged against the defendant where the Government has contributed to the delay?

10. Does Rule 16 of the Rules of Criminal Procedure authorize the court to substitute its judgment for the defendant's and to deny inspection of records on the ground that the court disagrees with the defendant's appraisal of the expected benefits?

11. Does Rule 16 of the Rules of Criminal Procedure require a showing of the specific need for individual papers?

12. In a case where there is no suggestion that compliance with the subpoena would have hampered the Government in any way, does Rule 17 of the Rules of Criminal Procedure permit the quashing of a subpoena for production of documentary evidence on the ground that the motion was not timely, that the production would not be beneficial to the defendant, and that the defendant had failed to show the need for specific papers?

13. Where outside contact with the jury is alleged to have occurred during the trial, is the defendant entitled to a hearing to determine the facts, and to a new trial if warranted by the facts, or may the District Judge, who is

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reported to have already made an investigation, unknown to petitioner, deny the motion without comment and make no official record of the occurrence?

STATUTES, RULES AND REGULATIONS INVOLVED

Internal Revenue Code:

> Sec. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.
> (26 U.S.C. 1946 ed., Sec. 41)
>
> Sec. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
> (26 U.S.C. 1946 ed., Sec. 145 (b).)

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Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and partner.* The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

(26 U.S.C. 1946 ed., Sec. 3797)

Federal Rules of Criminal Procedure:

Rule 16. DISCOVERY AND INSPECTION.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. SUBPOENA.

* * * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or

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oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

U. S. Treasury Department
Bureau of Internal Revenue
Regulations 111:

Sec. 29.42-2. Income Not Reduced to Possession.

Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

Sec. 29.3797-4. Partnerships.

The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. * * *

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STATEMENT

Petitioner was convicted in the United States District Court for the District of Nevada, upon an indictment under Section 145 (b) of the Internal Revenue Code (26 USC 145 (b)), charging that petitioner willfully and knowingly attempted to defeat and evade income taxes for the years 1944 and 1945. The jury disagreed with respect to additional counts which involved the year 1946.

During the years 1944 and 1945, petitioner was in the gambling, cafe and food business (R. 1032, 1134, 1290). Petitioner and his wife filed separate returns. Each return showed the combined income and, on the community property basis, calculated a tax on one-half (R. 3519-3529). The returns of both petitioner and his wife disclosed income from the following enterprises (R. 3525, 3527-8):

San Diego Social Club and 21 Club
The 311 Club
The Menlo Club
110 Eddy Club
186 Day-Nite Club
186 Day-Nite Cigar Store

Corporate returns were filed for the 186 Club (Ex. 87-87A, R. 3541, 3551). (Ex. 88-88A, R. 3562, 3563). Partnership returns[1] were filed for the following enterprises:

21 Club (1944 return, R. 1077)
21 Club and San Diego Social Club (1945 return, R. 1076)
311 Club (1944 and 1945 returns, R. 1077)
110 Eddy (1944 return, Ex. 81, R. 3531)
110 Eddy (1945 return, Ex. 82, R. 3533)
186 Day-Nite Cigar Store (1944 return, Ex. 84, R. 3535)

[1] The return forms were designed for partnerships, syndicates, pools, joint ventures, etc. (R. 3530). They are commonly referrd to merely as partnership returns.

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186 Day-Nite Cigar Store (1945 return, Ex. 85, R. 3538)
[2] Menlo Club (1945 return, Ex. 89, R. 3576)

Each return showed that petitioner had an interest.

A partnership return for the year 1944 was also filed by the B-R Smoke Shoppe (Ex. 78, R. 3530). It showed that petitioner had a one-half interest and that his share of the income was $600. The witness, Lando, who was shown on the return as a partner of the B-R Smoke Shoppe, testified that 1945 was a loss year (R. 1330). See also R. 1965, 1968.

On the premise that some of the partnership books were incomplete, the income of all of the partnerships was recomputed by the prosecution on the theory that increases in net worth represented taxable income. This assumed that the partnerships were the individual enterprises of the petitioner, which was the principal issue in the case. If the partnerships were recognized and petitioner's individual books were adequate, the use of the net-worth method in a prosecution of petitioner as an individual would have raised other questions. A revenue agent testified that the 21 Club had a fairly complete set of records, consisting of a general ledger, journal, and cash receipts and disbursements (R. 1250). Witness Semenza testified as to the condition of the books (R. 3275, 3281, 3283-5, 3287, 3289, 3290, 3299, 3413, 3415, 3417, 3418) and concluded that they were adequate (R. 3432).

Although the prosecution's own case included uncontradicted evidence that varying amounts of cash were held in safes and deposit boxes throughout the years involved (R. 1268, 1484, 1535, 1536), the prosecution exhibit used in computing petitioner's net worth at the beginning of 1944, 1945 and 1946 showed no figures for cash outside the banks (Ex. 183, R. 3613). Witness Semenza testified that without that cash figure it was impossible to determine correct net worth (R. 3292-3). Two government witnesses reluc-

[2] The Menlo Club did not begin operation until 1945.

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tantly agreed (R. 2557-8, 2878-80). Government counsel instructed the accountant with respect to treatment of various items (R. 2870-78-81-85).

The prosecution computed the net worth of each partnership separately. For present purposes the Court is concerned only with the following four partnership enterprises:[3]

110 Eddy Street (Ex. 163, R. 3589)
Day-Nite Cigar Store (Ex. 164, R. 3593)
Menlo Club (Ex. 165, R. 3597)
B-R Smoke Shoppe (Ex. 169, R. 3601)

These computations were based on the petitioner's books and records and were merely a restatement of the results of the operations in a different accounting form. Some changes involved the capitalization of improvements instead of treating them as expenses (R. 1268, Ex. 165, 174), and the treatment of taxes as additions to costs instead of as expense items, Ex. 175. The prosecution did not rely on the discovery of any specific item of new income or any new source of income beyond those reported in the books or tax returns.

After calculating the net worth figures of the partnerships separately the figures were transferred to a composite exhibit showing the net worth computation for the petitioner and his wife (Ex. 183, R. 3612). This exhibit reflected the theory of the prosecution that all of the income of the enterprises should be allocated to petitioner. This was done upon instructions of the prosecuting attorney (R. 28.70) not of the accountant.

The amounts of partnership net worth, all of which was charged to petitioner in Ex. 183, are as follows:

---

[3] The 186 Club was treated by the prosecution as a corporation and therefore no net worth figure representing its income was included in Ex. 183. The 186 Club occupied the back room of Day-Nite Cigar Store (R. 1425). It was bought in 1943 by Nealis and Kopstick (R. 1425), who later withdrew and were paid off (R. 1427). The prosecution recognized the partnership status of the 21 Club and San Diego Social Club (R. 2894). In Tax Court proceedings all enterprises are recognized as partnerships. *Remmer* v. *Commissioner*, Docket No. 23486.

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	1944	*1945*
B-R Smoke Shoppe	$18,231.47	$23,344.66
Day-Nite Cigar Store	39,494.37	30,390.47
110 Eddy Club	39,998.52	44,321.40
Menlo Club		183,647.94
Total	$97,724.36	$281,704.47

In this manner the prosecution arrived at the conclusion that petitioner had understated his income as follows (Ex. 183, R. 3613):

	1944	*1945*
Total Income per Exhibit 183	$50,747.91	$71,065.40
Income Reported	19,000.00	59,318.36
Difference	31,474.91	11,747.04

The relationships between petitioner and his partners were evidenced by oral and written agreements. Prosecution witness, Kyne, had an interest in six different enterprises (R. 1493, 1496) including the four which are of present importance here. A written agreement between Kyne and petitioner concerning the Menlo Club was introduced as Government Exhibit 113, R. 3582. A similar written agreement was made with witness Maundrell (Ex. 130, R. 3585) and other partners. There was also a written agreement concerning the Transit Smoke Shoppe, a later enterprise (R. 1189, 1523). Kyne testified that the oral agreements were similar in nature.

The written agreements deal with two different kinds of interest: An immediate "working interest" in the profits (R. 338) and an "actual interest" in the assets to be acquired by credits of undrawn profits (R. 1509). Because petitioner financed the enterprises, the arrangement contemplated that the shares of the profits of the other partners would be credited to their capital accounts until such time as the accumulated credits equalled their shares of the original investment and that petitioner's capital would be withdrawn in the same proportion as the other part-

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ners' earned credits. Witness Semenza, an accountant, testified that this is the usual practice in partnerships of a similar nature (R. 3388, 3423, 3433). With respect to the Menlo Club, for example, the equities of the various partners were credited with their working interests and charged with their withdrawals (R. 1807-8). Maundrell withdrew from the enterprise in 1948 and received all but $1700.00 of his equity in cash (R. 1807-10). Other partners drew on their accounts from time to time (R. 1833-5). The tax returns showed the distributive share of each partner and defendant's Ex. M-1 contained summaries of the partners' accounts (R. 3632, 3637, 3642). No ledger accounts were set up for the B-R Smoke Shoppe; the profits were divided between the partners at the end of each year. The other enterprises maintained regular books, with complete and detailed records of receipts and disbursements on a daily basis. The ledger posting was not up-to-date, but could readily be made current from the original records (R. 3275).

Petitioner spent little time around any of the enterprises (R. 1494). The other partners were active in the business (R. 1323, 1494). Cavani and Turner ran the 110 Eddy Club; Lando ran the B-R Smoke Shoppe; Maundrell was office manager for the Menlo Club, card room, bar, and restaurant (and also supervised the Day-Nite Cigar Store in Kyne's absence). Nelso, Ditto, Fricker, and Turner, who were also partners in the Menlo Club, had supervision of the various shifts in the 24-hour operation conducted there (R. 1330, 1385).

Petitioner did not participate in keeping the books (R. 1494-5). Public accountants were employed for that purpose. Lando was well known in the sporting and racing fraternity and his contribution to the partnership was his knowledge of the game and his ability to make prices (R. 1322-3). Kyne's working interest in the 110 Eddy Club was for services (R. 1382). He was the real manager of all of the enterprises (R. 1494).

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With respect to the partnership issue, the instructions to the jury were as follows:

Instruction No. 24, R. 142:

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Partnerships as such are not subject to income tax, but are required to make returns of income.

A partner in a partnership shall include in his individual net income his share of the net income or loss of the partnership. If he draws either more or less than his share, his income tax is nevertheless based on the share to which he is entitled under the partnership agreement.

Instruction No. 28, R. 143, 144:

Certain businesses were described in the income tax returns in evidence as partnerships. The law does not prescribe any specific form of agreement as a requisite for partnership status. A partnership is an organization of two or more parties who have intended in good faith, and acting with a business purpose to join together in the present conduct of an enterprise. The arrangement between them may be either written or oral, and can be either an express or an implied agreement. It is not necessary that they contribute equal amounts of capital, or devote equal amounts of time to the business of the partnership, or have an equal share in the drawings, or have an equal right to draw money out of the business. The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners.

Petitioner's request for instructions dealing specifically with the "working interest" was denied (R. 83-4).

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Proceedings Under Rules 16 and 17 of the Rules of Criminal Procedure.

The criminal indictment was filed on April 9, 1951 (R. 8). The case was set for trial on November 28, 1951 (R. 36). A motion for a bill of particulars was filed April 27, 1951, and denied June 15, 1951 (R. 1[illegible]).

On November 13, 1951, petitioner filed a motion for a continuance (R. 16-17), and on November 14, 1951, a motion seeking a court order to inspect and take copies of certain books and records pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure. The records sought were described as "The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of" several named enterprises and any others from which the Government contends petitioner received income as an owner during the years 1944, 1945 and 1946. Supporting affidavits were filed with the motions (R. 20-34). They recited that the Government had placed liens against petitioner's funds; that a certified public accountant who had assisted the petitioner prior to the indictment had withdrawn because of petitioner's inability to compensate him for his services (R. 49); that petitioner's tax counsel had become associated with the case in March, 1951; that in September, 1951, a certified public accountant had finally been engaged; that access to the records had been denied by the Government after the indictment, and that the records covered by the motion were material to the preparation of the defense.

The Government filed an affidavit in opposition (R. 35-41). This affidavit recited that certain records had been procured by the Government from third parties. (At the trial the third parties were identified as certain other partners in the enterprises (R. 2122-2126)). The affidavit in opposition to the motion also recited that prior to the indictment certain of the records had been turned over to an accountant for his use in behalf of the petitioner; that the

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accountant had turned them over to one of the petitioner's attorneys who continued to hold them and that the accountant had been unable to return them to the Government in accordance with his agreement. These latter records were subsequently deposited with the Clerk of the Court, pursuant to an order of the Trial Judge, and made available to both parties during the trial (R. 928-929, 1151). Petitioner's motion covered a considerable quantity of original records such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports, etc. (R. 48). These were never made available to petitioner during the trial (R. 2717, 2771, 3250), although they were actually in the court house (R. 2451, 3483-6).

Both of petitioner's motions were denied (R. 42, 3492). The Court of Appeals held that prior opportunities which had been afforded petitioner's representatives to examine the material were sufficient (R. 3755), that the motion to inspect and take copies was not timely (R. 3756), and that no specific showing of prejudice had been made (R. 3758).

Pursuant to Rule 17 of the Federal Rules of Criminal Procedure, petitioner filed a motion on November 23, 1951, together with supporting affidavits filed November 26, 1951, and procured a subpoena (R. 46-7) for production and inspection of books, papers, documents and objects (R. 42-54). The prosecution filed a motion to quash the subpoena, based upon the earlier affidavit (R. 55-58). The petitioner's motion was denied and the motion of the prosecution was granted (R. 58). The Court of Appeals sanctioned the denial of petitioner's motion because of the circumstances discussed in connection with the motions under Rule 16 (R. 3757). The Court of Appeals did not hold that compliance with the subpoena would have hampered the Government in any way.

Improper Communication With Jury

The verdict of the jury was returned on February 22, 1952 (R. 88). On February 24, 1952, certain stories ap-

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peared in California newspapers to the effect that during the trial the District Judge had enlisted the aid of the Federal Bureau of Investigation to investigate a remark made to one of the jurors at his home to the effect that money might be paid to the juror if he supported the defense (R. 114, 117). The defense had no prior knowledge of the incident (R. 112). A motion for new trial was filed on February 29, 1952 (R. 106) which included as Ground 17 (R. 109) the contention that the defendant had been substantially prejudiced and deprived of a fair trial by the incident. In addition, petitioner moved that there be a trial of the issue and that evidence be produced to adduce what had actually transpired. In support of Ground 17, an affidavit by petitioner's counsel was filed (R. 111) to which copies of the newspaper stories were attached. The affidavit alleged that the petitioner had been prejudiced by the incident and that the interests of justice required a trial of the issue (R. 112). The facts alleged in the affidavit were not challenged by opposing affidavits or by any remarks of the Trial Judge or the prosecuting attorneys. No hearing was held and no findings were made. The motion for new trial and the motion for a hearing for the purpose of developing the facts were denied without any comment (R. 93-94).

Treatment of Accounts Receivable as Cash

The evidence with respect to petitioner's taxable income on the net worth theory was summarized in prosecution Ex. 183 (R. 3612). Item 2 of that exhibit dealt with the B-R Smoke Shoppe and brought into the computation the results shown by Ex. 169 (R. 3601). The latter showed bank roll, cash on hand, at the end of 1945 to be $20,000. Exhibit 169 indicates that it was based on the testimony of Pritchett, a prosecution witness, and on Ex. 111-A. Pritchett testified (R. 1949) that the "cash" consisted of $15,000 of "markers" and only $5,000 in actual cash. The term "markers" was identified as meaning IOU's or Ac-

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counts Receivable which had not been paid (R. 1962, 1968). Pritchett's testimony dealt with the "markers" of customers and represented bets which had not been paid and which affected the business profits (R. 1965-1969). "Markers" representing the indebtedness of partners were considered as cash on settlements between the partners (R. 1734). Defendant's Exhibit M-1 omits the markers and shows cash on hand as $5,000 (R. 3628-9).

The only bank roll figure shown in Ex. 111-A was the amount as of January 1, 1943 (R. 2773). Exhibit 169 assumed, without any evidence to support it, that the bank roll remained the same at the end of 1943 and at the end of 1944 (R. 2773). Government witness Weaver testified that the result of his treatment of the markers was to increase the net worth of the business by $15,000 (R. 2781). He thought the markers represented cash advances, despite Pritchett's testimony (R. 2780). The Court of Appeals understood that the markers represented unpaid bets but held that they were properly treated as cash because of its belief that they were collectible (R. 3769).

Weaver further testified that in preparing the net worth computation for the Menlo Club he had used "mostly" the cash receipts and disbursements method and that it was impossible to secure an accurate picture "by sticking to any one particular method specifically" (R. 2621). At another point Weaver testified that "there has actually arisen a sort of hybrid basis" (R. 2727).

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that the tests for determining the recognition of a partnership for Federal income tax purposes as set forth in *Commissioner* v. *Culbertson*, 377 U.S. 733, are applicable in a criminal case, and that a failure to report all of the partnership income in his individual return is evidence of the defendant's willful intent to evade income taxes.

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2. In not holding that the method of accounting employed by petitioner is capable of clearly reflecting the income; or in not holding that the applicable method of accounting must be determined by the Commissioner of Internal Revenue.

3. In holding that the petitioner failed to keep adequate records which would clearly reflect income and that the net-worth method of proof was therefore permissible.

4. In holding that, despite the omission from a net worth computation of a cash item which was known to exist at the beginning of the indictment period, the case could be submitted to the jury on the assumption that the difference between the opening net worth and the closing net worth represented taxable income received during the year.

5. In holding that the defendant had the burden of establishing the amount of the omitted cash item.

6. In holding that the Government's net worth computation for a taxpayer on the cash basis properly includes accounts receivable.

7. In sanctioning the denial of petitioner's motions under Rules 16 and 17 of the Rules of Criminal Procedure.

8. In sanctioning the denial of petitioner's motion for a hearing to determine the facts of a reported incident during the trial involving one of the jurors and a third person.

9. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. Conflicts of Decision with Respect to the Necessity for Establishing the Net Worth at the Beginning of the Indictment Period.

The decision of the Court of Appeals is in conflict with the decisions in two other Circuits, viz: *Bryan* v. *United States*, 175 F. 2d 223 (CA 5) affirmed without considering point in issue here, 338 U.S. 552, and *United States* v. *Fenwick*, 177 F. 2d 488 (CA 7). Those cases hold that

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where the prosecution attempts to establish an understatement of income by the net-worth method, the case should not be submitted to the jury if the starting point net worth is not definitely established, because the evidence is not sufficient to make out a prima facie case. In civil fraud cases the Tax Court similarly requires a definite establishment of the net worth at the beginning of the taxable period. *James Q. Whittemore* v. *Commissioner,* Tax Court Docket No. 13421, 7 T.C.M. 845, 849 (1948).

In criminal tax cases, several methods of proving unreported income are available to the Government. For example, it may show specific instances of failure to account for gross business income; it may show that deductions claimed on the tax returns were fictitious or false; it may show that false entries were made in the books or that a duplicate set of books was maintained for the purpose of concealing the true condition of the business. In the absence of direct evidence of this nature, unreported income may be shown, under certain conditions, by indirect evidence such as an analysis of bank deposits; by showing an increase in net worth; or by evidence of purchases, expenditures, and investments in excess of the reported income during the indictment years.

In this case, there is no evidence of any specific item of income which was not reported in the books or tax returns. The Government elected to prove its case exclusively by the net-worth method (R. 549-554), and it is bound by the limitations which have been established upon the use of it. In this method of proof, a showing is made that at the beginning of each year the defendant's assets were worth a specific sum and that at the end of the year his assets were worth a greater sum. The difference is then adjusted for any funds received as gifts, loans, inheritances, etc., for taxes paid, and for living expenses. The resulting figure is *assumed* to be taxable income. The Court of Appeals emphasized (R. 3764) the statement in *Bell* v. *United States,* 185 F. 2d 302 (CA 4) certiorari denied, 340 U.S. 930, that the net-worth method "by its very nature (it) is

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an approximation." This should require all the more care in the use of the method, lest improper conclusions be drawn from it. Cf. *Thomas A. Talley* v. *Commissioner,* Docket Nos. 33140, 33141, 20 T.C. No. 101, June 30, 1953.

It is well settled that in a net worth case "the starting point must be based upon a solid foundation" (*United States* v. *Chapman,* 168 F. 2d 997, 1001 (CA 7)). No prima facie case is established unless it is clear that the net worth at the beginning of the indictment period accurately reflects the defendant's total assets. Infirmities in net-worth computations are matters for the court to determine, not the jury. (*United States* v. *Venuto,* 182 F. 2d 519, 523 (CA 3)). Accounting testimony in this record supports the necessity for an accurate starting figure (R. 1259, 3292-3). The reason is plain. New assets indicate the receipt of income; but assets are not really "new" if acquired with cash on hand at the beginning of the year, or in exchange for other assets. Accordingly, where the starting point net worth is not established, the source of apparently new assets is in doubt, and the assumption that the difference in net worth represents income, may not be made. Without that assumption, the net-worth computation is meaningless because no reasonable mind could conclude that it was evidence of the receipt of income in the taxable year.

The prosecution introduced in evidence a computation of net worth made by a Revenue agent (Ex. 183, R. 3612). Line 25 is marked "Cash in Safe Deposit Boxes" but no figures are shown which affect the computation. Instead of figures, the column listing the assets for each year shows an interrogation mark. The exhibit was prepared in that manner on instructions from Government counsel (R. 2878). The prosecution showed by its own witness that the petitioner held cash in safes and deposit boxes at all times (R. 1268, 1484, 1535, 1536, 2956). There was no evidence to the contrary but neither was there any evidence as to the exact amount of the cash on December 31, 1943. There was evidence that a check in the amount of $17,739.50 was

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cashed on December 3, 1943, and the proceeds placed in a safe deposit box (R. 1483-4); that the cash in the box varied every day and that there were, in addition, two safes where money was kept. A third safe, mentioned in the evidence, affects an enterprise which came into existence during the year 1945.

Petitioner objected to the introduction of Ex. 183 (R. 515-538, 2856-2857) and moved for a judgment of acquittal on the ground that the use of the net-worth method was not available to the prosecution because of lack of evidence as to the starting point (R. 3477). The instructions to the jury on the point were inadequate (R. 136-138) and the petitioner's request for other instructions was denied (R. 79-83).

On a review of this evidence, together with evidence that petitioner did not pay a 1938 judgment of $1800 until 1945, the Court of Appeals sanctioned the use of the net-worth method in this case and declined to follow the decisions in the *Bryan* and *Fenwick* cases (R. 3766). The District Judge expressed the opinion that those cases are ridiculous (R. 2969). It is apparent that both courts below missed the significance of the starting figure (R. 2880-1, 2964).

The Court of Appeals expressed the view (R. 3765) that the Government would be frustrated in its attempt to enforce the tax evasion provisions of the Internal Revenue Code if net-worth cases were withdrawn from juries because of mere statements that defendants had additional undisclosed assets (R. 3765). However, that is not the situation here because the existence of cash in some unknown amount was not open to question. The testimony regarding the existence of the cash was produced by a prosecution witness (R. 1483-4); there was no evidence to the contrary and there is thus virtual agreement that a cash asset in some amount existed. Line 25 of Ex. 183 shows Government recognition of the existence of the asset. The suggestion of the Court of Appeals that the unpaid $1800 judgment outstanding on the critical date tended to

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show that petitioner did not have any substantial amount of cash overlooks the cash in bank shown by Ex. 163 (R. 3589) and Ex. 169 (R. 3601) in the amount of $8,425.51 as of December 31, 1943.

Moreover, this reluctance of the Court of Appeals to require the Government to prove its case undermines the principle that the Government has the burden of proof and it shifts to defendants the obligation to show the amount of starting-point cash. The Internal Revenue Code does not require taxpayers to keep records on a net-worth basis and they are ordinarily no better prepared than the Government to produce evidence of their cash position after a lapse of several years. Here there can be no doubt that petitioner habitually kept considerable amounts of cash outside of the banks. That is not speculation; it was established as a part of the Government's case. The practice of holding considerable cash outside of banks was not unusual in the light of the nature of the enterprises. We submit that petitioner is entitled to be tried and judged under the traditional principles generally applicable in courts of criminal justice and that, since the Government did not make a prima facie showing, it was not entitled to submit the case to the jury.

It is quite evident that there is a lack of understanding in the courts of the fundamentals underlying the net-worth method of showing receipts of taxable income in specified years and that the guidance of this Court is required to secure uniformity.

2. Commissioner's Authority to Depart from Taxpayer's Method of Accounting.

In approving the Government's use of the net-worth method for all of petitioner's enterprises, the Court of Appeals has decided a frequently-recurring question of federal tax law and has reached a result which probably conflicts with an applicable decision of this Court. The Court of Appeals has misconstrued the term "method of

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accounting" and has permitted departure from the taxpayer's method upon a showing which this Court held to be insufficient in an analogous situation (R. 3762). Except for the B-R Smoke Shoppe, the evidence of inadequacies in petitioner's books amounted to no more than normal accounting errors (R. 2630-88, 2755, 2772). Section 41, Internal Revenue Code, permits taxpayers to select any method of accounting which properly reflects their income. The Commissioner's authority to select a different method is limited to situations where (1) no method of accounting has been regularly employed, or (2) the method employed does not clearly reflect the income. This does not mean that the Commissioner is free to disregard the "method" merely because the books contain errors. *Thomas A. Talley* v. *Commissioner,* Tax Court Docket Nos. 33140, 33141, June 30, 1953, 20 T.C.—No. 101. Inaccuracies and delayed posting from original records are not uncommon occurrences, but they do not condemn the "method" and permit the Commissioner to select another.

This was the authoritative interpretation of an earlier tax statute. The Revenue Act of 1916 permitted returns on the taxpayer's "basis of keeping accounts" and this Court held that the quoted language "refers to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books." *United States* v. *American Can Co.,* 280 U.S. 412. Accordingly, this Court held that where the Commissioner revalued inventories, disallowed an unauthorized mark-up, corrected the erroneous entries, and made reassessments in the amount of several million dollars, he did not reject the accrual basis upon which the returns were made, and that the cash basis could not be substituted.

Before taxpayers are subjected to criminal penalties based on the results of a method of accounting which they did not themselves employ and whose results they could not foresee, it would appear that if the courts are authorized

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to deal with the question at all[4] they should require a showing that the basic methods actually employed were inherently inadequate and not capable of producing correct results. Here the Government produced no evidence of the use of an accounting method which was basically inadequate or calculated to deceive, and we submit that the Court of Appeals erred in approving a departure from the method of accounting employed by the petitioner.

Moreover there was no sufficient showing that the petitioner's books and records were inadequate in the sense that they were incomplete or inaccurate. This necessarily follows because all of the books and records were not in evidence. A large quantity of petitioner's original records was in the possession of the Government, they were not introduced in evidence, and petitioner's attempts to reach them through a motion for discovery and a subpoena for production were unavailing. *See Infra,* pages 31-33.

The net-worth method is frequently employed by the Government in civil and criminal fraud cases (*Montgomery* v. *United States,* 203 F. 2d 887, 892 (CA 5)). Admittedly, it gives only an approximate result (R. 3764) and this Court should review the Government's policy in order to correct an apparent disregard of basic principles.

3. Relationship of Net-Worth Method to Basic Cash and Accrual Methods.

This Court has not previously considered the question whether the net-worth method of proving income is a permissible hybrid method of accounting. The Court of Appeals has indicated that the basic distinction between the cash and accrual methods of reflecting income is not applicable. With respect to the markers which represented accounts receivable (R. 1962, 1968), the Court of Appeals

[4] Section 41, I.R.C., provides that the Commissioner shall make the determination. He has determined deficiencies without departing from the method of accounting adopted by petitioner's enterprises. Tax Court Docket 23486

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held that they were properly included as part of the assets of a business accounting on the cash basis, regardless of whether they should technically be treated as cash or accounts receivable (R. 3769). The Government's brief in the court below made the same statement (fn. 16, p. 68). Unless the net-worth method is an exception, this is a departure from the well-settled rule that income may be computed on either a cash or an accrual method, but not on a hybrid system. In *Security Flour Mills Company* v. *Commissioner*, 321 U.S. 281, this Court said: "We are of the opinion that the purpose of the language which Congress used [Secs. 41, 43, Revenue Act of 1943] was not to substitute, whenever in the discretion of an administrative officer or tribunal such a course would seem proper, a divided and inconsistent method of accounting not properly to be denominated either a cash or an accrual system."

Either the Court of Appeals recognized the net-worth method as a hybrid system or it has decided a Federal question in conflict with applicable decisions of this Court. The statement in the Government's brief below supports the first alternative. In either event, the supervisory authority of this Court should be exercised.

Accounts receivable are definitely accrual items. They may properly represent income only where the accrual method of accounting is employed. The net-worth method was employed here by the Government on the theory that the annual difference would represent income to a taxpayer on the cash basis. Accordingly, any asset which did not represent the investment of cash should have been omitted. Accounts receivable may not properly be regarded as income on the cash basis and their inclusion in Exhibit 183 was definitely prejudicial to the petitioner.

While Exhibit 183 (R. 3612) was a statement of assets, it was not a statement of asset values (R. 551) because the annual difference between asset values does not represent taxable income on any basis. With respect to items other than cash, it reflected cash outlays which had been made to

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procure or improve the assets on hand at the end of the year (R. 2555). See, for example, the item in Ex. 169, R. 3601, "Cost of Business Purchased from Sherwood." The markers are reflected in Item 2 of Ex. 183 as a portion of the assets computed for the B-R Smoke Shoppe on Ex. 169. Exhibit 169 shows an asset of cash on hand, of $20,000, which is identified as supported by Ex. 111-A, and by the testimony of prosecution witness Pritchett. The latter testified (R. 1949, 1962, 1968) that the cash on hand was $5,000 and that the other $15,000 was in markers which represented unpaid bets. Thus, it is clear that the markers were not assets which had been purchased by the expenditure of cash; instead, they represented the amount of credit which had been extended to customers; they were mere promises to pay, not cash. When markers were paid the cash on hand was increased (R. 1360). The markers differ from the loans shown in Ex. 183 (e.g. Item 13). While the latter represents promises to pay, they were not included in the Exhibit for that reason; rather they were included because they represented investments of cash during the year. The witness who prepared Ex. 183 testified that he included the markers at the direction of one of the prosecution attorneys (R. 2878).

This question vitally affects the year 1945. For that year the prosecution contended that petitioner understated income in the amount of the difference between the total income as shown by Ex. 183 and the amount of income reported. This difference was said to be $11,747.04 (R. 3613). Accordingly, it is clear that if the $15,000 represented by markers were eliminated from the computation, there would be no difference (understatement of income) whatever for the year 1945.

The net-worth method is frequently used by the Government in criminal tax cases. In *United States* v. *Johnson*, 319 U.S. 503, this Court approved of the use of such a method as "reinforcement" to evidence of unreported income from a specific source. Here, and in other cases, the

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net-worth method is the sole proof. It is important in the administration of criminal justice that this Court consider and settle the question whether the net-worth method (which is never used in income tax returns) is a permitted hybrid method, or whether, in employing it, the Government must adhere to the conventional cash and accrual systems.

4. Tests for Determining Liability for Criminal Penalties Where Government Disagrees with Taxpayer's Interpretation of Technical Statutory Provisions.

This case presents a question of far-reaching importance which has not heretofore been considered by this Court and which requires an authoritative answer It affects all of the technical questions of tax law which are embodied in the Internal Revenue Code and will determine whether laymen can be subjected to criminal penalties on the presumption that they have a clear and certain undertsanding of the law.

As shown by the statement of facts, petitioner's returns disclosed the receipt of income from various enterprises, and those enterprises filed partnership returns, disclosing that petitioner was liable for his share of the income. The Government contended that four of the partnerships should not be recognized for tax purposes and that petitioner was therefore liable to criminal penalties because he had not reported all of the income individually. This was the paramount issue.

The prosecution recognized two of the six enterprises as partnerships (21 Club and San Diego Social Club) (R. 893-4) and the jury failed to convict on the counts dealing with the year 1946, for which partnership returns were also filed. The written partnership agreements were drawn in 1946 but related back. The 186 Club was eliminated from the partnership issue because the Government recognized it as a corporation. Notwithstanding the uncertain legal status of the enterprises, petitioner has been found guilty

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of tax evasion on the presumption that he willfully and knowingly failed to report all of the income of the enterprises on his individual returns. The records of the Tax Court show that an official deficiency letter was issued on May 6, 1949, in which the 186 Club and all other enterprises were recognized as partnerships. *Remmer* v. *Commissioner,* Docket No 23486.

The Court of Appeals held (R. 3768) that the tests of liability for partnership income laid down in *Commissioner* v. *Culbertson,* 377 U.S. 733, 742, were applicable and that the question was one of fact for the jury. The *Culbertson* case was a civil case and this Court held that the question was one of fact for the Tax Court, the experts.

Fact-finding tribunals in tax cases are at liberty to look beyond the formal evidences of title, etc. *United States* v. *Cumberland Public Service Co.,* 338 U.S. 451, fn. 3. Permitting similar latitude to juries, and subjecting defendants to criminal penalties for reliance on formal documents, is a novel and dangerous extension of a policy adopted to give finality to the decisions of administrative agencies. Moreover, the *Culbertson* case was decided in 1949. Accordingly, it was not available to petitioner in 1945 and 1946, when he is alleged to have committed the offenses upon which he was convicted. But even if the tests applicable in civil cases are likewise to be applied in criminal cases, the tests are not sufficiently well understood that knowledge of the correct conclusion could safely be attributed to every layman.

The earlier cases in this field, *Commissioner* v. *Tower,* 327 U.S. 280, and *Lusthaus* v. *Commissioner,* 327 U.S. 293, were decided on February 21, 1946, about the time when the latest alleged offense of the petitioner occurred. These cases were rather widely misinterpreted by taxpayers and by the Courts (See *Trapp* v. *Jones* (W.D. Okla.) 87 Fed. Supp. 415; *Spies, et al,* v. *United States,* (N.D. Iowa), 84 Fed. Supp. 769). Even the Justices of this Court were not in agreement in the *Culbertson* case as to what tests should

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be applied, nor as to the proper conclusion to be drawn in that particular case. The decision did not completely clarify the situation and the courts have been flooded with litigation ever since. The proceedings following this Court's remand of the *Culbertson* case are illuminating. Both courts attempted to apply the *Culbertson* decision, but they reached different conclusions. The Tax Court decision rendered on the remand, 9 T.C.M. 647, was reversed by the Court of Appeals, 194 F. 2d 581 (CA 5). It is not an overstatement to say that the tests for determining the civil liability are still uncertain and it is a new departure in the law to hold a taxpayer liable for criminal penalties when he mistakenly claims that his income should be computed on the partnership basis The partnership issue was not included in the criminal case, *Paysoff Tinkoff* v. *United States*, 86 F. 2d 866, (CA 7), nor were fraud penalties asserted in *Paysoff Tinkoff* v. *Commissioner*, 120 F. 2d 564 (CA 7), which this Court referred to as evidencing a claim by Tinkoff which carried the partnership theory to the *reductio ad absurdum: Culbertson* v. *Commissioner*, supra, fn. 8.

The Senate Finance Committee report on H.R. 4473, Proposed Revenue Act of 1951, discloses the then current confusion with respect to the recognition of partnerships for tax purposes. In 1952, the Bureau of Internal Revenue published a ruling outlining the Bureau's position with respect to recognition of partnerships for years prior to 1951 Mim. 6767, Cumulative Bulletin 1952-1, p. 111. A current ruling states that "the term 'partnerships' for tax purposes is broader than the term under common law, the Uniform Partnership Act, or individual State laws." Rev. Rul. 144, Internal Revenue Bulletin No. 16, Aug. 3, 1953, p. 29. The Bureau of Internal Revenue has attempted to require some partnerships to file corporate returns on the theory that they are associations. (*The Olmsted Hotel* v. *Commissioner*, Tax Court Docket 28375, 11 T.C.M. 694.) Recent decisions of the Tax Court illustrate that some

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doubtful partnerships are still recognized. In *Frederick B. Hill, Jr.* v. *Commissioner*, Docket No. 32356, 12 T.C.M. 757, the Tax Court recognized a limited partnership for tax purposes. All but one of the partners were related. The partners bought their interests from Hill and paid for their interests with notes. With one exception, none of the other partners was required to devote any time to the business. There was a written partnership agreement, but it was not recorded. Taxpayers are faced with a hard choice if they are liable to criminal prosecution when they persist in their claim to the right to file partnership returns.

Today the tax liability for partnership income is one of the most prolific sources of litigation. A recent analysis of cases on the Tax Court docket for the period November 8, 1951 to January 19, 1953, shows over one thousand disputes in the partnership field (1953 Commerce Clearing House, Par. 8637). In such cases the question usually is whether the taxpayer is correct in his conclusion that he is liable for only a portion of the partnership income. This is a criminal case, but if it presents only the same question as the civil cases, any of the taxpayers in the thousand Tax Court cases would likewise be liable to criminal prosecution. If it be the law that the civil tests are applicable in criminal cases, any taxpayer who claims to be a partner may be indicted if the Bureau disagrees. If the Government really believes that the same tests apply, the dearth of reported criminal cases is difficult to explain.

However, we submit that the question in a criminal case is not the same as in a civil case. The offense of tax evasion requires, first, a knowledge that certain omitted income should be included in the tax return. The question here is whether petitioner knew that he had not created a partnership (or a syndicate, pool, joint venture, etc.), and knowingly misrepresented that he had. Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that there is no basis on

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which a jury could properly convict him of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue.

In a recent civil case where the Commissioner asserted fraud penalties because of his refusal to recognize the taxpayer's claimed partnership, the Tax Court agreed that the partnership should not be recognized for tax purposes, but it declined to approve the fraud penalties even though it held, on the authority of the *Culbertson* decision (P. 903), that "the parties did not in good faith intend to become partners for the operation of the business." (*C. C. Cooke* v. *Commissioner*, 10 T.C.M. 881). The Court of Appeals for the Tenth Circuit reversed the Tax Court and held that for some of the years involved the partnership should be recognized, 203 F. 2d 258. It did not disturb the Tax Court decision with respect to the fraud penalties and apparently the Commissioner did not file any appeal on that issue. The *Cooke* case is presently pending in this Court on a petition for certiorari, Docket No. 77, October Term, 1953.

In the case at bar, the jury was instructed (R. 144) that "The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners." In the *Cooke* case, supra, the Tax Court held that such a finding will not support even a civil fraud penalty. The jury was also instructed that the partnership must serve a business purpose (R. 143), and the Court of Appeals agreed that the applicable tests include that concept (R. 3678). We submit that the Court of Appeals has sanctioned an erroneous test and has mistakenly applied the civil rule in a criminal case. In a field where even the civil liability is so uncertain, it would appear that a taxpayer with any basis for claiming a partnership should be free to persist in his claims until overruled by the courts, without subjecting himself to criminal prosecution. When "dealing with criminal sanctions in the complicated, technical field of the revenue

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law", *United States* v. *Carroll*, 345 U.S. 457, 460, there is no basis upon which a jury could properly find that a defendant had more knowledge in 1945 and 1946 than is possessed in 1953 by a multitude of taxpayers.

While the trial court covered the question of intent in a general charge (R. 134-5), the denial of petitioner's requested instructions Nos. 69, 75, 77, 78, 79, 80, 81, 82, 88, 89, and 90 (R. 73-79) left the jury free to determine the partnership issue by applying the civil rule.

A review of the case and of the policy of the Government in this field would be in the interest of taxpayers generally.

5. Practice Under Rules 16 and 17, Federal Rules of Criminal Procedure.

Matters of general importance are presented dealing with the practice under Rules 16 and 17 of the Federal Rules of Criminal Procedure, including the question whether the Court of Appeals has placed an unduly restrictive interpretation on them. The Court of Appeals has sanctioned the denial of petitioner's motion for a pre-trial inspection of his own records and has thus withheld from the petitioner the benefits of the "more liberal policy for the production, inspection, and use of the materials at the trial" which this Court has declared to be the purpose of Rules 16 and 17, *Bowman Dairy Company* v. *United States*, 341 U.S. 214, 218-220. Added significance is given to the denial of petitioner's motion by the circumstances which made the motion necessary and by the fact that an important issue in the case was whether petitioner's books and records were inadequate.

Despite the fact that Rule 16 authorizes a motion "at any time after the filing of the indictment", the Court of Appeals held that the motion was not timely. No weight was given to petitioner's unsuccessful attempts to secure the release from Federal lien of sufficient assets to finance his defense, (R. 22, 24), nor to the time consumed in unavailing efforts to arrange for inspection of the records without

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a court order (R. 21-34, 166), during which the Government made unwarranted and impossible demands as the price of its consent (R. 29-30, 41). The significance of the Government's maneuvering apparently was lost on both courts below. The Government sought a net worth statement (R. 38, 50-54), and a showing of petitioner's "interest" in the enterprises (R. 27, 30, 33, 166, 185). It recognized petitioner's need for the records by bargaining with him for evidence which would bolster the Government's case, making its conditions one at a time, and having driven petitioner to a last-resort motion for a court order, the Government took the position that petitioner did not really need the records and secured a denial of the motion on the ground that the trial date was only two weeks away. The trial lasted three months, petitioner made repeated efforts to have access (R. 928-9), and the records sought were actually in the court house (R. 2451, 3483-6). Under all the circumstances, it would appear that the time element should have been given no consideration, even if the Rule itself did not foreclose it.

The Court of Appeals also referred to the prior opportunities which the defense had been given to examine the records. But they were in connection with the civil liability and occurred before the time when petitioner's tax counsel was engaged (R. 22, 32). It would be reasonable to anticipate that an examination of the records under his direction would develop additional defense material. The probability of benefit to be derived from the tax attorney's supervision of an examination of the records is especially marked here in the light of the Government's reliance on the net-worth method. This but emphasizes the lack of any rational basis for the opinion of the Court of Appeals that petitioner could not benefit from further examination of the records (R. 3755-6). It also raises the question of the extent to which the Court has discretion under the Rule to override the defendant's judgment in such a situation.

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Since a prerequisite to the use by the Government of the net-worth method of proof is the lack of adequate business records of the defendant,[5] Sec. 41 I.R.C., (R. 3762), it seems plain that the suppression of a mass of original documents, of sufficient bulk to fill a packing box of approximately fifty cubic feet, plus several other smaller cartons (R. 48), was prejudicial to petitioner. Since the impressive quantity of records was in itself a matter of consequence, the rule was improperly interpreted by the Court of Appeals to require that the need for specific papers be shown (R. 3758). By denying the benefit of the rule here the District Court permitted the Government to withhold records and then submitted to the jury the issue of the inadequacy of the partial records in evidence. This travesty of justice was sanctioned by the Court of Appeals and its action violates the spirit of the rule as interpreted in the *Bowman* case, supra.

Petitioner also sought a subpoena for production of the records, which was quashed. The grounds for quashing subpoenas as set forth in Rule 17 are that compliance would be (a) unreasonable or (b) oppressive. There was no suggestion that the Government would have been hampered in any way and the Court of Appeals stated no grounds which are recognized by Rule 17.

Although evidencing some uncertainty as to the proper interpretation of the *Bowman* case, the Court of Appeals for the District of Columbia has followed the "view which leads to the fullest presentation of facts." *Frank Fryer* v. *United States*, No. 11564, July 17, 1953. The *Fryer* case held that since the rule provides for modification of subpoenas to exclude unreasonable and oppressive demands, the Trial Court should not quash a subpoena in the absence of sound reasons for precluding pre-trial inspection. Tested by that interpretation, the court below has misconceived

[5] This is the interpretation of the Government and the court below. As pointed out supra pp. 21-23 their interpretation is probably incorrect.

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the purpose of the rule and has adopted, instead, an interpretation which is harsh and unduly restrictive.

The ruling of the court below cannot be reconciled with the decision in *Gordon* v. *United States,* 344 U.S. 414, where, in passing on the request of a defendant in a criminal case for the production of evidence tending to impeach a Government witness, this Court held, even in the absence of specific legislation, that (p. 420) "For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule * * * ".

There is a divergence of opinion among the courts with respect to the teaching of the *Bowman* case and the superficial distinction made by the court below (R. 3757-8) seems to be out of harmony with the well-considered opinion in the *Fryer* case.

6. Presumption of Prejudice Where Outside Contact with the Jury Has Occurred.

An important question is presented involving serious aspects of federal criminal justice. The Court of Appeals approved the summary denial of petitioner's motion for a new trial and his request that the District Court hold a hearing on a reported instance of improper contact with the jury. The Court of Appeals held that petitioner had failed to show any prejudice (R. 3776-7). The record contained only petitioner's affidavit calling to the attention of the District Court the stories which had appeared in two newspapers (R. 111-120). In substance these articles reported that the foreman of the jury had received a suggestion that money might be paid him to influence the verdict, that the trial judge had caused an investigation to be made and had concluded that the incident was harmless. Petitioner's affidavit was filed promptly upon learning of the incident after the jury had returned its verdict. Petitioner's motion for a hearing to determine precisely what had occurred was denied (R. 93-94).

The record contains no official statement concerning the incident. The District Judge did not even comment on the

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petitioner's motion (R. 93-94). The Court of Appeals relied solely on the newspaper stories to answer petitioner's assignments of error and to determine whether petitioner had been prejudiced (R. 36-37). The Court of Appeals held that petitioner had the burden of showing prejudice before he could get a hearing. We submit that the court should have at least remanded the case for the purpose of holding a hearing for the record, and that the District Court should have been required to pass on the motion for new trial in the light of the evidence developed at the hearing. Only by such orderly procedure could a satisfactory record be made. We submit further that petitioner has been convicted by a jury which was evidently subjected to outside influence of a character calculated to affect its deliberations, and that the assertions of prejudice to the petitioner set forth in the affidavit (R. 112) were well taken.

Whether investigation was actually made by the Federal Bureau of Investigation; whether its purpose was to ascertain the affect on the jury; whether one or more jurors were subjected to interrogation by the agents of the Federal Bureau of Investigation; whether the jurors were asked polite questions or were subjected to a grilling; whether any of the jurors was apprehensive of being suspected and criticized should he vote for a verdict favorable to the petitioner; the identity of the third party who supposedly communicated with the juror; the full conversation between them; what took place at the supposed conference between the juror and the trial judge; what took place between the trial judge, the juror, and the prosecuting attorney; what took place between the agents of the Federal Bureau of Investigation and the prosecuting attorneys; what the juror supposed to have been contacted communicated to his fellow jurors—none of this information is contained in the record, and petitioner was denied an opportunity to ascertain it.

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Whether the newspaper stories were complete or accurate was unknown to the Court of Appeals and its casual disposition of the matter is in sharp contrast to the serious view of such incidents customarily taken by the Courts.

On this barren record, the question is whether a District Judge is authorized to make an off-the-record examination of such an occurrence and leave no basis for an appellate court to form a judgment of the propriety of his action. In *Ryan* v. *United States*, 191 Fed. 2d. 799 (C.A. D.C.) the record showed that several jurors and other witnesses were examined and cross-examined. The Court of Appeals approved this procedure and said, p. 781, "the trial court adopted the appropriate procedure of probing the matter by an extensive hearing." Here there is no such record and the District Court declined to hold a reported hearing.

As stated, the denial of petitioner's motion for hearing was approved by the Court of Appeals on the ground that petitioner had failed to show any prejudice. When the District Court learned of the incident, he recognized that he had a duty to cause an examination to be made; he did not wait for anybody to show prejudice. Outside contacts with a jury raise a presumption of prejudice, *Mattox* v. *United States*, 146 U. S. 140, 150, and the cases hold that the presumption can be overcome only by affirmatively showing that there was no prejudice. *Stone* v. *United States*, 113 Fed. 2d. 70, 77-78 (CA 6); *Little* v. *United States*, 73 Fed. 2d. 861 (CA 10); *Wheaton* v. *United States*, 133 Fed. 2d. 522 (CA 8).

If the newspaper articles are reliable (and that is the evidence upon which the Court of Appeals held there was no prejudice) the district judge already knew that a juror had been contacted, and the court had concluded for itself that the contact was harmless. Alternate jurors were available, but the contacted juror was not withdrawn. The defense had been excluded from the investigation and was entitled to have the aid of the court in adducing the facts

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for the record. Under the circumstances the Court of Appeals' reliance on the lack of affidavits from jurors was an insufficient basis for approving the action of the District Court, and transferred to the defense a burden which it is not required to bear.

The action of the Court of Appeals ignores the presumption of prejudice which arises upon a mere showing of outside influence on the jury, and leaves to a single district judge the authority to exclude the defense from any part in the investigation and personally make a final decision which reflects only his own judgment, with no opportunity for either the defense or a reviewing court independently to appraise the situation. This Court should determine whether such a procedure is calculated to safeguard the integrity of the jury system and to preserve the constitutional right to a fair and impartial trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Aug., 1953.

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HAROLD B. WILLEY,

No. 304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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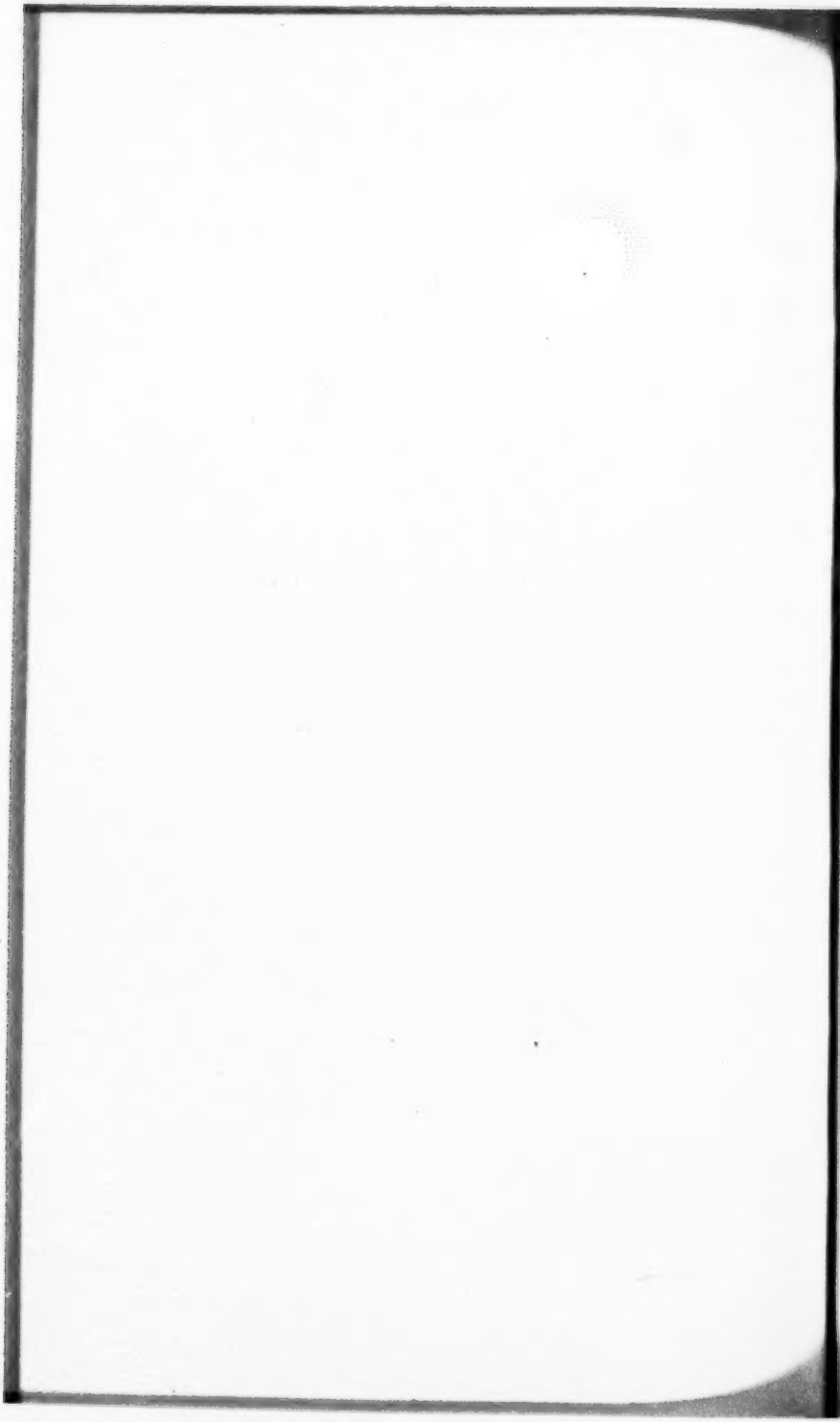

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REPLY BRIEF FOR THE PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The purpose of this brief is to inform the Court of some recent developments, to comment on the Brief in Opposition and to supply some additional authorities.

ARGUMENT

1. Additional conflicts have arisen with respect to the necessity for establishing the net worth at the beginning of the indictment period (Petition, pp. 17-21).

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Although not considering a net worth case at the time, the Third Circuit has added its endorsement to the views on that subject expressed by the Fifth and Seventh Circuits in *Bryan* v. *United States,* 175 F. 2d 223, and *United States* v. *Fenwick,* 177 F. 2d 488.

In *United States* v. *George L. Smith,* 206 F. 2d 905, the court agreed that no conviction could be countenanced where the prosecution failed to establish the net worth at the beginning of the period and added (p. 911):

> We think it part of the Government's prima facie case to establish, at least, that what it charges against defendant is income for the year involved. It has not established its prima facie case by showing that defendant had some money and then asking the jury to infer that that money is "income" for the year involved.

In addition to a conflict between circuits, there is also a difference of opinion among the individual judges of the court below. In *Calderon* v. *United States,* decided October 9, 1953, not yet reported, 53-2 CCH 9579, where the bench consisted of Judges Denman, Healy and Bone, the *Bryan* and *Fenwick* cases were cited with approval. Referring to net-worth statements, the court said:

> Absent such a starting item as, say, cash on hand the remainder of the statement proves nothing.

The Tax Court also has announced its approval of the views of the Fifth and Seventh Circuits and has declined to sustain fraud penalties in a net worth case where the Government's computations failed to take into account cash savings from earlier years. *King Tsak Kwong* v. *Commissioner,* Docket 27019, October 7, 1953, CCH Decision 19,924(M). The Tax Court pointed out that:

> Expenditures and increase in bank balances do not necessarily prove the existence of current income as long as the hypothesis exists that both might have been from sources other than current income.

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These recent decisions give added emphasis to the need for the guidance of this Court in order that there may be a uniform understanding and a consistent practice in the application of the judicial process in net-worth cases, which now play so important a part in tax litigation.

Respondent seeks to distinguish the *Bryan* and *Fenwick* cases on the ground that each involved a defective investigation and that the Government was forced to admit that there might well be assets which it had not discovered (B.Op. 24). There is no basis for the suggested distinction.

Here the undisputed evidence showed that there was cash on hand December 31, 1943;[1] the only question was the amount. The Government could not determine it and there was no basis upon which the jury could do better. Accordingly, no reasonable mind could conclude that the amount was insufficient to throw the Government's net-worth computation substantially out of line (B.Op. 22). Respondent's suggestion that the Government's exhaustive investigation, though fruitless, together with petitioner's unwillingness to give assistance, could somehow serve to take the place of the missing evidence, is incompatible with the well-settled principles that the Government has the burden of producing the evidence and that a defendant's failure to testify is without significance. The jury was so charged (R. 132, 152). The net-worth computation conceded the existence of cash and the Government's inability to determine the amount (R. 3613). Thus, this case differs in no substantial respect from the *Bryan* and *Fenwick* cases.

2. With respect to the method of accounting to be employed, the circumstances under which the taxpayer's method may be departed from, and where the authority lies to determine that a departure is necessary (Pet. 21-23), respondent is driven to the contention (fn. 7, B.Op. 25) that Sec. 41, Internal Revenue Code, has no application to criminal cases. The court below held otherwise (R. 3762).

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[1] It was on hand, even if held in storage only overnight (B.Op. 22, fn. 5).

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Until the respondent's brief was filed, it had been generally accepted that the Government is forbidden to compute taxable income on any basis other than the method of accounting selected by the taxpayer, unless Section 41 is invoked to authorize a departure. The jury was so charged (R. 136-137). This new construction of Section 41 supports petitioner's contention that the intervention of this Court is required in order that it may be authoritatively determined whether taxpayers are subject to criminal prosecution for failure to report amounts of income disclosed by methods of computation which they did not themselves employ and whose results they could not forsee.

This Court has held that the selection of a method by the taxpayer in his return constitutes an election which binds both him and the Commissioner. *Pacific National Company* v. *Welch*, 304 U.S. 191. The Court further emphasized that the selected method must be adhered to if it is capable of producing correct results. The Court said:

> While petitioner's return may have been an inept application of the deferred payment method, there is nothing in it or the statement of claim for refund that gives any support to the idea that, *if rightly applied*, that method would not clearly reflect income. (Italics supplied)

The Treasury Regulations have adopted a definition of "method of accounting" which, while not wholly consistent with *United States* v. *American Can Company*, 280 U.S. 412 (Pet. 22), nevertheless demonstrates that the courts below erred in approving a departure from the taxpayer's method upon evidence which dealt with the details of bookkeeping rather than the basic method. Treasury Regulations 111, Section 29.41-2, page 254, states:

> A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. For the purposes of this section, a change in the method of

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> accounting employed in keeping books means any change in the accounting treatment of items of income or deductions, such as a change from cash receipts and disbursements method to the accrual method, or vice versa; a change involving the basis of valuation employed in the computation of inventories (see sections 29.22(c)-1 to 29.22(c)-8, inclusive); a change from the cash or accrual method to the long-term contract method, or vice versa; a change in the long-term contract method from the percentage of completion basis to the completed contract basis, or vice versa (see section 29.42-4); or a change involving the adoption of, or a change in the use of, any other specialized basis of computing net income such as the crop basis (see sections 29.22(a)-7 and 29.23(a)-11).

The Court of Appeals for the Sixth Circuit has held that under Sec. 41, Internal Revenue Code, the only question for the courts is whether the Commissioner has abused his discretion. In *Schramm—Receiver of First National Bank, Detroit* v. *United States*, 118 F. 2d 541, the court said:

> This is an administrative problem left by the statute to be determined "in the opinion of the Commissioner", *Lucas* v. *Kansas City Structural Steel Company*, 281 U.S. 264. That official has a broad administrative discretion in determining the question and it is beyond the power of the courts to overturn his decision unless the evidence clearly shows that he has abused his discretion.

This view of the proper application of Sec. 41, Internal Revenue Code, is in sharp contrast with the procedure in the case at bar, where the jury, instead of the Commissioner, was permitted to determine the propriety of departing from the taxpayer's method of accounting by deciding the false issue whether the books were adequate (R. 137). In *Remmer* v. *Commissioner*, Tax Court Docket 23486 (Pet. p. 23, fn. 4) it appears that the Commissioner found no reason to depart from the petitioner's method of accounting. But his subordinates have in effect overruled him by inducing the jury

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to reach a contrary conclusion, in disregard of the statutory mandate that the Commissioner's discretion is decisive.

Respondent's reply to petitioner's complaint that it was a travesty of justice to withhold a large quantity of records and then submit to the jury the question whether the records in evidence were adequate (Pet. 33), is that the objection is "patently insubstantial" (B.Op. 26). This casual treatment of an outrageous procedure is not calculated to create public confidence in the administration of justice.

The need for education of the personnel of the Internal Revenue Service (formerly the Bureau of Internal Revenue) in the proper application of the net-worth method of accounting is now officially recognized. The report dated September 25, 1953, of a Hearing Before the Joint Committee on Internal Revenue Taxation on Reorganization of the Internal Revenue Service, contains the following statements by the Commissioner (pp. 17-18):

> Mr. ANDREWS. * * * Now, then, let me tell you, and I am glad you mentioned the net-worth method. In the first place, gentlemen, this method is based upon an accounting technique which is one of the most difficult of all techniques, although to a person experienced in the handling of it, it is really not anything more than a simple procedure. Our difficulty has been—and when I say "our," I mean the service—that the net-worth theory was adopted without, in my opinion, a proper instruction to those who have to apply it, of how to use it.
>
> Representative DINGELL. They said you just count figures and never mind using your brains.
>
> Mr. ANDREWS. We propose to send out a manual to include in our training, which is an up-to-date discourse on how to use the net-worth theory. It is a good technique if it is properly used.

* * * * * * *

(pp. 22-23):

> Mr. ANDREWS. Congressman, let me say this to you: I am not at all happy about the situation as regards the assertion of fraud charges and fraud penalties. There

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is, as you know, a distinction between criminal fraud and civil fraud. I am told, and if I am wrong in this distinction Mr. Tuttle can straighten me out, that you assert fraud charges, criminal fraud charges when the preponderance of evidence is enough to give you an indictment before the grand jury. If you assert civil fraud, you do that when there is doubt that you can carry it that far.

Now, I am worried about that last part because I am afraid, very frankly, that there may have been an awful lot of citizens in this country who have been slapped with a civil fraud penalty without complete study.

3. Respondent's reply to petitioner's objection to the inclusion of the markers as cash in Exhibit 183 (Pet. 23-25) is an attempt to show that some undetermined portion was not accounts receivable (B.Op. 28). However, the court below understood that the markers were accounts receivable, and nevertheless held they were properly included as cash items (R. 3769). Since respondent does not attempt to support the use of the hybrid method sanctioned by the court below, it would appear that respondent recognizes the validity of petitioner's assignment of error No. 6, (Pet. 17).

4. With respect to the need for additional detailed instructions to the jury in criminal prosecutions where the offense charged is based upon erroneous interpretation of technical statutory provisions (Petition 26-31), it is pertinent to note that even in civil cases the courts with consistent uniformity have declined to sustain penalties where the liability was unclear or was in doubt at the time of the alleged offenses:

J. B. Jemison v. *Commissioner*, 45 F. 2d 4 (CA 5);
Rogers Recreation Co. of Conn. v. *Commissioner*, 103 F. 2d 780 (CA 2);
Bronson v. *Commissioner*, 183 F. 2d 529 (CA 2);
Wm. E. Mitchell v. *Commissioner*, 45 BTA 822, 118 F. 2d 308 (CA 5);
Kellett v. *Commissioner*, 5 T.C. 608;

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Jarvis v. *Commissioner,* Tax Court Docket No. 5126, May 28, 1946, 5 T.C.M. 459;
Kesterson Lumber Corp. v. *Commissioner,* Tax Court Docket No. 127, May 9, 1944, 3 T.C.M. 432;
United States v. *The Bank of Powers, et al,* June 22, 1939, Not officially reported, (DC Ore), 39-2 U.S.T.C. 9665;
Charles C. Rice v. *Commissioner,* 14 T.C. 503;
Joseph H. Imeson v. *Commissioner,* 14 T.C. 1151;
Idus A. Inglis v. *Commissioner,* 14 T.C. 1448;
Dale R. Fulton v. *Commissioner,* 14 T.C. 1453;
Joe H. Bartling v. *Commissioner,* Tax Court Docket Nos. 18905, 19886, June 6, 1950, 9 T.C.M. 458.

To ask a jury to form a rational conclusion with respect to whether petitioner had any basis for claiming his enterprises were partnerships, with only general instructions as a guide (R. 142, 143-144) was to invite a miscarriage of justice. Moreover, it is beyond the capacity of the average jury to pass intelligently on such questions as whether the net-worth method should be used, whether the computation was meaningless in the absence of a firm starting point, or whether the treatment of the markers as cash was permissible. Here the instructions were so general (R. 136-7; R. 147-8; R. 145) that it is doubtful whether the jury even realized that it was supposed to decide these questions.

Respondent does not attempt to support the application of the 1949 rule of *Commissioner* v. *Culbertson,* 337 U.S. 733, in a criminal case involving prior years. The statement (B.Op. 29) that petitioner himself sought the application of the *Culbertson* rule is directly opposed to the Government's brief in the court below, which asserted (pp. 71-72) that the instructions requested by petitioner were properly rejected because they "fail to include the test laid down in that case for determining such fact". The jury did not have the benefit of the concession now made (B.Op. 30) that a failure of the agreement between associates to actually create a partnership status may well be

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with no tinge of criminal intent and the court below was persuaded to affirm the conviction on the authority of the *Culbertson* case. Respondent regards the joint conduct of an enterprise under an agreement which is insufficient to create a partnership status as a "nominal partnership" and confuses tax avoidance with tax evasion (B.Op. 30-31).

The Tax Court has recently held that *Commissioner* v. *Culbertson,* 337 U.S. 733, effected such a change in the tax law dealing with partnerships that the court would not recognize an earlier decision as *res judicata. Joe Lynch* v. *Commissioner,* Tax Court Docket No. 24859, 20 T.C. — No. 146, September 23, 1953, CCH Decision 19,901. An excerpt from the Commissioner's brief, quoted in the dissenting opinion, contended that "These cases altered the law governing the validity of family partnerships for tax purposes". The *Lynch* decision emphasizes the uncertain tax status of partnership enterprises, and the validity of petitioner's complaint that he was tried and convicted on the basis of a rule which was not in effect at the time of the alleged offenses. The Government was recognizing the partnerships in a civil proceeding at the same time it sought criminal penalties here (Pet. 27). Thus, the Commissioner's subordinates secured petitioner's conviction for making fraudulent claims, although the Commissioner recognized them as valid. We submit that petitioner is the victim of dubious administrative conduct and that the public interest requires the intervention of this Court.

5. Respondent supports the rulings of the trial court on the motions under Rules 16 and 17 of the Federal Rules of Criminal Procedure on the ground that petitioner's accountant had had ample opportunity to inspect the records and that the last-minute request was unreasonable (B.Op. 32). Thus, respondent assumes that the Government's maneuvering did not contribute to the delay and ignores the fact that petitioner was repeatedly denied access to the records although they were readily available throughout the three months' trial (Pet. 32).

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Respondent insists that the trial court has a large measure of discretion (B.Op. 31). In *Fryer* v. *United States*, (CA DC), July 7, 1953, now pending on the Government's petition for certiorari, Docket No. 311, the Government asserts (*Fryer* Pet. 10-11) that the need for limited disclosures is to withhold evidence which may be a surprise and thus prevent perjury, subornation, and an opportunity to manufacture evidence. If that is the purpose of giving the trial court large discretion, it is not apparent why the rule should receive a niggardly construction where, as here, petitioner was seeking records of enterprises which the Government asserted were wholly owned by him.

Respondent's further assertion that petitioner has not been able to show that the rulings were prejudicial (B.Op. 33) disregards the issue of inadequacy of records and the probable affect on the jury of a disclosure that petitioner's books were supplemented by a mass of original documents (Pet. 33).

The principal pertinency of the *Fryer* case here is that the Court of Appeals for the District of Columbia gave to *Bowman Dairy Company* v. *United States*, 341 U.S. 214, a construction which was in marked contrast to the construction adopted by the court below (R. 3757). The court below was guided by the bare decision in the *Bowman* case, while the Court of Appeals for the District of Columbia gave heed to the reasoning of the *Bowman* case. The court below stressed the purpose of the rule to expedite trials, while the Court of Appeals for the District of Columbia was more impressed with the purpose to achieve a fair balance between the Government and the accused so as to bring about fairness in the administration of criminal proceedings. The Government's petition in the *Fryer* case apparently agrees that the latter is the dominant purpose (*Fryer* Pet. 10).

6. With respect to the question of prejudice arising from outside contact with the jury (Pet. 34-37), respondent now contends (B.Op. 34) that there was no proof "that there had in fact been the necessary outside contact with a juror."

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This argument does not support the holding of the Court of Appeals to the effect that, assuming the actual contact, there was no showing of prejudice. Unless this Court intervenes, the precedent is established that outside contact is not presumptively prejudicial.

In the court below the fact of actual contact was accepted without question. The Government's brief in the court below stated, page 52:

> Thus, without even making an initial investigation of the facts, appellant, on the basis of pure speculation, was in effect asking the trial judge, who had first-hand knowledge of the events in question, to reconsider his conclusion that they had been "harmless".

It is pertinent to note that a similar question is now pending before this Court in *A. Elwood North* v. *The State of Florida*, No. 435. Here, as in that case, after the verdict petitioner learned for the first time that the jury had been subjected to outside influence. In both cases, the outside influence was of a character calculated to affect the deliberations of the jury. However, unlike the *North* case, no testimony was taken here on petitioner's motion for a new trial and the court below approved denial of the petitioner's motion without any record from which it could determine that no prejudice had occurred. In the *North* case, there was at least a proper judicial inquiry with a reviewable record. Here there was none.

We submit that the pendency of the *North* case is a further cogent reason for the granting of this petition.

7. The constitutional guaranty of due process of law loses much of its substance if the Government prosecutors misinterpret the law and thereby mislead the court and jury in a case dealing with criminal sanctions in the complicated, technical field of the revenue law. *United States* v. *Carroll*, 345 U.S. 457, 460. We submit that it is hopeless to expect the jury, without proper guidance, to comprehend the statutory provisions which are alleged to have been violated.

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Both Rule 52(b), Federal Rules of Criminal Procedure, and Rule 27 of this Court, provide that plain errors may be noticed, even though not assigned. Where, as here, the errors affect substantial rights, and present questions of dubious administrative conduct, it is not in the public interest for the court to ignore errors on the ground they were not assigned below, where they are obvious and seriously affect the fairness, integrity or public reputation of judicial proceedings. *Johnson* v. *United States,* 318 U.S. 189; *Simmons* v. *United States,* 206 F. 2d 427 (CA DC).

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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November, 1953.

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HAROLD B. WILLEY,

No. 304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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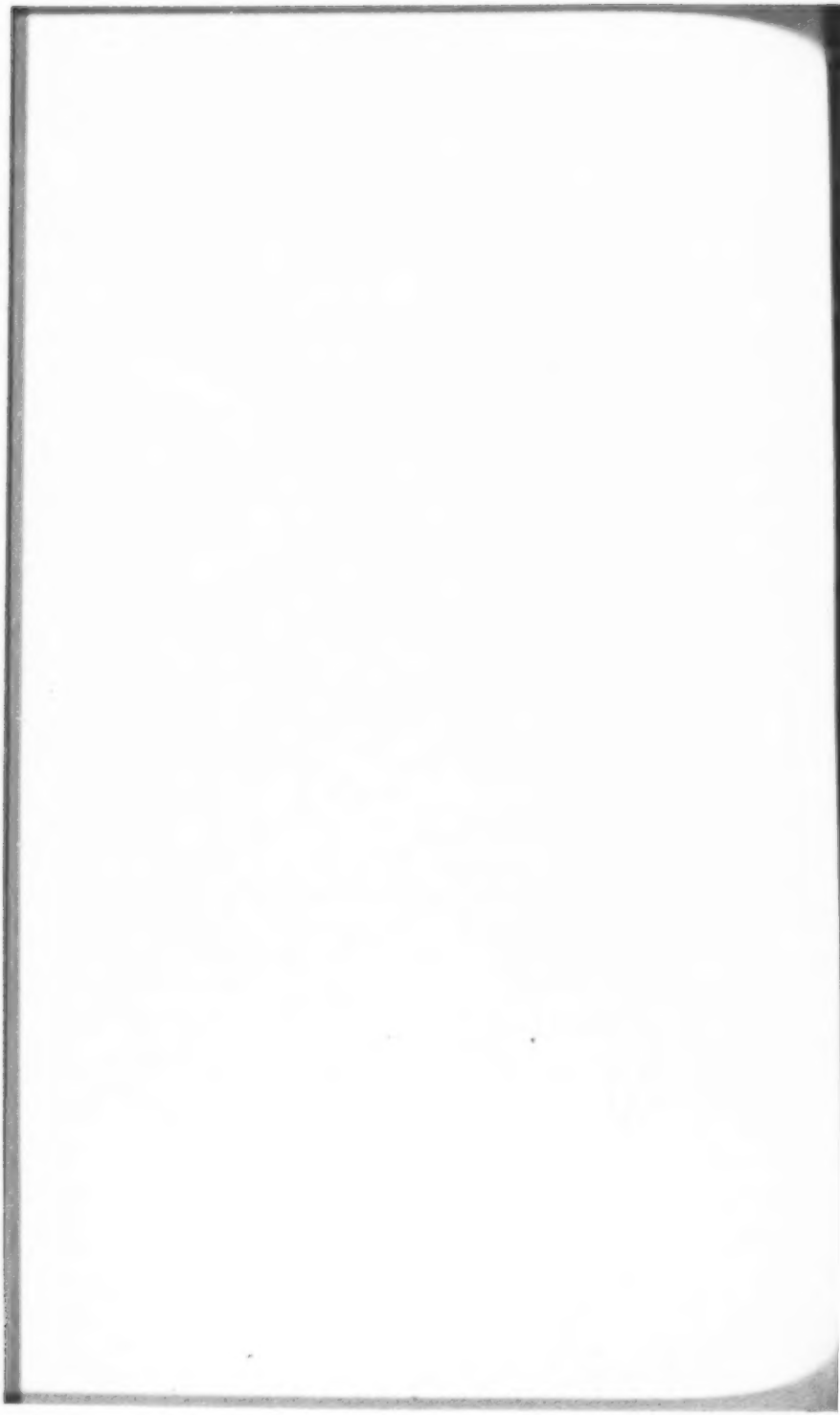

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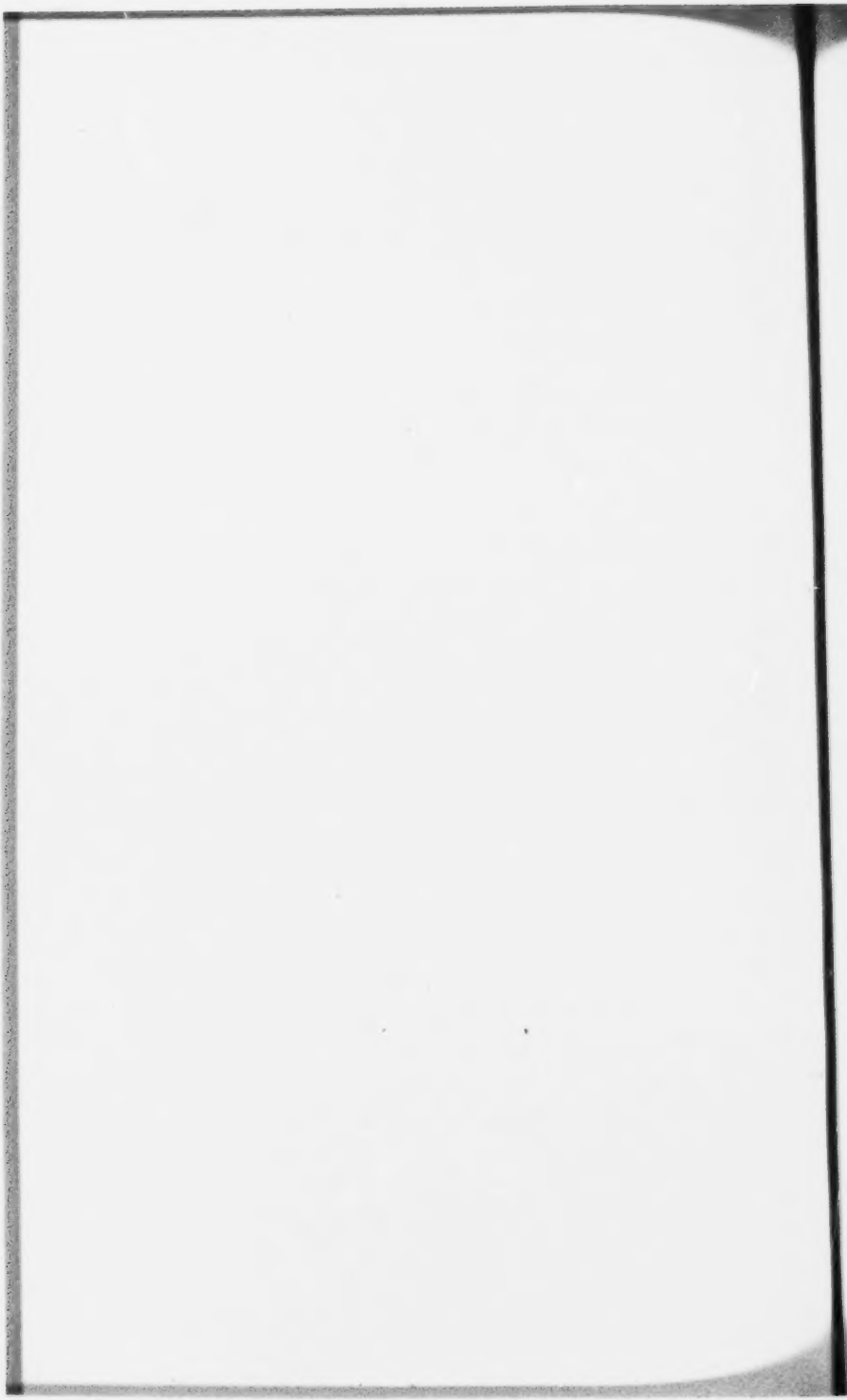

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OCTOBER TERM, 1953

No. 304

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The District Court wrote no Opinion. The Opinion of the Court of Appeals (R. 3748-3777) is reported in 205 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778). An order denying a petition for rehearing, rehearing en banc, and staying mandate was entered on June 30, 1953 (R. 3779). On July 17, 1953, an

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order was entered by Mr. Justice Clark, extending the time for filing a Petition for Writ of Certiorari to and including August 29, 1953 (R. 3781). The Petition was filed on August 28, 1953. The jurisdiction of this Court is invoked under Title 28, USC 1254. See also Rules 37(b)2 and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Do mere errors in the taxpayer's books authorize the Commissioner to substitute another method of accounting?

2. Was the sufficiency of petitioner's accounting system a question for the jury?

3. Where all of the books and records are not in evidence, the court has denied petitioner's motion for discovery, and has quashed a subpoena requiring the Government to produce a mass of petitioner's original records, can a finding be made that petitioner did not keep adequate books which clearly reflect income, so as to permit a computation on the net-worth theory?

4. Where it is clear that a computation by the net-worth method has omitted an asset shown to have been in existence at the beginning of the indictment period, can any assumption be made that the difference between the net worth at the beginning of the year and the net worth at the end of the year represents taxable income received during the year?

5. Without that assumption, does a net-worth computation establish a prima facie case of unreported income?

6. In computing income by the net-worth method, must the traditional basic distinction between the cash and accrual methods of accounting be observed or is the net-worth method independent of conventional accounting concepts?

7. May accounts receivable be included in a computation of net-worth on the cash basis?

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8. Does the defendant have the burden of establishing the amount of a cash item which has been omitted from the Government's net-worth computation?

9. Are the tests for determining whether partnerships will be recognized for the purpose of computing civil liability, equally applicable to the determination of liability for criminal penalties?

10. Are the tests used in civil cases so clear and certain that a defendant in a criminal case can properly be charged with knowledge in 1945 and 1946 of the development of the law in this field up to the year 1949?

11. Does Rule 16 of the Rules of Criminal Procedure, providing for a motion for discovery and inspection "at any time after the filing of the indictment", authorize the denial of the motion on the ground that it is not timely?

12. If timeliness is an element, does the Rule permit the time to be charged against the defendant where the Government has contributed to the delay?

13. Does Rule 16 of the Rules of Criminal Procedure authorize the court to substitute its judgment for the defendant's and to deny inspection of records on the ground that the court disagrees with the defendant's appraisal of the expected benefits?

14. Does Rule 16 of the Rules of Criminal Procedure require a showing of the specific need for individual papers?

15. In a case where there is no suggestion that compliance with the subpoena would have hampered the Government in any way, does Rule 17 of the Rules of Criminal Procedure permit the quashing of a subpoena for production of documentary evidence on the ground that the motion was not timely, that the production would not be beneficial to the defendant, and that the defendant had failed to show the need for specific papers?

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16. Where outside contact with the jury is alleged to have occurred during the trial, is the defendant entitled to a hearing to determine the facts, and to a new trial if warranted by the facts, or may the District Judge, who is reported to have already made an investigation, unknown to petitioner, deny the motion without comment and make no official record of the occurrence?

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent statutes, rules and regulations are set forth in the Appendix, infra, pp. 49-56.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Nevada, upon an indictment under Section 145 (b) of the Internal Revenue Code (26 USC 145 (b)), charging that petitioner willfully and knowingly attempted to defeat and evade income taxes for the years 1944 and 1945. The jury disagreed with respect to additional counts which involved the year 1946.

During the years 1944 and 1945, petitioner was in the gambling, cafe and food business (R. 1032, 1134, 1290). Petitioner and his wife filed separate returns. Each return showed the combined income and, on the community property basis, calculated a tax on one-half (R. 3519-3529). The returns of both petitioner and his wife disclosed income from the following enterprises (R. 3525, 3527-8):

San Diego Social Club and 21 Club
The 311 Club
The Menlo Club
110 Eddy Club
186 Day-Nite Club
186 Day-Nite Cigar Store

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Corporate returns were filed for the 186 Club (Ex. 87-87A, R. 3541, 3551). (Ex. 88-88A, R. 3562, 3563). Partnership returns[1] were filed for the following enterprises:

21 Club (1944 return, R. 1077)
21 Club and San Diego Social Club (1945 return, R. 1076)
311 Club (1944 and 1945 returns, R. 1077)
110 Eddy (1944 return, Ex. 81, R. 3531)
110 Eddy (1945 return, Ex. 82, R. 3533)
186 Day-Nite Cigar Store (1944 return, Ex. 84, R. 3535)
186 Day-Nite Cigar Store (1945 return, Ex. 85, R. 3538)
[2] Menlo Club (1945 return, Ex. 89, R. 3576)

Each return showed that petitioner had an interest.

A partnership return for the year 1944 was also filed by the B-R Smoke Shoppe (Ex. 78, R. 3530). It showed that petitioner had a one-half interest and that his share of the income was $600. The witness, Lando, who was shown on the return as a partner of the B-R Smoke Shoppe, testified that 1945 was a loss year (R. 1330). See also R. 1965, 1968.

On the premise that some of the partnership books were incomplete, the income of all of the partnerships was recomputed by the prosecution on the theory that increases in net worth represented taxable income. This assumed that the partnerships were the individual enterprises of the petitioner, which was the principal issue in the case. If the partnerships were recognized and petitioner's individual books were adequate, the use of the net-worth method in a prosecution of petitioner as an individual would have raised other questions. A revenue agent testi-

[1] The return forms were designed for partnerships, syndicates, pools, joint ventures, etc. (R. 3530). They are commonly referred to merely as partnership returns.

[2] The Menlo Club did not begin operation until 1945.

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fied that the 21 Club had a fairly complete set of records, consisting of a general ledger, journal, and cash receipts and disbursements (R. 1250). Witness Semenza testified as to the condition of the books (R. 3275, 3281, 3283-5, 3287, 3289, 3290, 3299, 3413, 3415, 3417, 3418) and concluded that they were adequate (R. 3432).

Although the prosecution's own case included uncontradicted evidence that varying amounts of cash were held in safes and deposit boxes throughout the years involved (R. 1268, 1484, 1535, 1536), the prosecution exhibit used in computing petitioner's net worth at the beginning of 1944, 1945 and 1946 showed no figures for cash outside the banks (Ex. 183, R. 3613). Witness Semenza testified that without that cash figure it was impossible to determine correct net worth (R. 3292-3). Two government witnesses reluctantly agreed (R. 2557-8, 2878-80). Government counsel instructed the accountant with respect to treatment of various items (R. 2870-78-81-85).

The prosecution computed the net worth of each partnership separately. For present purposes the Court is concerned only with the following four partnership enterprises:[3]

110 Eddy Street (Ex. 163, R. 3589)
Day-Nite Cigar Store (Ex. 164, R. 3593)
Menlo Club (Ex. 165, R. 3597)
B-R Smoke Shoppe (Ex. 169, R. 3601)

These computations were based on the petitioner's books and records and were merely a restatement of the results

[3] The 186 Club was treated by the prosecution as a corporation and therefore no net worth figure representing its income was included in Ex. 183. The 186 Club occupied the back room of Day-Nite Cigar Store (R. 1425). It was bought in 1943 by Nealis and Kopstick (R. 1425), who later withdrew and were paid off (R. 1427). The prosecution recognized the partnership status of the 21 Club and San Diego Social Club (R. 2894). In Tax Court proceedings all enterprises are recognized as partnerships. *Remmer v. Commissioner*, Docket No. 23486.

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of the operations in a different accounting form. Some changes involved the capitalization of improvements instead of treating them as expenses (R. 1268, Ex. 165, 174), and the treatment of taxes as additions to costs instead of as expense items, Ex. 175. The prosecution did not rely on the discovery of any specific item of new income or any new source of income beyond those reported in the books or tax returns.

After calculating the net worth figures of the partnerships separately the figures were transferred to a composite exhibit showing the net worth computation for the petitioner and his wife (Ex. 183, R. 3612). This exhibit reflected the theory of the prosecution that all of the income of the enterprises should be allocated to petitioner. This was done upon instructions of the prosecuting attorney (R. 2870).

The amounts of partnership net worth, all of which was charged to petitioner in Ex. 183, are as follows:

	1944	*1945*
B-R Smoke Shoppe	$18,231.47	$23,344.66
Day-Nite Cigar Store	39,494.37	30,390.47
110 Eddy Club	39,998.52	44,321.40
Menlo Club		183,647.94
Total	$97,724.36	$281,704.47

In this manner the prosecution arrived at the conclusion that petitioner had understated his income as follows (Ex. 183, R. 3613):

	1944	*1945*
Total Income per Exhibit 183	$50,747.91	$71,065.40
Income Reported	19,000.00	59,318.36
Difference	31,474.91	11,747.04

The relationships between petitioner and his partners were evidenced by oral and written agreements. Prosecution witness, Kyne, had an interest in six different enterprises (R. 1493, 1496) including the four which are of pres-

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ent importance here. A written agreement between Kyne and petitioner concerning the Menlo Club was introduced as Government Exhibit 113, R. 3582. A similar written agreement was made with witness Maundrell (Ex. 130, R. 3585) and other partners. There was also a written agreement concerning the Transit Smoke Shoppe, a later enterprise (R. 1189, 1523). Kyne testified that the oral agreements were similar in nature.

The written agreements deal with two different kinds of interest: An immediate "working interest" in the profits (R. 338) and an "actual interest" in the assets to be acquired by credits of undrawn profits (R. 1509). Because petitioner financed the enterprises, the arrangement contemplated that the shares of the profits of the other partners would be credited to their capital accounts until such time as the accumulated credits equalled their shares of the original investment and that petitioner's capital would be withdrawn in the same proportion as the other partners' earned credits. Witness Semenza, an accountant, testified that this is the usual practice in partnerships of a similar nature (R. 3388, 3423, 3433). With respect to the Menlo Club, for example, the equities of the various partners were credited with their working interests and charged with their withdrawals (R. 1807-8). Maundrell withdrew from the enterprise in 1948 and received all but $1700.00 of his equity in cash (R. 1807-10). Other partners drew on their accounts from time to time (R. 1833-5). The tax returns showed the distributive share of each partner and defendant's Ex. M-1 contained summaries of the partners' accounts (R. 3632, 3637, 3642). No ledger accounts were set up for the B-R Smoke Shoppe; the profits were divided between the partners at the end of each year. The other enterprises maintained regular books, with complete and detailed records of receipts and disbursements on a daily basis. The ledger posting was not up-to-date, but could readily be made current from the original records (R. 3275).

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Petitioner spent little time around any of the enterprises (R. 1494). The other partners were active in the business (R. 1323, 1494). Cavani and Turner ran the 110 Eddy Club; Lando ran the B-R Smoke Shoppe; Maundrell was office manager for the Menlo Club, card room, bar, and restaurant (and also supervised the Day-Nite Cigar Store in Kyne's absence). Nelso, Ditto, Fricker, and Turner, who were also partners in the Menlo Club, had supervision of the various shifts in the 24-hour operation conducted there (R. 1330, 1385).

Petitioner did not participate in keeping the books (R. 1494-5). Public accountants were employed for that purpose. Lando was well known in the sporting and racing fraternity and his contribution to the partnership was his knowledge of the game and his ability to make prices (R. 1322-3). Kyne's working interest in the 110 Eddy Club was for services (R. 1382). He was the real manager of all of the enterprises (R. 1494).

With respect to the partnership issue, the instructions to the jury were as follows:

Instruction No. 24, R. 142:

> Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. Partnerships as such are not subject to income tax, but are required to make returns of income.
>
> A partner in a partnership shall include in his individual net income his share of the net income or loss of the partnership. If he draws either more or less than his share, his income tax is nevertheless based on the share to which he is entitled under the partnership agreement.

Instruction No. 28, R. 143, 144:

> Certain businesses were described in the income tax returns in evidence as partnerships. The law does not

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prescribe any specific form of agreement as a requisite for partnership status. A partnership is an organization of two or more parties who have intended in good faith, and acting with a business purpose to join together in the present conduct of an enterprise. The arrangement between them may be either written or oral, and can be either an express or an implied agreement. It is not necessary that they contribute equal amounts of capital, or devote equal amounts of time to the business of the partnership, or have an equal share in the drawings, or have an equal right to draw money out of the business. The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners.

Petitioner's request for instructions dealing specifically with the "working interest" was denied (R. 83-4).

Proceedings Under Rules 16 and 17 of the Rules of Criminal Procdure.

The criminal indictment was filed on April 9, 1951 (R. 8). The case was set for trial on November 28, 1951 (R. 36). A motion for a bill of particulars was filed April 27, 1951, and denied June 15, 1951 (R. 10).

On November 13, 1951, petitioner filed a motion for a continuance (R. 16-17), and on November 14, 1951, a motion seeking a court order to inspect and take copies of certain books and records pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure. The records sought were described as "The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of" several named enterprises and any others from which the Government contends petitioner received income as an owner during the years 1944, 1945 and 1946. Supporting affidavits were filed with the motions (R. 20-34).

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They recited that the Government had placed liens against petitioner's funds; that a certified public accountant who had assisted the petitioner prior to the indictment had withdrawn because of petitioner's inability to compensate him for his services (R. 49); that petitioner's tax counsel had become associated with the case in March, 1951; that in September, 1951, a certified public accountant had finally been engaged; that access to the records had been denied by the Government after the indictment, and that the records covered by the motion were material to the preparation of the defense.

The Government filed an affidavit in opposition (R. 35-41). This affidavit recited that certain records had been procured by the Government from third parties. (At the trial the third parties were identified as certain other partners in the enterprises (R. 2122-2126)). The affidavit in opposition to the motion also recited that prior to the indictment certain of the records had been turned over to an accountant for his use in behalf of the petitioner; that the accountant had turned them over to one of the petitioner's attorneys who continued to hold them and that the accountant had been unable to return them to the Government in accordance with his agreement. These latter records were subsequently deposited with the Clerk of the Court, pursuant to an order of the Trial Judge, and made available to both parties during the trial (R. 928-929, 1151). Petitioner's motion covered a considerable quantity of original records such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports, etc. (R. 48). These were never made available to petitioner during the trial (R. 2717, 2771, 3250), although they were actually in the court house (R. 2451, 3483-6).

Both of petitioner's motions were denied (R. 42, 3492). The Court of Appeals held that prior opportunities which had been afforded petitioner's representatives to examine the material were sufficient (R. 3755), that the motion to inspect and take copies was not timely (R. 3756), and that

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no specific showing of prejudice had been made (R. 3758).

Pursuant to Rule 17 of the Federal Rules of Criminal Procedure, petitioner filed a motion on November 23, 1951, together with supporting affidavits filed November 26, 1951, and procured a subpoena (R. 46-7) for production and inspection of books, papers, documents and objects (R. 42-54). The prosecution filed a motion to quash the subpoena, based upon the earlier affidavit (R. 55-58). The petitioner's motion was denied and the motion of the prosecution was granted (R. 58). The Court of Appeals sanctioned the denial of petitioner's motion because of the circumstances discussed in connection with the motions under Rule 16 (R. 3757). The Court of Appeals did not hold that compliance with the subpoena would have hampered the Government in any way.

Improper Communication With Jury

The verdict of the jury was returned on February 22, 1952 (R. 88). On February 24, 1952, certain stories appeared in California newspapers to the effect that during the trial the District Judge had enlisted the aid of the Federal Bureau of Investigation to investigate a remark made to one of the jurors at his home to the effect that money might be paid to the juror if he supported the defense (R. 114, 117). The defense had no prior knowledge of the incident (R. 112). A motion for new trial was filed on February 29, 1952 (R. 106) which included as Ground 17 (R. 109) the contention that the defendant had been substantially prejudiced and deprived of a fair trial by the incident. In addition, petitioner moved that there be a trial of the issue and that evidence be produced to adduce what had actually transpired. In support of Ground 17, an affidavit by petitioner's counsel was filed (R. 111) to which copies of the newspaper stories were attached. The affidavit alleged that the petitioner had been prejudiced by the incident and that the interests of justice required a trial of the issue (R. 112). The facts alleged in the affi-

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davit were not challenged by opposing affidavits or by any remarks of the Trial Judge or the prosecuting attorneys. No hearing was held and no findings were made. The motion for new trial and the motion for a hearing for the purpose of developing the facts were denied without any comment (R. 93-94).

Treatment of Accounts Receivable as Cash

The evidence with respect to petitioner's taxable income on the net worth theory was summarized in prosecution Ex. 183 (R. 3612). Item 2 of that exhibit dealt with the B-R Smoke Shoppe and brought into the computation the results shown by Ex. 169 (R. 3601). The latter showed bank roll, cash on hand, at the end of 1945 to be $20,000. Exhibit 169 indicates that it was based on the testimony of Pritchett, a prosecution witness, and on Ex. 111-A. Pritchett testified (R. 1949) that the "cash" consisted of $15,000 of "markers" and only $5,000 in actual cash. The term "markers" was identified as meaning IOU's or Accounts Receivable which had not been paid (R. 1962, 1968). Pritchett's testimony dealt with the "markers" of customers and represented bets which had not been paid and which affected the business profits (R. 1965-1969). "Markers" representing the indebtedness of partners were considered as cash on settlements between the partners (R. 1734). Defendant's Exhibit M-1 omits the markers and shows cash on hand as $5,000 (R. 3628-9).

The only bank roll figure shown in Ex. 111-A was the amount as of January 1, 1943 (R. 2773). Exhibit 169 assumed, without any evidence to support it, that the bank roll remained the same at the end of 1943 and at the end of 1944 (R. 2773). Government witness Weaver testified that the result of his treatment of the markers was to increase the net worth of the business by $15,000 (R. 2781). He thought the markers represented cash advances, despite Pritchett's testimony (R. 2780). The Court of Appeals understood that the markers represented unpaid bets but

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held that they were properly treated as cash because of its belief that they were collectible (R. 3769).

Weaver further testified that in preparing the net worth computation for the Menlo Club he had used "mostly" the cash receipts and disbursements method and that it was impossible to secure an accurate picture "by sticking to any one particular method specifically" (R. 2621). At another point Weaver testified that "there has actually arisen a sort of hybrid basis." (R. 2727).

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In holding that the tests for determining the recognition of a partnership for Federal income tax purposes as set forth in *Commissioner* v. *Culbertson*, 377 U.S. 733, are applicable in a criminal case, and that a failure of a defendant who has attempted to form partnerships to report all of the partnership income in his individual return is evidence of his willful intent to evade income taxes.

2. In not holding that the method of accounting employed by petitioner is capable of clearly reflecting the income; or in not holding that the applicable method of accounting and the defendant's true tax liability must be determined by the Commissioner of Internal Revenue.

3. In holding that the petitioner failed to keep adequate records which would clearly reflect income and that the net-worth method of proof was therefore permissible.

4. In holding that, despite the omission from a net-worth computation of a cash item which was known to exist at the beginning of the indictment period, the case could be submitted to the jury on the assumption that the difference between the opening net worth and the closing net worth represented taxable income received during the year.

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5. In holding that the defendant had the burden of establishing the amount of the omitted cash item.

6. In holding that the Government's net-worth computation for a taxpayer on the cash basis properly includes accounts receivable.

7. In sanctioning the denial of petitioner's motions under Rules 16 and 17 of the Rules of Criminal Procedure.

8. In sanctioning the denial of petitioner's motion for a hearing to determine the facts of a reported incident during the trial involving one of the jurors and a third person.

9. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

1. The tax returns involved were made on the basis of the cash receipts and disbursements method of accounting. The Government elected to prove its case solely by a net-worth computation. The only authority for departing from the method adopted by the taxpayer is found in Section 41, Internal Revenue Code. That section authorizes the Commissioner of Internal Revenue to select a different method (1) where no method has been regularly employed or (2) where the method employed does not clearly reflect the income. The term "method of accounting" refers to the general bookkeeping system as distinguished from the detailed entries of individual items in the books. Accordingly, errors or other inaccuracies in the books are not sufficient to invoke the authority under Section 41. Resort to a different method requires a preliminary determination by the Commissioner that one of the two conditions specified in Section 41 prevails. There was no such determination by the Commissioner in this case.

2. Instead, the Government contended that a departure from the cash receipts and disbursements method was

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permissible because the taxpayer's books and records were inadequate in the sense that they were incomplete and inaccurate. The jury, instead of the Commissioner, was asked to determine the question of adequacy. We think that this construction of the statute is inadmissible and that the use of the net-worth method was not authorized.

However, even assuming that the Government's construction of the statute was correct, there was no sufficient showing of inadequacy here. All but one of the enterprises maintained regular books and there was no showing that the inadequacies could not be corrected from the original records. But all of the books and records were not in evidence and they were withheld from the petitioner despite his attempt to reach them through a motion for discovery and a subpoena for production. Entirely aside from the impropriety of submitting such a question to the jury, we submit that it could not properly make a determination of inadequate books under such circumstances. Moreover, it appears that in another proceeding the Commissioner of Internal Revenue has made a determination of petitioner's tax liability without departing from his method of accounting. We submit that this forecloses a departure from the taxpayer's method under Section 41.

3. Respondent's contention that the net-worth method is permissible as expert testimony, whether or not the preliminary determinations prescribed by Section 41, Internal Revenue Code, are made, necessarily assumes a construction of Section 145(b), Internal Revenue Code, which is quite inadmissible. That section must be read together with related sections and the offense for which it prescribes a penalty is the intentional failure to report the amount of tax imposed upon the true income, as shown by an official determination having the approval of the Commissioner of Internal Revenue. To construe Section 145(b) as authorizing criminal penalties upon the evidence of experts and in the absence of an official determination would raise serious questions concerning its validity.

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4. But assuming, for the sake of argument, that the net-worth method was permissible, the computation offered in evidence by the Government was fatally defective in two respects. First, the starting point was not established. While the undisputed evidence showed that petitioner held cash at all times in safes and deposit boxes, the amount was unknown. Accordingly, the Government's computation gave him credit for none. With this gap in the proof, the assumption that new assets were acquired with new funds, which is essential to give meaning to the net-worth computation, could not be made. The Government had the burden of proof and could not shift to petitioner the obligation to produce affirmative evidence as to the amount of the starting cash.

5. Second, the Government's net-worth computation was erroneous because it included an amount of accounts receivable for the year 1945 which was in excess of the entire understatement of income charged to petitioner. The accounts receivable item consisted of promises to pay by customers who had lost bets. The Court of Appeals sanctioned the inclusion of the accounts receivable, apparently on the theory that the net-worth computation is a hybrid method and therefore it was not necessary to adhere to the cash receipts and disbursements method. Respondent does not attempt to support this theory, but argues that some unknown portion of the accounts receivable represented withdrawals by individual partners and was therefore properly included in the net-worth computation. The net-worth computation is, at best, an approximation, and the small understatement of income shown here leaves no room for inferences favorable to the prosecution after its failure to meet its burden of proof.

6. The paramount issue in this case was whether certain enterprises were partnerships as claimed by petitioner. The enterprises were jointly conducted with other individuals, who had real and substantial interests in the

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profits; the oral and written partnership agreements provided that the other partners would leave their profits in the business until such time as their credits equalled petitioner's capital contribution, which was to be reduced annually. The other partners contributed services.

There was no evidence that the partnerships were a sham, but the Court of Appeals held that they could be disregarded under the rule of *Commissioner* v. *Culbertson*, 377 U.S. 733. That case was not decided until long after the taxable years here involved, and the recognition of partnerships is still a much litigated question. Accordingly, if the *Culberston* rule is to be applied, we submit that it is so uncertain that no layman can be assumed to know that his partnership will not be recognized. In such circumstances, criminal penalties may not be asserted.

Moreover, we submit that the question in a criminal case is not the question which the *Culbertson* case answers. The question here is not whether the partnerships should be recognized but whether they were unreal and a sham, so that petitioner knowingly and deliberately misrepresented their status when he claimed they were partnerships. The partners observed the agreements, built up their credits on the books, and withdrew some cash. In the absence of evidence that the partnerships were shams, no prima facie case was established.

7. Petitioner's motion under Rule 16, Federal Rules of Criminal Procedure, to inspect and take copies of certain of his own records was denied, and a subpoena issued under Rule 17, seeking the production of the same records, was quashed. The Court of Appeals sanctioned a harsh interpretation of the rules on the reasoning that sufficient prior opportunities to examine the material had been afforded petitioner, that his motions were not timely, and that no specific showing of prejudice had been made.

The principal purpose of the rules was to bring about fairness in the administration of criminal procedures and

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since it appeared that the evidence sought was relevant and competent, and since no showing was made that the Government would have been hampered in any way, the motions should have been granted.

8. After the return of the verdict, certain newspaper stories were brought to the attention of petitioner's counsel, which stated that during the trial a third party had made a remark to one of the jurors at his home, to the effect that money might be paid to the juror if he supported the defense; that the district judge caused an investigation to be made by the Federal Bureau of Investigation and had concluded that the incident was harmless. The defense had not been notified of the investigation and had no knowledge of the incident until the appearances of the stories in the press. Petitioner thereupon filed a motion for a new trial, together with a request that a full hearing be held in order to make a record of what had actually transpired.

The trial court denied the motion without comment and no hearing was held. Accordingly, the Court of Appeals relied solely on the newspaper stories to answer petitioner's assignments of error on this point and to determine whether petitioner had been prejudiced. That court held that petitioner was required to show prejudice before he could have a hearing. This is contrary to the general rule that outside contacts with a jury raise a presumption of prejudice and we submit that such an important matter may not safely and fairly be left to the sole discretion of the trial judge, with no record upon which the defense or a reviewing court can form its own judgment of whether the incident was prejudicial.

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ARGUMENT

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It Was Not Permissible to Use the Net-Worth Method of Computation and, in Any Event, It Did Not Establish a Prima Facie Case.

Sec. 41 Requires Inadequacy of Method

The tax returns here involved were filed on the basis of the cash method of accounting. The prosecution did not rely on the discovery of any specific item of new income or any new source of income beyond those reported in the books or tax returns. The Government concedes (B. Op. 2) that the proof was based upon a computation of the annual increase in net worth.

The only authority for the use of the net-worth method of computation in criminal cases is found in Sec. 41, Internal Revenue Code. That section permits taxpayers to select "any method of accounting" which properly reflects their income. The Commissioner's authority to select a different "method" is limited to situations where (1) no method of accounting has been regularly employed, or (2) the method employed does not clearly reflect the income. This does not mean that the Commissioner is free to disregard the "method" merely because the books contain errors. *Thomas A. Talley* v. *Commissioner*, Tax Court Docket Nos. 33140, 33141, June 30, 1953, 20 T.C. , No. 101.

The meaning of the term "method of accounting" is not in doubt. As defined in the Treasury Regulations (Regulations 111, Sec. 29.41-2, p. 254) it means the basic system as distinguished from the detailed entries used in employing the system. The regulations include the following in the term:

Cash receipts and disbursements method
Accrual method
Basis of valuation employed in the computation of inventories
Long-term contract method

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Percentage of completion basis
Completed contract basis
Crop basis.

The regulations are thus fairly consistent with this Court's construction of the term "basis of keeping accounts", which is found in the Revenue Act of 1916. In *United States* v. *American Can Company*, 280 U.S. 412, the quoted language was held to refer "to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books." The taxpayer's selection of a method in his return constitutes an election which binds both him and the Commissioner and the selected method must be adhered to if it is capable of producing correct results. *Pacific National Company* v. *Welch*, 304 U.S. 191.

The Commissioner's authority under Section 41, Internal Revenue Code, gives him broad administrative discretion which is not reviewable by the courts in the absence of abuse. *Schramm, Receiver of First National Bank, Detroit,* v. *United States*, (CA 6) 118 F. 2d 541. Hence it would appear that Section 41 is never available without the Commissioner's authority.

In this case, there is no evidence that the Commissioner has made the preliminary determination required by Sec. 41 to the effect that the *method* selected by the petitioner is inadequate. Instead, the prosecution introduced evidence that the books were inadequate in the sense that they were incomplete or inaccurate. As shown by the *American Can* and *Pacific National* cases, supra, this is not a sufficient premise for the employment of the net-worth method.

Inadequacy of Books Not Shown

Moreover, aside from the erroneous premise, there was not a sufficient showing that the petitioner's books and records were inadequate. With one exception, all of the enterprises kept regular books and there was no showing

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that the inadequacies could not be supplied from the original records. A large quantity of petitioner's original records was in the possession of the Government, the records were not introduced in evidence, and petitioner's attempts to reach them through a motion for discovery and a subpoena for production were unavailing. See Infra, pp. 41-45. Thus, with only a portion of petitioner's books and records in evidence, the jury was asked to determine whether his books and records were adequate. The instructions were not specific (R. 136-7, 145, 147-8) and the jury could not properly exercise the Commissioner's authority and determine the question of inadequacy. Petitioner was grievously prejudiced by the entire proceeding, even assuming that the Government correctly construed the statute as permitting the use of the net-worth method where the books are merely inadequate.

Respondent's Contention

In the Brief in Opposition, respondent contends in a footnote (fn. 7, B. Op. 25) that Section 41 has no application to criminal cases. This is a novel contention and is contrary to the decision of the court below (R. 3762). If the respondent means that the net-worth method of computation is not a "method of accounting" within the meaning of Section 41, then it is clear that the jury was improperly instructed otherwise (R. 136-7) and that the jury, the trial court and the Court of Appeals were misled into the belief that it was a method of accounting and into giving more weight to the computation than was justified. If the respondent means that the net-worth method of computation is admissible as expert testimony, and as the sole proof of the amount of tax due, without satisfying Sec. 41, then respondent must believe that Section 145(b) makes it a crime to file a return showing income in a smaller amount than some expert—any expert—testifies is due and owing. If upheld, such a contention would leave Section 145(b)

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without any standard and make the crime it defines so uncertain that the validity of the statute would be brought into question.

However, we do not subscribe to the view that Congress has made it a crime to differ with the experts, and we do not agree that a prima facie case may be established by expert testimony alone. Section 145(b) must be read together with Sections 41, 51, 272 and 3612, Internal Revenue Code, and what it punishes is an attempted evasion of the tax on the true income, as shown by an official determination having the approval of the Commissioner.

Section 145(b), Internal Revenue Code, under which this prosecution arose, prescribes punishment for a willful attempt in any manner to evade and defeat "any tax imposed by this Chapter". Each count of the indictment (R. 3-8) charged an attempt to defeat and evade a large part of the income tax due and owing, stated in dollars. There is no statute which prescribes the dollar amount of petitioner's tax liability. Thus, the question is, How is "any tax imposed by this Chapter" to be translated into dollars? The complicated statutory provisions for ascertaining tax liability, which are supplemented by equally complicated administrative regulations, have given rise to endless disputes and litigation. The true tax liability is such a controversial question that administration of the law would have been impossible unless Congress had prescribed a definite method for determining the amount of "any tax imposed by this Chapter".

The question which Section 145(b) raises is resolved by the related sections. Section 41, Internal Revenue Code, provides that the net income "shall be computed" in accordance with the method of accounting regularly employed in keeping the books, but that under certain circumstances the Commissioner may require that the computation be made in accordance with a different method. Section 51, Internal Revenue Code, provides that every individual

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subject to tax shall make a return, presumably in accordance with his books. Section 3612, Internal Revenue Code, provides that if any person makes a false and fraudulent return, then the Collector shall make a substitute return. Section 3612(c) provides that any substitute return made by the Collector and *approved by the Commissioner* "shall be prima facie good and sufficient for all legal purposes." Section 3612, Internal Revenue Code, is made applicable to income taxes by Section 61, Internal Revenue Code.

Accordingly, it would seem to be clear that in a prosecution under Section 145(b) the amount of "tax imposed" which the defendant is charged with evading and defeating should be established by a substitute return made under the authority of Section 3612. The statute does not leave the amount of tax disclosed by the substitute return to the individual determination of the Collector; his determination is subject to the approval of the Commissioner. Thus, an attempt to defeat and evade a portion of the tax shown by a determination in the form of a return bearing the approval of the Commissioner is the offense for which Section 145(b) prescribes punishment.

No civil claim for a deficiency in income tax is authorized without the approval of the Commissioner of Internal Revenue (Sec. 272, Int. Rev. Code) and it is inconceivable that Congress would authorize a criminal prosecution without a similar supporting determination by the Commissioner. Possibly a deficiency determination under Section 272, satisfies the requirements of Section 3612. However, the statute clearly does not prescribe punishment for failing to return and pay the amount of tax computed to be due by a subordinate of the Commissioner of Internal Revenue, under the domination of the chief Government prosecutor (R. 2869-2885), which was the situation in this case.

In lieu of the prescribed official determination, a net-worth computation prepared during the course of the trial by a technical advisor of the Bureau of Internal Revenue

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(R. 2840) was relied on here (Ex. 183, R. 2852-3, 2856, 3612-13), and the same witness testified to the tax liability (R. 2860-2865). The jury was instructed to consider this as expert testimony (R. 147-8). The Government elected to treat the net-worth computation as a "method" and we submit that it was not permissible to use it without the sanction of the Commissioner, as required by the Internal Revenue Code.

The need for a strict adherence to the procedure prescribed for proving a defendant's tax liability is dramatically shown in this case by the fact that the Commissioner disagrees with his subordinate and with the theory on which the unofficial computation (Ex. 183) was based. The net-worth computation attributed all of the income from the various enterprises to the petitioner on the theory that they were his sole proprietorships and not partnerships as reported in the various tax returns (R. 2867, 2869). The Commissioner has repudiated this theory in an official deficiency letter which recognizes that petitioner is entitled to report only his individual share of the partnership income. An appeal from the Commissioner's determination in the deficiency letter is pending before the Tax Court. *Remmer* v. *Commissioner*, Docket No. 23486. In the determination of the civil liability, the Commissioner did not depart from the petitioner's method of accounting. Thus, it is apparent that the finding of unacceptability of the taxpayer's method, which is a pre-requisite under Section 41, is not only completely lacking, but that such a finding is foreclosed by the deficiency letter, if the *Schramm* case, supra, is correct. Accordingly, the net-worth computation was unauthorized and the Government did not make out a prima facie case.

Moreover, the use of expert testimony to show the results of a net-worth computation as the sole proof to sustain a charge that a taxpayer using the cash basis of accounting has understated his income tax for a particular year in-

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volves a basic fallacy. It is obvious that different methods of accounting will produce different amounts of income, or at least will distribute the income differently throughout the taxable years. Accordingly, we submit that it is fallacious to assume that evidence of the income computed on a different basis than that actually employed by the taxpayer shows the income which he knew he was under a duty to report. The amount shown on any substitute basis is meaningless by itself and does not support an indictment under Section 145(b). This is particularly true of the net-worth method. A net-worth computation is evidence of the taxpayer's spending in particular years, but it does not purport to give any positive indication of whether the funds represent income, or when the income was derived. Those vital ingredients of a prima facie case are left entirely to assumption, and of course, the taxpayer could not have foreseen the result of the computation.

The net-worth method may serve a limited purpose where there is other evidence indicating that the taxpayer had specific sources of income which he has failed to disclose. Such a use of the net-worth method as "reinforcement" was approved by the Court in *United States* v. *Johnson*, 319 U.S. 503. We submit, however, that the net-worth method was misapplied in this case. That view is consistent with a recent official statement of the Commissioner of Internal Revenue. Reference is respectfully made to the Reply Brief for Petitioner, pp. 6-7.

Starting Point

Furthermore, even if the situation warranted the use of the net-worth method, the computation (Ex. 183) was fatally defective because the net worth at the beginning of the indictment period was not definitely established.

The net-worth computation reflects known assets and cash outlays which have been made to procure or improve the assets on hand at the end of the year (R. 2555). All

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such cash outlays are treated as newly acquired assets. No attempt is made to identify the source of the funds used to make the outlays, nor the year in which the funds became available to the taxpayer. The year in which the outlay was made is assumed to be the year in which the funds became available. In this manner, a showing is made that at the beginning of each year the defendant's assets were worth a specific sum and that at the end of the year his assets were worth a greater sum. The difference is then adjusted for any funds received as gifts, loans, inheritances, etc., for taxes paid and for living expenses. The adjustment for gifts, loans, inheritances, etc. is a deduction, which is made only if the Government can find any such receipts. If the Government fails to find any gifts, loans, or inheritances, it assumes that there were none. The burden is then cast on the defendant to show that there were such items which the Government failed to discover. Taxes and living expenses are assumed to have been financed from receipts of the current year. After making the aforesaid adjustments, the resulting figure is assumed to be taxable income. The jury was so charged (R. 137-8). The year in which the outlays were made is thus assumed to identify the year in which the income was received. In Exhibit 183, all of these assumptions were made by the party having the burden of proof.

The crudeness of the method and the assumptions which are required to be made in order to give any meaning to the results, have caused some judicial qualms about the propriety of submitting such evidence to juries. The senior circuit judge of the Fifth Circuit has recently pointed out that the proof of a criminal case by reliance on the net-worth method is fraught with danger of violation of the defendant's constitutional rights. In *Demetree* v. *United States*, decided November 24, 1953, not yet reported (See 53-2 U.S.T.C. 9646) the court said:

> This is another of the growing list of criminal cases in which the government, having no or little

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direct evidence of defendant's guilt to offer and endeavoring to prove it by circumstantial evidence, attempts to do so by what may be called the net worth and expenditures method of proof. In this attempt, unless the greatest care is taken by the district judge to prevent it, there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendant's income to take the place of proof of it.

Sometimes conclusions from those computations and estimates are allowed to invade the province of the jury and furnish the basis for a conviction not upon evidence of facts but upon speculation and theorizing by the government's witnesses as to what the facts really are.

Sometimes, without adhering to the essentials of the method, that the net worth at the beginning as well as the end of the period be shown, the proof comes in and the case is submitted with a complete gap in the proof as to the beginning of the period.

This kind of latitudinous allowance of the admission and use of conclusions as evidence and the submission of the case to the jury without a scrupulous adherence to the theory has resulted in a tendency to accept, if not in the complete acceptance of, the idea that in a case tried by this method, ordinary rules of proof may be relaxed if not disregarded. Further and more prejudicial to a defendant, there has grown up a kind of ancillary theory that the government by introducing proof of deposits, expenditures, etc., having put up what it calls a *prima facie* case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the government establish his guilt by legal and credible evidence beyond a reasonable doubt. This is accomplished by requiring him to prove himself innocent by assuming the burden of overcoming the prejudicial effect of the mass of exhibits, estimates, conjectures, and conclusions which the government has been allowed to get into the record, upon the apparent theory that it is up to the defendant

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to explain all of it away as part of his burden to prove his innocence.

This court and other courts have, in many cases,[2] pointed out the dangers attending trials conducted in this way. Some of them have at times seemed to be more concerned with easing the difficulties attending the proof of guilt by this method than with preserving unimpaired the constitutional rights of a defendant, the fundamental safeguards and guarantees of his liberty. Most of the courts, however, confronted with the situation which this kind of case presents, have withstood all attacks upon, and have held fast to, constitutional principles, including the fundamental premise upon which criminal trials proceed, that the defendant is presumed innocent until his guilt is established by legal and admissible evidence beyond a reasonable doubt.

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[2] *Bryan* v. *United States,* 175 Fed. (2d) 223 (49-1 USTC Par. 9322); *Fenwick* v. *United States,* 177 Fed. (2d) 488 (49-2 USTC Par. 9448); *United States* v. *Caserta,* 199 Fed. (2d) 905 (52-2 USTC Par. 9540); *Pollock* v. *United States,* 202 Fed. (2d) 281 (53-1 USTC Par. 9229); *Montgomery* v. *United States,* 203 Fed. (2d) at 892 (53-1 USTC Par. 9336). Cf. *U.S.* v. *Johnson,* 319 U.S. 503 (43-1 USTC Par. 9470).

The courts have been particularly zealous to insist that the starting point in a net-worth computation must be based upon a solid foundation. *United States* v. *Chapman,* 168 F. 2d 977, 1001 (CA 7); *United States* v. *George L. Smith,* 206 F. 2d 905 (CA 3); *Bryan* v. *United States,* 175 F. 2d 223 (CA 5); *United States* v. *Fenwick,* 177 F. 2d 488 (CA 7).

In the *Bryan* and *Fenwick* cases, supra, it was held that where the prosecution attempts to establish an understatement of income by the net-worth method, the case should not be submitted to the jury if the starting point net worth is not definitely established because the evidence is not sufficient to make out a prima facie case. These cases were recently cited with approval by the court below, where the bench consisted of Judges Denman, Healy and Bone. *Calderon* v. *United States,* 207 F. 2d 377. In civil

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fraud cases the Tax Court follows a similar practice. *King Tsak Kwong* v. *Commissioner,* Docket 27019, decided October 7, 1953, CCH Decision No. 19,924(M); *James Q. Whittemore* v. *Commissioner,* Docket No. 13421, 7 T.C.M. 845, 849.

The importance of a precise starting point in a computation by the net-worth method is that, without it, the hypothesis remains that some or all of what appear to be new assets were actually acquired in exchange for old assets or with cash received in earlier years. Thus, the assumption that the difference between the amount of assets at the beginning and end of a particular year constitutes taxable income realized in that year, cannot be made. Without that assumption, the net-worth computation is meaningless.

The starting point was not fixed in this case because the undisputed evidence introduced by the prosecution showed that the petitioner held cash in safes and deposit boxes at all times (T. 1268, 1484, 1535, 1536, 2956), but there was no evidence as to the amount. In the net-worth computation (Ex. 183, R. 3612) Line 25 is marked "cash in safe deposit boxes", but no figures are shown which effect the computation. Instead of figures, the column listing the assets for each year shows an interrogation mark. Thus, the net-worth computation conceded the existence of cash at the beginning of the indictment period and also the Government's inability to determine the amount. From such evidence it seems clear that no reasonable mind could conclude that the new assets shown by the net-worth statement were actually paid for with newly acquired funds, and that such funds could be assumed to constitute taxable income of the indictment years. Accordingly, the Government failed to make out a prima facie case.

Petitioner objected to the introduction of Exhibit 183 (R. 515-538, 2856-2857) and moved for judgment of acquittal on the ground that the use of the net-worth method was not available to the prosecution because of lack of evidence as to the starting point (R. 3465, 3477). The mo-

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tion was denied (R. 3469). The instructions to the jury on the point were inadequate (R. 136-138), and the petitioner's request for other instructions was denied (R. 79-83).

The Court of Appeals declined to follow the decisions in the *Bryan* and *Fenwick* cases (R. 3766). It expressed the view (R. 3765) that the Government would be frustrated in its attempt to enforce the tax evasion provisions of the Internal Revenue Code if net-worth cases were withdrawn from juries because of mere statements that defendants had additional undisclosed assets. This view merits the comment made in the *Demetree* case that some courts have appeared to be more concerned with easing the difficulties attending the proof of guilt by the net-worth method, than with preserving the constitutional rights of a defendant. Moreover, the situation here is not comparable to the extreme case which the court below had in mind. The existence of the cash did not depend on the acceptance of defendant's claims. It was shown by a prosecution witness (R. 1483-4); there was no evidence to the contrary and the Government conceded in Line 25 of Exhibit 183 that an unknown amount of cash was in the petitioner's possession at the beginning of the indictment period. The comment of the court below (R. 3765) that petitioner "did not attempt in any way at the trial to prove that substantial funds were in fact kept in the box" indicates an erroneous conception of the burden of proof. We submit that petitioner did not have the burden of establishing the amount of the omitted cash item.

The suggestion of the court below (R. 3765) that an unpaid $1800 judgment outstanding on the critical date tended to show that petitioner did not have any substantial amount of cash, overlooks the fact that petitioner had much more than this amount in the bank (Ex. 183, R. 3589; Ex. 169, R. 3601).

Markers

The net-worth computation (Ex. 183) was further fatally

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defective in that it erroneously included both cash and accrual items. It is well settled that the cash and accrual systems of accounting are distinct, and that each system should be employed to the exclusion of the other. It is not permissible to use them both at the same time. Sec. 29.41-2, Treas. Regs. 111, provides: "A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency."

Nevertheless, the Court of Appeals has sanctioned a departure from this principle (R. 3769), apparently on the theory that the net-worth system is a hybrid method of computation. A prosecution witness testified that he had used "mostly" the cash receipt and disbursements method, and that it was impossible to secure an accurate picture "by sticking to any one particular method specifically" (R. 2621). He thought "there has actually arisen a sort of hybrid basis" (R. 2777). Keeping in mind that the prosecution was attempting to show fraud on the part of a taxpayer whose accounts were maintained on the cash receipts and disbursements system, it is somewhat startling to have a judicial indication that such a taxpayer may be punished for not reporting the amount of tax shown to be due by a method of computation which treats promises to pay as cash.

In this case, the promises to pay consisted of so-called "markers" which represented the amount of credit extended to customers. The markers were unpaid bets. They were not identified as such in the Government's exhibits. They were included in an item entered on Exhibit 169 (R. 3601) for the year 1945 as "cash on hand—bankroll—Ex. 111-A, Pritchitt's test.—$20,000". The markers are included in Exhibit 183 (R. 3612) under Item 2 which reflects the net-worth results computed in Exhibit 169.

Turning to Pritchett's testimony (R. 1949, 1962, 1968), it appears that the cash was only $5,000 and that the other $15,000 represented markers. The witness Kyne explained that the markers indicated unpaid bets, sometimes taken

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over the telephone and not represented by any note or other document (R. 1361). Markers were also used to indicate withdrawals by the partners (R. 1299, 1374-5). Markers of this kind were disposed of on settlement at the end of each year. They were considered as cash already distributed to the partner responsible for the marker. Pritchett's testimony dealt with customers' markers which, if not paid, would have affected profits (R. 1968). When such markers were paid, the cash on hand was increased (R. 1360). This was the understanding of the court below (R. 3769).

We submit that the markers should have been excluded from Exhibit 183 in the computation for the year 1945. For that year, the prosecution contended that petitioner understated income in the amount of $11,747.04 (R. 3613). Accordingly, if Exhibit 183 had adhered to the cash receipts and disbursements method, and reflected only cash receipts, and omitted the promises to pay in the amount of $15,000, the evidence would have shown no understatement of income whatever.

The Brief in Opposition does not attempt to support the use of the hybrid method sanctioned by the court below. If there was any confusion in the testimony concerning the nature of the $15,000 markers, as suggested by respondent (B. Op. 28), it was an error to admit Exhibit 183 in evidence. The net-worth computation, at best, is an approximation, and where it indicates only a small understatement there is no room for permitting the jury to indulge in the inferences suggested by respondent. Moreover, the jury had no reason to make such inferences in view of the instructions (R. 137-8).

II

The Form of the Enterprises Was Not a Sham and Partnership Issue Should Not Have Been Submitted to the Jury.

As shown by the statement of facts, petitioner's returns disclosed the receipt of income from various enterprises, and those enterprises filed partnership returns, disclosing

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that petitioner was liable for his share of the income. The Government contended that four of the partnerships should not be recognized for tax purposes and that petitioner was therefore liable to criminal penalties because he had not reported all of the income individually. This was the paramount issue.

The prosecution recognized two of the six enterprises as partnerships (21 Club and San Diego Social Club) (R. 893-4) and the jury failed to convict on the counts dealing with the year 1946, for which partnership returns were also filed. The written partnership agreements were drawn in 1946 but related back. (R. 3582-5) Presumably, this is what distinguished 1946 in the eyes of the jury. The 186 Club was eliminated from the partnership issue because the Government recognized it as a corporation. Notwithstanding the uncertain legal status of the enterprises, petitioner has been found guilty of tax evasion on the presumption that he willfully and knowingly failed to report all of the income of the enterprises on his individual returns. The records of the Tax Court show that an official deficiency letter was issued on May 6, 1949, in which the 186 Club and all other enterprises were recognized as partnerships. *Remmer* v. *Commissioner,* Docket No. 23486.

The Court of Appeals held (R. 3768) that the tests of liability for partnership income laid down in *Commissioner* v. *Culbertson,* 377 U.S. 733, 742, were applicable and that the question was one of fact for the jury. The *Culbertson* case was a civil case and this Court held that the question was one of fact for the Tax Court, the experts.

Moreover, the *Culbertson* case was decided in 1949. Accordingly, it was not available to petitioner in 1945 and 1946, when he is alleged to have committed the offenses upon which he was convicted. In 1949 the law was so changed that earlier decisions are not recognized as *res judicata. Joe Lynch* v. *Commissioner,* Tax Court Docket No. 24859, 20 T.C. —— No. 146, September 23, 1953, CCH Decision 19,901. But even if the tests applicable in civil

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cases are likewise to be applied in criminal cases, the tests are not sufficiently well understood that knowledge of the correct conclusion could safely be attributed to every layman.

The earlier cases in this field, *Commissioner* v. *Tower*, 327 U.S. 280, and *Lusthaus* v. *Commissioner*, 327 U.S. 293, were decided on February 21, 1946, about the time when the latest alleged offense of the petitioner occurred. These cases were rather widely misinterpreted by taxpayers and by the Courts (See *Trapp* v. *Jones*, (W.D. Okla.) 87 Fed. Supp. 415; *Spies, et al.* v. *United States*, (N.D. Iowa) 84 Fed. Supp. 769). Even the Justices of this Court were not in agreement in the *Culbertson* case as to what tests should be applied, nor as to the proper conclusion to be drawn in that particular case. The decision did not completely clarify the situation and the courts have been flooded with litigation ever since. The proceedings following this Court's remand of the *Culbertson* case are illuminating. Both courts attempted to apply the *Culbertson* decision, but they reached different conclusions. The Tax Court decision rendered on the remand, 9 T.C.M. 647, was reversed by the Court of Appeals, 194 F. 2d 581 (CA 5). It is not an overstatement to say that the tests for determining the civil liability are still uncertain and it is a new departure in the law to hold a taxpayer liable for criminal penalties when he mistakenly claims that his income should be computed on the partnership basis.

The Senate Finance Committee report on H.R. 4473, Proposed Revenue Act of 1951, discloses the then current confusion with respect to the recognition of partnerships for tax purposes. In 1952, the Bureau of Internal Revenue published a ruling outlining the Bureau's position with respect to recognition of partnerships for years prior to 1951, Mim. 6767, Cumulative Bulletin 1952-1, p. 111. A current ruling states that "the term 'partnerships' for tax purposes is broader than the term under common law, the Uniform Partnership Act, or individual State laws." Rev. Rul. 144,

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Internal Revenue Bulletin No. 16, Aug. 3, 1953, p. 29. The Government has attempted to require some partnerships to file corporate returns on the theory that they are associations. (*The Olmsted Hotel* v. *Commissioner,* Tax Court Docket 28375, 11 T.C.M. 694).

Today the tax liability for partnership income is one of the most prolific sources of litigation. A recent analysis of cases on the Tax Court docket for the period November 8, 1951 to January 19, 1953, shows over one thousand disputes in the partnership field (1953 Commerce Clearing House, Par. 8637). In such cases the question usually is whether the taxpayer is correct in his conclusion that he is liable for only a portion of the partnership income. This is a criminal case, but if it presents only the same question as the civil cases, any of the taxpayers in the thousand Tax Court cases would likewise be liable to criminal prosecution. If it be the law that the civil tests are applicable in criminal cases, any taxpayer who claims to be a partner may be indicted if the Bureau disagrees. If the Government really believes that the same tests apply, the dearth of reported criminal cases is difficult to explain.

However, we submit that the question in a criminal case is not the same as in a civil case. The offense of tax evasion requires, first, a knowledge that certain omitted income should be included in the tax return. The question here is whether petitioner knew that he had not created a partnership (or a syndicate, pool, joint venture, etc.), and knowingly misrepresented that he had. Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that there is no basis on which a jury could properly convict him of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue.

In a recent civil case where the Commissioner asserted fraud penalties because of his refusal to recognize the taxpayer's claimed partnership, the Tax Court agreed that

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the partnership should not be recognized for tax purposes, but it declined to approve the fraud penalties even though it held, on the authority of the *Culbertson decision* (p. 903), that "the parties did not in good faith intend to become partners for the operation of the business." (*C. C. Cooke* v. *Commissioner*, 10 T.C.M. 881). The Court of Appeals for the Tenth Circuit reversed the Tax Court and held that for some of the years involved the partnership should be recognized, 203 F. 2d 258. It did not disturb the Tax Court decision with respect to the fraud penalties and apparently the Commissioner did not file any appeal on that issue. Certiorari was denied in the *Cooke* case, Docket No. 77, October Term, 1953.

In the case at bar, the jury was instructed (R. 144) that "The important question is whether the parties, including the defendant, actually had the intent in good faith to join together in operating the business as partners." In the *Cooke* case, *supra*, the Tax Court held that such a finding will not support even a civil fraud penalty. The jury was also instructed that the partnership must serve a business purpose (R. 143), and the Court of Appeals agreed that the applicable tests include that concept (R. 3678). We submit that the Court of Appeals has sanctioned an erroneous test and has mistakenly applied the civil rule in a criminal case.

While the trial court covered the question of intent in a general charge (R. 134-5), the denial of petitioner's requested instructions Nos. 69, 75, 77, 78, 79, 80, 81, 82, 88, 89, and 90 (R. 73-79) left the jury free to determine the partnership issue by applying the civil rule.

There was no basis upon which the jury could properly have found that petitioner never intended to form partnerships. The trial court insisted that the question whether the partnerships were real should be left to the jury, despite petitioner's contention that there was no reasonable basis upon which the jury could infer otherwise (R. 3480).

The enterprises were conducted on a profit-sharing basis,

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the individual partners' equities were carried on the books, (R. 3287) the other partners performed services, and petitioner supplied the cash. A distinction was made between the interests of the partners in the profits and their interests in the assets, (R. 338, 1509) but that is customary and does not militate against the existence of valid partnerships, nor indicate that the partnerships were a sham. The credits for the other partners reduced petitioner's interest in the partnership capital, and the prosecuting attorney conceded that Maundrell, one of the partners, was "entitled" to his $15,000-$17,000 credits after petitioner recovered his capital (R. 538). If Maundrell was entitled to take out of the business the credits which accumulated during the indictment years, it is plain that his share of the annual earnings was real and substantial and the fact that it remained in the business is of no consequence.

The Government's peculiar theory that the other partners should be recognized at some later time (R. 538) evidently prevailed with the jury, although, unlike the Government, the jury was willing to recognize the partnerships for the year 1946, after the partnership agreements had been formalized by written instruments. However, these circumstances go to the question of the validity of the partnerships; they do not bear on the question of the petitioner's intent. Here there was an agreement between petitioner and others to conduct enterprises jointly. We submit that the details are not so important as the fact that the agreements were carried out and that the others acquired interests in the profits of the business which were recorded in the books and resulted in reducing petitioner's capital interest. The contention that petitioner attempted to defraud the Government by claiming that his proportionate share of the income was reduced by the arrangement is erroneous as a matter of law. We submit that it is not attempted evasion for a taxpayer to claim that his plan has been successful. If it were otherwise, no taxpayer could contend for and act upon a plausible construction of

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the technical statutory provisions of the Internal Revenue Code and escape criminal penalties if his construction proved to be erroneous.

There is nothing in the record to support the necessary conclusion that the partnership agreements were empty gestures and that petitioner did not intend and attempt to form partnerships. Moreover, the partnerships were recognized by the Commissioner of Internal Revenue for all of the indictment years, *Remmer* v. *Commissioner,* Tax Court Docket 23486, and the fact that this indictment occurred is evidence of administrative confusion. The jury was also confused by the legal technicalities and the instructions of the trial court, with the result that it brought in a verdict which has no support in the record.

Respondent apparently believes that a taxpayer who actually conducts an enterprise jointly with other individuals in the form of a partnership will be subject to criminal penalties if his purpose was to evade taxes. (B. Op. 30-31). This reasoning confuses avoidance with evasion. We understand that evasion involves a misrepresentation of what was actually done, no matter what the purpose of the act, nor whether the attempt was successful. Where the form is not a sham, we submit that no evasion can result from merely doing business in a particular form and reporting the tax liability applicable to that form. It is well settled that taxpayers are free to choose the form in which they will conduct their enterprises and that their civil liabilities will not be affected even though they deliberately select the form which results in tax reduction. Congress makes tax liabilities depend on the manner in which business transactions are carried out, and taxpayers are free to avail themselves of the opportunity to reduce their taxes by adopting the particular form of transaction or business organization which will qualify for the tax savings.

The legal right of a taxpayer to reduce his tax liability, by any means which the law permits, is firmly established:

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United States v. *Isham*, 17 Wall. 496
Gregory v. *Helvering*, 293 U.S. 465, 469
Commissioner v. *Tower*, 327 U.S. 280

In the *Tower* case, supra, it was held that the principle

> * * * would clearly apply, for example, in a situation where a member of a partnership, in order to keep from paying future taxes on partnership profits and in order to get into a lower income tax bracket sells his interest to a stranger, relinquishing all control of the business. But the situation is different where the taxpayer draws a paper purporting to sell his partnership interest even to a stranger, though actually he continues to control the business to the extent he had before the "sale" and channels the income to his wife. * * *

In other words, the rule is that a purpose to reduce taxes does not effect the question of tax liability, unless it is established that the partnership form was only a sham. The rule was thus stated in *Chisholm* v. *Commissioner*, 79 Fed. 2d 14 (CA 2), certiorari denied 296 U.S. 641:

> * * * The question always is whether the transaction under scrutiny is in fact what it appears to be in form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance. True, it is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize. * * *

Here all of the partners in the enterprises had substantial rights and interests in the profits and the partnership form was not a sham.

We submit that the civil tests for the recognition of partnerships are not applicable in criminal cases; that if such tests are applicable there is a wide difference of opinion as to their meaning; that a taxpayer's claim of even a doubtful partnership status cannot properly be made the basis of a criminal charge; and that there was no evidence here from which the jury could properly conclude that the purported partnerships were unreal.

III

Petitioner's Motions Were Consistent With the Purpose of Rules 16 and 17, Federal Rules of Criminal Procedure.

Proceeding under Rule 16 of the Federal Rules of Criminal Procedure, petitioner filed a motion after the finding of the indictment, to inspect and take copies of certain books, papers, documents and tangible objects, which were described (R. 19-20). Supporting affidavits filed with the motion (R. 20-34) recited the circumstances which made the motion necessary and explained the delay. An affidavit in opposition was filed by the prosecution, urging that the motion be denied on the ground that ample opportunity to prepare his case had already been afforded the defendant (R. 35-41). The motion was denied by the trial court. The Court of Appeals sanctioned this action on the reasoning that sufficient prior opportunities to examine the material had been given (R. 3755), that the motion was not timely (R. 3756), and that no specific showing of prejudice had been made (R. 3758).

Rule 16 provides for such motions "at any time after the filing of the indictment or information" and it does not appear that the time element was a factor to be considered. At any rate, the Government had contributed to the delay and the time element was not a sufficient reason for denying the motion even if the rule itself does not foreclose it. Petitioner made unsuccessful attempts to secure the release from Federal lien of sufficient assets to finance his defense

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(R. 20-25), and much time was consumed in unavailing efforts to arrange for inspection of the records without a court order (R. 25-34, 166). The Government made unwarranted and impossible demands as the price of its consent (R. 29-30, 41). The Government sought a net-worth statement (R. 38, 50-54), and a showing of petitioner's "interest" in the enterprises (R. 27, 30, 33, 166, 185). The Government recognized petitioner's need for the records by bargaining with him for evidence which would bolster the Government's case. It made its conditions one at a time, and finally drove petitioner to a last-resort motion for a court order. The Government then took the position that petitioner did not really need the records and secured a denial of the motion on the ground that the trial date was only two weeks away. The trial lasted three months, petitioner made repeated efforts to have access to the records (R. 928-9), and the records sought were actually in the courthouse (R. 2451, 2771).

Petitioner showed that the prior opportunities to examine the records had occurred before the time when petitioner's tax counsel was engaged (R. 22, 32). It was not unreasonable to anticipate that an examination of the records under his direction would develop additional defense material, particularly in the light of the Government's announced reliance on the net-worth method. We submit that there was a reasonable showing that an examination of the records would be beneficial to petitioner and it does not appear that the rule authorizes the court to substitute its own judgment on that matter.

Bearing in mind that the Government contended that the books and records were inadequate as a basis for the net-worth computation, it seems plain that the suppression of a mass of original documents, of sufficient bulk to fill a packing box of approximately fifty cubic feet, plus several other smaller cartons (R. 48), was prejudicial to petitioner. The impressive quantity of records was in itself a matter of consequence, and we submit that the rule was improperly

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interpreted by the Court of Appeals to require that the need for specific papers be shown (R. 37-58). The result of denying the benefit of the rule here was to permit the Goverment to withhold records and then submit to the jury the question of whether the partial records in evidence were adequate. It is submitted that this procedure violated the spirit of the rule as interpreted in *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 218-220.

Petitioner also sought a subpoena for production of the records, which was quashed. Rule 17 provides that the grounds for quashing subpoenas are that compliance would be (a) unreasonable or (b) oppressive. There was no suggestion here that production of the records would have hampered the Government in any way and the grounds for quashing the subpoena do not satisfy the requirements of Rule 17.

In *Bowman Dairy Co.* v. *United States,* supra, the court said:

(pp. 218-220):

> It was intended by the rules to give some measure of discovery. Rule 16 was adopted for that purpose. It gave discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be numerous and difficult to identify. The rule was to apply not only to documents and other materials belonging to the defendant, but also to those belonging to others which had been obtained by seizure or process. This was a departure from what had theretofore been allowed in criminal cases.
>
> Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. In the interest of orderly procedure in the handling of books, papers, documents and objects in the custody of the Government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial, it was provided by Rule 16 that the court

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could order such materials made available to the defendant for inspection and copying or photographing. In that way, the control and possession of the Government is not disturbed. Rule 16 provides the only way the defendant can reach such materials so as to inform himself.

But if such materials or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17 (c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production by Rule 17 (c). There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17 (c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence. The court may control the use of Rule 17 (c) to that end by its power to rule on motions to quash or modify.

(pp. 220-221):

* * * Rule 17 (c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of the subpoenaed materials. *United States* v. *Maryland & Virginia Milk Producers Assn.*, 9 F.R.D. 509. However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial. There was no intention to exclude from the reach of process of the defendant any material that had been used before the grand jury or could be used at the trial. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena. * * *

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The Court of Appeals for the District of Columbia interpreted the *Bowman* case by following the "view which leads to the fullest presentation of facts". *Frank Fryer* v. *United States*, 207 F. 2d 134, certiorari denied Nov. 16, 1953, Docket No. 311. The denial of certiorari in the *Fryer* case confirms the view that the dominant purpose of the rules was to achieve a fair balance between the Government and the defendant so as to bring about fairness in the administration of criminal proceedings.

Even in the absence of specific legislation, this court held, in *Gordon* v. *United States*, 344 U.S. 414, 420, that "for production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule * * *".

When tested by such a construction, it appears that the court below has misconceived the purpose of the rules and has adopted, instead, an interpretation which is harsh and unduly restrictive.

IV

Outside Contacts With a Jury Raise a Presumption of Prejudice and Petitioner's Motion for a Hearing Should Have Been Granted.

On February 22, 1952, the date that the verdict was returned, petitioner's counsel gave oral notice of a motion for new trial, and defendant's time to file a written motion was extended to February 29, 1952 (R. 105). On February 29, 1952, the motion for new trial was filed (R. 106-110).

Ground 17 (R. 109-110) set forth that petitioner was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the jury, the court, the prosecuting attorneys, and the agents of the Federal Bureau of Investigation, as described in an accompanying affidavit. Ground 17 included a motion that there be a trial of the issue and that evidence be taken from all participants in the jury incident. The accompanying affidavit (R. 111-114) recited the gist of two newspaper articles, submitted

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copies of the articles which had appeared in two California newspapers on February 24, 1952 (R. 114-120), stated the probable prejudice, and renewed the request for a hearing. The newspaper articles were to the effect that the foreman of the jury had received a suggestion that money might be paid him to influence the verdict, that the trial judge had caused an investigation to be made without notifying the defense, and had concluded that the incident was harmless.

The motion for new trial was heard by the trial judge on February 29, 1952 (R. 92) and defendant's counsel stated that since the court had already ruled on every ground set forth, with the exception of Ground 17, that no argument would be presented unless the court indicated that argument would in any wise change the decision. Counsel pointed out that Ground 17 involved matters which had recently come to their attention and renewed the request "for an opportunity to obtain evidence in that connection by hearing" (R. 93). The motion was denied on all grounds (R. 94). The court made no comment and gave no reason.

Relying solely on the newspaper stories, the Court of Appeals held that petitioner had failed to show any prejudice, and that he had the burden of so showing before any hearing would be required. The court suggested that petitioner should have supplied affidavits by jurors, showing that they had received communications which would tend to prejudice them. Accordingly, the court below sanctioned the denial of petitioner's motion by the trial court (R. 3776-3777). Thus, the court departed from the well-settled principle that outside contacts with a jury raise a presumption of prejudice, *Mattox* v. *United States*, 146 U.S. 140, 150, and that the presumption can be overcome only by affirmatively showing that there was no prejudice in fact. *Stone* v. *United States*, 113 F. 2d 70, 77-78 (CA 6); *Little* v. *United States*, 73 F. 2d 861 (CA 10); *Wheaton* v. *United States*, 133 F. 2d 522 (CA 8).

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It is well settled that affidavits of jurors are not competent evidence as to whether or not they were prejudiced. Such affidavits are competent only to indicate the existence of extraneous interferences with the jurors' deliberations. *Wheaton* v. *United States,* supra, p. 526. Since the newspaper stories upon which the court below relied plainly showed that the trial court as well as the prosecuting attorneys were fully aware of the facts, it is clear that the suggested affidavits would have been empty formalities and would have been competent evidence only with respect to the actual occurrence of the incident, concerning which there was no question.

We submit that orderly procedure required a hearing to determine the facts so that there would be a definite record of the details of the incident. In *Ryan* v. *United States,* 191 F. 2d 779 (CA DC), the record showed that several jurors and other witnesses were examined and cross-examined. The court approved this procedure and said, p. 781, "the trial court adopted the appropriate procedure of probing the matter by an extensive hearing".

In its present condition the record does not disclose whether the purpose of the FBI investigation was to inquire into the conduct of defense agents or to ascertain the effect on the jury. There was no opportunity for defense counsel to ascertain whether the jurors had been subjected to a grilling, whether they believed that the investigation remained inconclusive until the end of the trial, and whether any of them were apprehensive lest their verdict for acquittal might result in suspicion and criticism. In fact, none of the pertinent details are shown.

We submit that having been excluded from the investigation, the defense was entitled to have the aid of the court in adducing the facts and making a reviewable record. On this barren record, this Court can not determine the question of prejudice but we submit that the resolution of that question may not properly be left solely to the district judge, with no opportunity for an independent appraisal

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on appeal. We submit further that petitioner has been convicted by a jury which was subjected to outside influences of a character calculated to affect its deliberations and that the assertions of probable prejudice to the petitioner set forth in the affidavit (R. 112) were well taken. On this point, justice requires that this case be remanded for the purpose of holding a hearing and that the district court be required to pass on the motion in the light of evidence developed at such hearing.

CONCLUSION

In view of the manifest errors, the judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court with direction to enter a judgment of acquittal.

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January, 1954.

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APPENDIX

Statutes, Rules and Regulations Involved

Internal Revenue Code:

Sec. 41. General Rule

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annnual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.
(26 U.S.C. 1946 ed., Sec. 41)

Sec. 51. Individual Returns

(a) *Requirement.* Every individual having for the taxable year a gross income of $600 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations.
(26 U.S.C. 1946 ed., Sec. 51(a))

Sec. 61. Laws Made Applicable

All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, shall be extended to and made a part of this chapter. * * *
(26 U.S.C. 1946 ed., Sec. 61)

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Sec. 145. PENALTIES.

* * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution.
(26 U.S.C. 1946 ed., Sec. 145(b).)

Sec. 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to Board of Tax Appeals.*[1] If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *
(26 U.S.C. 1946 ed., Sec. 145(b))

[1] Name changed to The Tax Court of the United States. See section 1100 of this title.

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Sec. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

(a) *Authority of Collector.*—If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

(b) *Authority of Commissioner.*—In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise—

(1) *To Make Return.*—Make a return, or

(2) *To Amend Collector's Return.*—Amend any return made by a collector or deputy collector.

(c) *Legal Status of Returns.*—Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

(d) *Additions to Tax.*—

(1) *Failure to File Return.*—In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax: *Provided*, That in the case of a failure to make and file a return required by law, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, if the last date so prescribed for filing the return is after August 30, 1935, then there shall be added to the tax, in lieu of such 25 per centum: 5 per centum if the failure is for not more than 30 days, with an additional 5 per centum for each additional 30 days or fraction thereof during which the failure continues, not to exceed 25 per centum in the aggregate.

(2) *Fraud.*—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

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(3) *Cross Reference.—*

For additions to tax in the case of income tax, see sections 291 and 293, and in the case of a deficiency in gift tax, see section 1019.

(e) *Collection of Additions to Tax.*—The amount added to any tax under paragraphs (1) and (2) of subsection (d) shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax.

(f) *Determination and Assessment.*—The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists so made under the provisions of this section.
(26 U.S.C. 1946 ed., Sec. 3612)

Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and partner.* The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.
(26 U.S.C. 1946 ed., Sec. 3797)

Revenue Act of 1951:

Sec. 340. FAMILY PARTNERSHIPS.

(a) *Definition of Partner.*—Section 3797(a)(2) is hereby amended by adding at the end thereof the following: "A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person."

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Federal Rules of Criminal Procedure:

Rule 16. DISCOVERY AND INSPECTION.

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. SUBPOENA.

* * * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

U. S. Treasury Department, Bureau of Internal Revenue, Regulations 111:

Sec. 29.41-1. COMPUTATION OF NET INCOME.

Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditure which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is

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to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See sections 29.42-1 to 29.42-3, inclusive.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

Sec. 29.41-2. Bases of Computation and Changes in Accounting Methods.

Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income unless all items of gross income and all deductions are treated with reasonable consistency. See section 48 for definitions of "paid or accrued" and "paid or incurred." All items of gross income shall be included in the gross income for the taxable year in which they are received by the taxpayer, and deductions taken accordingly, unless in order clearly to reflect income such amounts are to be properly accounted for as of a different period. But see sections 42 and 43. See also section 48. For instance, in any case in which it is necessary to use an inventory, no method of accounting in regard to purchases and sales will correctly reflect income except an accrual method. A taxpayer is deemed to have received items of gross income which have been credited to or set apart for him without restriction. (See sections 29.42-2 and 29.42-3.) On the other hand, appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property. (But see section 29.22(c)-5.)

The true income, computed under the Internal Revenue Code, and, if the taxpayer keeps books of account, in accordance with the method of accounting regularly employed in keeping such books (provided the method so used is properly applicable in determining the net income of the taxpayer for purposes of taxation), shall in all cases

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be entered in the return. If for any reason the basis of reporting income subject to tax is changed, the taxpayer shall attach to his return a separate statement setting forth for the taxable year and for the preceding year the classes of items differently treated under the two systems, specifying in particulare all amounts duplicated or entirely omitted as the result of such change.

A taxpayer who changes the method of accounting employed in keeping his books shall, before computing his income upon such new method for purposes of taxation, secure the consent of the Commissioner. For the purposes of this section, a change in the method of accounting employed in keeping books means any change in the accounting treatment of items of income or deductions, such as a change from cash receipts and disbursements method to the accrual method, or vice versa; a change involving the basis of valuation employed in the computation of inventories (see sections 29.22(c)-1 to 29.22(c)-8, inclusive); a change from the cash or accrual method to the long-term contract method, or vice versa; a change in the long-term contract method from the percentage of completion basis to the completed contract basis, or vice versa (see section 29.42-4); or a change involving the adoption of, or a change in the use of, any other specialized basis of computing net income such as the crop basis (see sections 29.22(a)-7 and 29.23(a)-11). Application for permission to change the method of accounting employed and the basis upon which the return is made shall be filed within 90 days after the beginning of the taxable year to be covered by the return. The application shall be accompanied by a statement specifying the classes of items differently treated under the two methods and specifying all amounts which would be duplicated or entirely omitted as a result of the proposed change. Permission to change the method of accounting will not be granted unless the taxpayer and the Commissioner agree to the terms and conditions under which the change will be effected. See section 22(d) and regulations thereunder with respect to changing to optional method of inventorying goods.

Section 44 contains special provisions for reporting the profit derived from the sale of property on the installment plan.

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Sec. 29.42-2. INCOME NOT REDUCED TO POSSESSION.

Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.

Sec. 29.3797.4. PARTNERSHIPS.

The Internal Revenue Code provides its own concept of a partnership. Under the term "partnership" it includes not only a partnership as known at common law, but, as well, a syndicate, group, pool, joint venture, or other unincorporated organization which carries on any business, financial operation, or venture, and which is not, within the meaning of the Code, a trust, estate, or a corporation. • • •

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FILED
FEB 4 1954
HAROLD B. WILLEY, Clerk

No. 304

IN THE

Supreme Court of the United States

October Term, 1953

ELMER F. REMMER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S MEMORANDUM SUPPLEMENTING ORAL ARGUMENT

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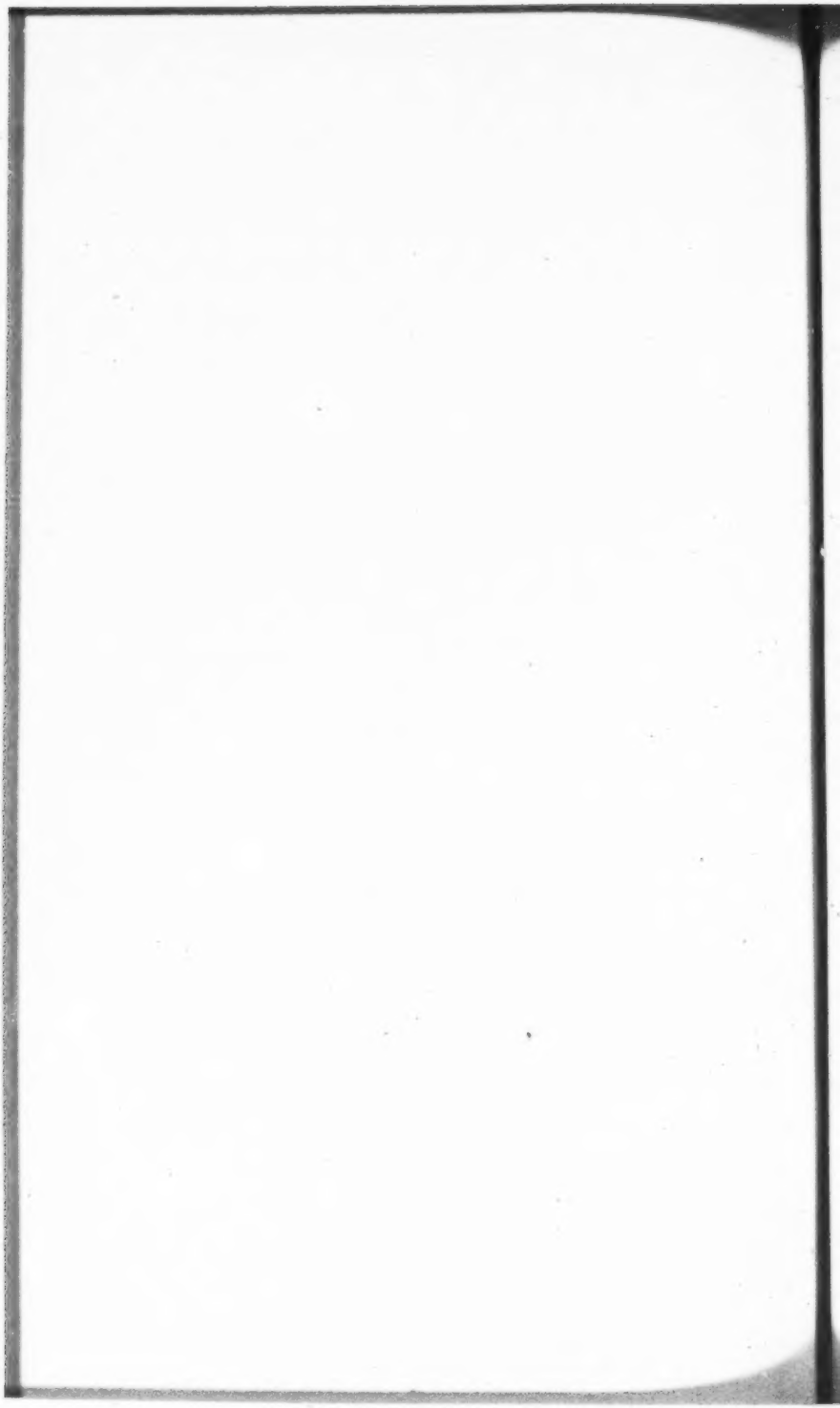

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---

PETITIONER'S MEMORANDUM SUPPLEMENTING ORAL ARGUMENT

To the Honorable, the Chief Justice and the Associated Justices of the Supreme Court of the United States:

At the argument of this case on February 2, 1954, the Court granted Petitioner's request that consideration be given to a short memorandum supplementing the argument. This memorandum is filed in response to that permission.

1. The parties agree that the fraud issue is wholly dependent on the non-recognition of the partnerships. That issue is not simply a question of whether the jury believed the evidence. It involves a consideration of whether the issue should have been presented to the jury at all and in addition whether the instructions (including the business purpose test) permitted or invited the jury to go behind the evidence.

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The statutory definition recognizes practically any joint venture as a partnership. The approval of a concept of tax evasion which would include the mere claim that a partnership has been created would open the door to punishment for bona fide claims in the many debatable areas of tax law.

The affirmance of this case will clothe jurors with the authority to go behind the evidence and make verdicts depend upon the nebulous tests applied by administrative tribunals under the authority of *United States* v. *Cumberland Public Service Co.*, 338 U. S. 451, fn. 3.

In the absence of evidence which contradicted the partnership form, there was no issue for the jury. (*Chisholm* v. *Commisisoner*, 79 F. 2d 14 (CA 2)).

2. The Government agrees that its net-worth computations are meaningless unless the starting point is solidly fixed. It concedes that it was unable to prove the amount of starting point cash and that it therefore gave Petitioner credit for none. Its attempt to establish sufficient evidence to go to the jury is based on two erroneous premises: (1) that it need simply show that one particular sum of $17,000 placed in the safe deposit box in December, 1943 could have been spent by the end of that month; and (2) that the starting point cash necessary to overcome the 1944 deficiency would have to be at least $31,000.

First, we note that the evidence with respect to the $17,000 (R. 1483-4) was not an effort by the prosecution's witness to show the total amount of cash on hand. At another point (R. 1536), he had testified that the amount varied from time to time. His testimony in R. 1484, is merely a statement that a particular check in the amount of $17,000 was cashed and the proceeds placed in the safe deposit box on December 3, 1943. This check did not represent the proceeds of the operations of the enterprises; it represented a payment for liquor which Petitioner had purchased for another business friend. Accordingly, this

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evidence does not purport to indicate the amount of cash which went into the safe deposit box from the ordinary operations of the various enterprises.

Moreover, the Government's conclusion that the $17,000 deposited on December 3, 1943 was used up by December 31, 1943 in the purchase of cashier's checks is not supported by the facts and the jury would not have been warranted in reaching such a conclusion. The cashier's checks upon which the Government relies were purchased to pay losses of the B-R Smoke Shoppe on bets received from other cities. (R. 1417-21). They involved only part of the daily operations, and resort to the safe deposit cash would have been necessary only if the total operations showed a loss. Ex. 116 (R. 1417, 1422, not printed) shows that during December, 1943, twenty-three checks, totaling $20,866.67 in value, were purchased on twelve different days. The B-R diary for 1943, (Ex. 111-A, R. 1350, 1354, not printed) shows a net profit for December of $186 on all bets placed. The largest net loss on any day was $350 and at no time during the month did the cumulative operations show a loss. Accordingly, it is clear that the wins were sufficient to pay for all cashier's checks and there is no evidentiary basis upon which the jury could have properly inferred that the checks were purchased with the $17,000 placed in the box on December 3, 1943.

Secondly, the Government argues that $31,000 in cash at the starting point would be necessary to overcome its deficiency computation for 1944, and, thus, that there is a deficiency even if Petitioner is given credit for $17,000 cash on hand at the starting point. That argument, however, overlooks the fact that a substantial part of the deficiency is based on obviously technical accounting adjustments as to which fraud could not properly be inferred. For example, the Government was permitted in Ex. 183 (R. 3612) to add to Petitioner's 1944 closing net worth the sum of $8,397.53 paid as liquor excise tax in 1944, even though the

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law gives him the option (as the jury was instructed, R. 145) to treat this as a current deduction rather than an addition to the cost of the liquor.

Allowance for this adjustment and recognition of the partnerships would substantially eliminate the 1944 deficiency even if there were no starting-point cash.

3. The jury could not properly have adopted the Government's treatment of the $15,000 in "markers" of the B-R Smoke Shoppe as the equivalent of cash. It could not ignore the nature of this particular type of "markers". The evidence clearly shows that they represented unpaid bets of patrons. (R. 1360-61, 1949, 1962). It is true that in the card-room operations (Menlo Club and 186 Club), the business at times loaned money to patrons who played in the establishments; and it was *specifically* to the Menlo Club (*not* the B-R) markers that Special Agent Weaver's testimony, quoted in the Government's Brief (pp. 88-90), relates. (R. 2722-4).

The B-R markers, however, represented unpaid bets on horse races (R. 1360-61) and were not in any sense loans of money previously taken in. Neither is there any evidence to support the speculation that the B-R markers may have represented cash advanced for bets at the race track, or on lay-off bets. Nor was there any instruction to the jury permitting such an inference to be drawn.

The jury did not have the benefit of the present concession that these markers should not have been treated as income if they represented unpaid bets. (R. 2776).

The bald way in which this $15,000 in "markers" was labeled as "cash" in Ex. 169 (R. 3601) and then reflected in Ex. 183 (R. 3612) could easily have misled the jury. The elimination of that sum from the 1945 computation not only wipes out any deficiency for that year, but it also raises the question of whether the jury would have convicted at all if the total amount involved in the case had been reduced by so large a sum.

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4. At the argument, inquiry was made by Mr. Justice Reed as to the showing made in *United States* v. *Johnson*, 319 U.S. 503, with respect to the starting point cash. An examination of the record in that case discloses that the defendant himself furnished the figures which the Government accepted and used in its calculations.[1] Here the defendant gave no evidence, and it is quite unlikely that he had a personal recollection of his cash position eight years before the trial.

It is noteworthy that the expenditures method employed by the prosecution in the *Johnson* case was corroborative of other evidence which showed that Johnson had a source of income which was not disclosed by his tax returns. While the case involved partnerships, Johnson disclaimed all connection with them. The prosecution proved that he received at least some of the income from the partnerships, and the expenditures method was employed to confirm that additional source of income. There is no evidence in this case of unreported sources of income, nor is it contended that the partnership returns failed to report the correct income of each enterprise.

5. Following denial of Petitioner's Motion for Inspection under Rule 16, and the quashing of the subpoena for production of his records by the prosecution under Rule 17, Petitioner made further effort to obtain his records. His Motion, during the trial, for production and inspection of these same records was summarily denied. (R. 928-9). This is in sharp contrast to the granting at the same time of a motion by the prosecution for an order directing Petitioner to deposit in court, for the prosecutor's examination and use, that portion of Petitioner's records previously returned to him.

---

[1] See *U.S.* v. *Johnson*, No. 4, 1942 Term, V. 2 of Record, p. 10, and Addendum following p. 110 of Brief for United States on Reargument. Johnson had told the Revenue Agent he had $10,000 on his person, and $58,000 in his safe at the starting point, and the government gave him credit in full for both sums.

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6. We submit that no reasonable jury could conclude that the circumstantial evidence in this case removed the hypothesis of innocence. The concession that cash in some unknown amount existed on December 31, 1943 rendered it impossible for a rational conclusion to be reached that the increase in Petitioner's assets during 1944 was financed by unreported income of 1944. The question mark in the Government's net-worth exhibit does not take the place of evidence. Accordingly, it is not important here to settle the question whether the trial court's personal opinion of the hypothesis of innocence is sufficient to withhold the case from the jury.

7. The Court invited comment of counsel on whether a consideration of the other issues is necessary for the purpose of a hearing on the effect of the extraneous jury contact. If such a hearing should result in the denial of a new trial, final disposition of the case would require a resubmission to this Court of the other issues in the case.

If, on the other hand, a new trial should be granted because of the jury contact, that trial would certainly raise again the questions of general importance which this Court now has the opportunity to settle.

Respectfully submitted,

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February, 1954.

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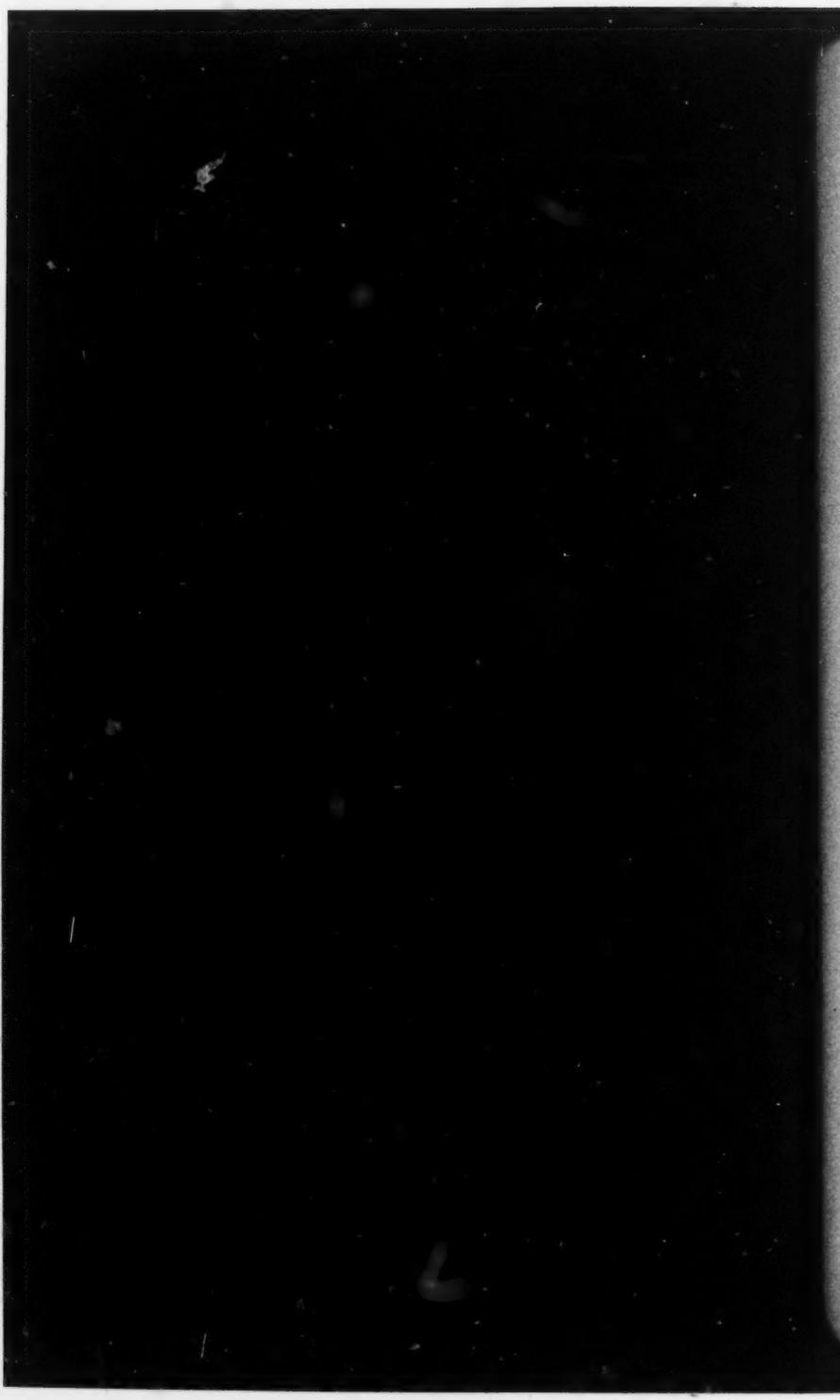

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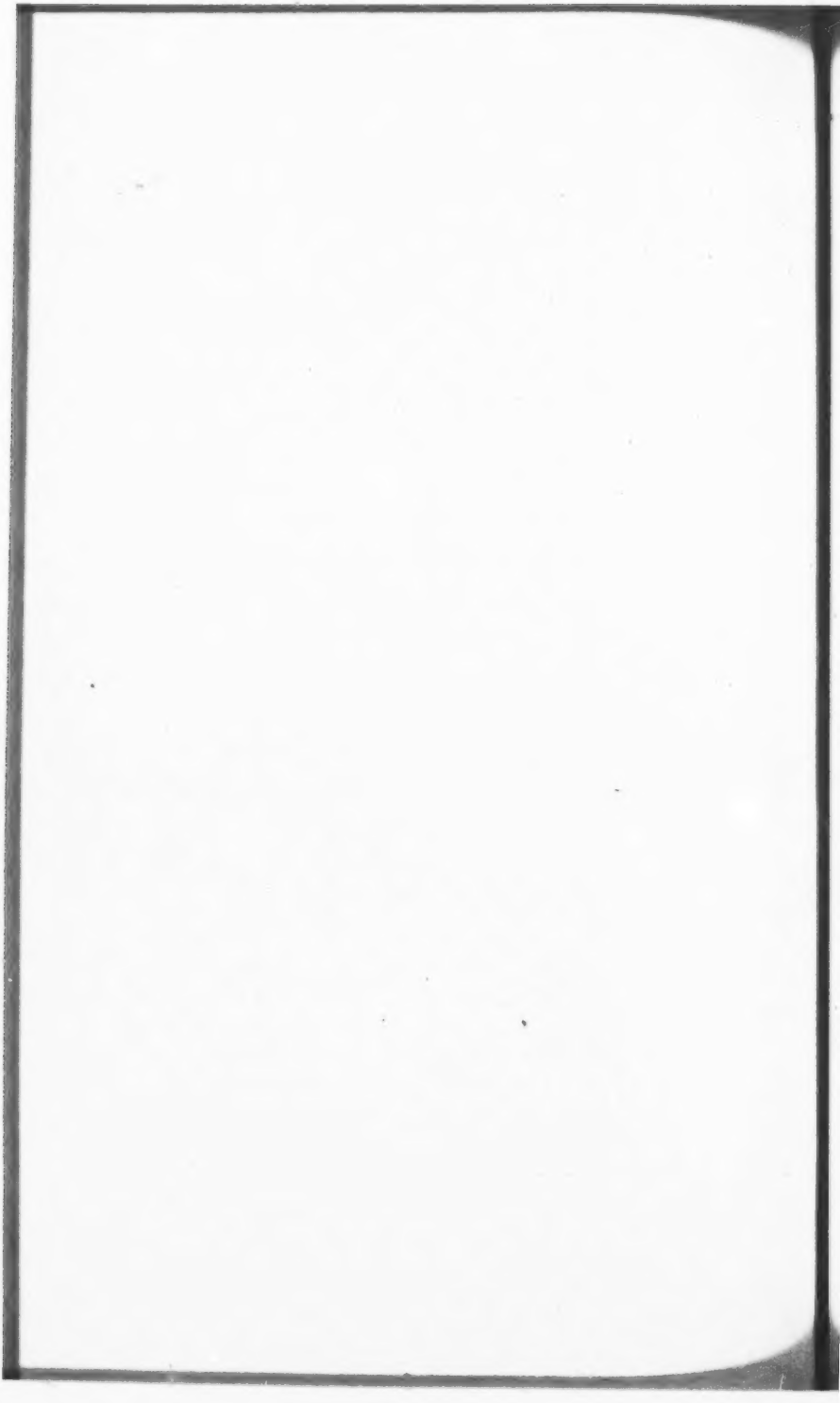

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 304

ELMER F. REMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 3748–3777) is reported at 205 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778), and a petition for rehearing was denied June 30, 1953 (R. 3779). On July 17, 1953, by order of Mr. Justice Clark, the time for filing the petition for a writ of certiorari was extended to August 29, 1953. The

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petition was filed August 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Petitioner was indicted for wilfully attempting to evade income taxes for the years 1944, 1945 and 1946. The proof of the Government that he had received income which he had not reported in his returns was based upon a computation of the annual increase in his net worth. He was convicted on four counts involving the years 1944 and 1945. The principal questions presented by the petition are:

1. Whether the evidence was sufficient to support the starting point of the Government's net worth computation.

2. Whether the evidence of the inadequacy of petitioner's books and records was sufficient to justify proof of his true net income by a net worth computation.

3. Whether, as to the third and fourth counts, the finding of guilt can be sustained, in view of the fact that the Government's net worth computation for the year 1945 includes $15,000 in "markers."

4. Whether the trial court correctly instructed the jury that, in determining whether certain of petitioner's business enterprises were partner-

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ships, the important question was whether the ostensible partners actually intended in good faith to operate the businesses as partners.

5. Whether the trial court abused its discretion in denying petitioner's motions to inspect certain of his records held by the Government, in view of his prior opportunities to examine these records and the belated filing of the motions.

6. Whether petitioner made a sufficient prima facie showing of an improper outside contact by a juror to entitle him to a hearing on the alleged occurrence.

STATUTE AND RULES INVOLVED

Internal Revenue Code:

SEC. 41. *General rule.*

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep

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books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 1946 ed., Sec. 41.)

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 16. *Discovery and Inspection*

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the

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preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

* * * * *

Rule 17. *Subpoena*

* * * * *

(c) For Production of Documentary Evidence and of Objects

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

On April 9, 1951, an indictment in six counts was filed against petitioner in the United States District Court for the District of Nevada, charging violations of Section 145 (b) of the Internal Revenue Code. The first and second counts al-

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leged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself and his wife for the year 1944 in the amount of $27,379.08. The third and fourth counts charged evasion of his own and his wife's income taxes for the year 1945 in the amount of $11,090.34. The fifth and sixth counts charged similar offenses for the year 1946. (R. 3–8.) After a jury trial lasting approximately three months, petitioner was convicted on the first four counts, the jury failing to agree as to the counts involving the year 1946. (R. 88, 3667.) On February 29, 1952, he was sentenced to imprisonment for five years and fined $5,000 on each of the first four counts. The terms of imprisonment were made to run concurrently, but the fines were cumulative. (R. 89–91.) The conviction was affirmed unanimously by the Court of Appeals for the Ninth Circuit. (R. 3748–3777.)

During the period involved in this case, petitioner had interests in a number of gambling houses. He also was interested in several bars, cafes, and liquor stores, most of which were located in the same neighborhood as, or even in the same building with, one of the gambling houses. These businesses were:

1. *Cal-Neva, Inc.*—This was an incorporated lodge located on the shore of Lake Tahoe, the dining room being on the California side of the state line and the gambling room on the Nevada side. As early as 1926 petitioner became associated

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with Graham and McKay in the operation of this business. They contributed the original capital; he was the active manager. In 1946 he bought their interests for $466,666.66. (R. 1595, 1903–1911, 3243.)

2. *B-R Smoke Shoppe.*—This was a bookmaking establishment in San Francisco. In December 1941 petitioner bought it as a going concern. He supplied the purchase price ($2,500) and the initial bankroll ($7,500). No merchandise was sold, the cigar boxes in the front being dummies. Bets were accepted from all parts of the country. The business was ostensibly a partnership, with petitioner owning a half interest and Kyne and Lando owning the other half. (R. 1287–1291, 1345–1357, 1579.)

3. *110 Eddy Street.*—This was a bar located in San Francisco. In 1942 the proprietor owed petitioner more than $4,000 and petitioner took the establishment over and spent a considerable sum in improvements in order to protect his money. The business was ostensibly a partnership in which petitioner, Kyne, Cavani and Turner held equal shares. (R. 1382–1386, 1398–1399, 2076.)

4. *186 Club.*—This was an incorporated clubroom located at 186 Eddy Street in San Francisco. It was devoted to draw poker and operated twenty-four hours a day with three eight hour shifts. In the front of the building was a cigar, liquor and magazine store called the *Day-Night Cigar and Liquor Store.* In March 1943 the whole

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establishment was purchased as a going concern, with about $6,000 furnished by petitioner and $16,000 furnished by Nealis and Kopstick, who were in turn bought out at the end of the year. The officers of the corporate club were Busterna, Casselini, Kyne and Lando. There were no officers' or directors' meetings. The liquor store was an ostensible partnership in which petitioner, Kyne and Lando held equal shares. (R. 643–647, 1302–1317, 1424–1429, 1451, 1973, 1981, 3556, 3569, 3575.)

5. *San Diego Social Club.*—This was a gambling casino located in El Cerrito, California. Across the front of the building was a restaurant and bar known as the *21 Club.* (R. 791.) Petitioner bought the business in April or May 1943, concealing his ownership because there was opposition to his operation of a gambling venture at that location. (R. 742–743, 1109, 1128.) He held a half interest in the combined business of the two clubs; Pechart and Kessel held the other half. (R. 1110.) He took no active part in the operation, but seems to have dictated the choice of key employees. (R. 1153–1160.) When Pechart and Kessel opened another club across the street they gave him a "friendship bonus" because of his opposition. (R. 1117–1118, 1143.)

6. *Menlo Club.*—This was a gambling house in San Francisco. Like the *186 Club,* it remained open twenty-four hours a day with three eight hour shifts. It was operated in conjunction with

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a bar and a restaurant known as *Tiny's Bar* and *Tiny's Restaurant.*[1] In April 1945 petitioner contracted to buy all three businesses for $175,000 and took a ten year lease on the premises at a total rent of $219,000. Thereafter it was operated by an ostensible partnership in which petitioner held 40% and Kyne, 15%. The other partners were Dito, Nelson, Maundrell, Fricker, and Turner. (R. 768–775, 1400–1410, 3576–3579.)

7. *Transit Smoke Shop.*—This was a combined gambling house, cigar and liquor store located in San Francisco. It was acquired in November 1946 for about $32,000, the money being supplied by petitioner. It was an ostensible partnership in which Partee held 50%, and petitioner and Kyne each held 25%. Partee put up no funds of his own. Kyne borrowed about $16,000 from the Menlo Club account to pay for his share and put this money into a safety deposit box which was used as a general depositary for the funds of all the San Francisco enterprises. (R. 1183–1193, 1474–1478, 1495–1496, 1523, 1566.)

8. *50–52 Mason Street.*—The *B–R Smoke Shoppe* was located at 50 Mason Street in San Francisco. During 1944, 1945 and 1946 close to $10,000 was spent in remodeling the front of this building into a private office for petitioner and general offices for all the San Francisco enterprises. The im-

[1] These are also referred to in the record as the "Menlo Bar" and "Tiny's Waffle Shop."

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provements were paid for with funds drawn from the *Menlo Club* account. (R. 1662–1668, 1680–1681, 1694–1699, 2513–2518, 2660–2673.) The building at 52 Mason Street was rented as a warehouse for whiskey. (R. 1481.) Kyne acted as general manager of all the San Francisco enterprises. He visited them each day, picked up the receipts and gambling records, and brought them to 50 Mason Street. (R. 1396, 1411–1413, 1430–1432, 1436–1437, 1452, 1477, 1557–1558.)

The Motions under Rules 16 and 17.—As early as the first half of 1946 Internal Revenue agents began an investigation of the income tax returns of the *B–R Smoke Shoppe.* (R. 2115, 2123, 2152, 2163.) In the latter part of 1946 a special agent, whose duty it was to investigate possible criminal tax evasion, was assigned to the case, and by July 1947 the agents were examining the returns of petitioner and of all the above-named enterprises. (R. 1249, 2423, 2454–2458.) The agents had numerous interviews during 1946 and 1947 with Kyne and with the two bookkeepers, Slater and Maundrell. Kyne, Slater, and Maundrell gave considerable oral information and turned over, freely and voluntarily, a large quantity of records. The agents took these to their own offices for study, promising that they would be returned when the investigation was complete and that Kyne and Maundrell could have access to them in the meanwhile. On several occasions

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Kyne and Maundrell obtained some of the records and then brought them back to the agents. (R. 1528–1530, 1640–1641, 1813–1815, 2123–2126, 2154–2155, 2165–2166, 2199–2200, 2449–2451, 2695–2698, 2783.)

The agents repeatedly pointed out to Kyne that the records of the enterprises were inadequate in many respects, but Kyne could not enlighten them. They sought permission to examine the contents of the safety deposit boxes, but this was refused by Kyne. Finally, at the agents' request, Kyne arranged an interview with petitioner on April 8, 1948, in the office of petitioner's then attorney, Thatcher. Thatcher asked whether the agents had any specific charges and whether they intended to recommend criminal prosecution, and when they would not commit themselves, he instructed petitioner not to answer any questions and terminated the interview. Thereafter, Thatcher, of his own accord, turned over further records of petitioner to the agents. The agents were never able to communicate with petitioner himself during the course of the investigation. (R. 2496, 2558–2572, 3045.) The special agent did not complete his investigation and submit his report recommending criminal prosecution until November 10, 1949. (R. 2577.)

Meanwhile, however, the Bureau of Internal Revenue had begun a civil proceeding for recovery of income taxes, and had issued 90-day letters alleging an understatement of net income for

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1944, 1945, and 1946 in the approximate amount of $487,000 and specifying the businesses from which this arose. (R. 30–32.) A jeopardy assessment was levied against petitioner's assets in March 1949. (R. 3059.) On June 2, 1949, Lawrence Semenza, a certified public accountant, filed a power of attorney with the Treasury Department authorizing him to represent petitioner. (R. 37, 909–910.) On July 11, 1949, Semenza, at his request, was taken into a room where the agents were keeping the records which had been turned over to them; he was told he could take away anything he wanted; he selected those which he thought were pertinent to petitioner's civil liability for underpayment of taxes; and he signed a receipt and agreed to return the records to the agents. (R. 39, 901, 908–910, 919–920, 922.)

On February 14, 1950, petitioner was officially notified by the Bureau of Internal Revenue that criminal proceedings were being contemplated. (R. 3210.) In March he employed two of the attorneys who represented him at the trial, Messrs. Golden and Gillen, together with a second certified public accountant, Friedman. (R. 37.) There was a conference on May 25, 1950, at which petitioner's representatives were informed that if they prepared a net worth statement they would be allowed to compare it with the one already prepared by the Bureau. (R. 38–39.) Friedman was allowed to see all the records remaining in the hands of the agents; he

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spent about a week examining them and was allowed to take some of them. (R. 39, 184–185, 3212–3213.) Furthermore, petitioner's attorneys instructed Semenza to turn over to Friedman all records pertaining to the San Francisco enterprises. (R. 910.) In November 1950 Friedman withdrew from the case and left all the records in the hands of petitioner's attorneys (R. 910, 3224.) Shortly before the case was presented to the grand jury in April 1951, Semenza was asked by the agents to return the records in accordance with this agreement. (R. 911.) Petitioner's attorneys refused to give them up on the ground that they were petitioner's property. (R. 173–176.) The indictment was returned on April 9, 1951, and trial was set for November 7, 1951. (R. 8, 447.)

The trial date was postponed to November 28, 1951, because the judge was engaged in other matters. (R. 180.) Meanwhile, the records which had been given by Friedman to petitioner's attorneys were returned to Semenza. (R. 912.) On October 22, 1951, defense counsel asked the prosecutor, Mr. Campbell, that they be allowed to examine the other records which still remained in the agents' hands. (R. 26–28.) The prosecutor agreed to do this, provided a showing was made of petitioner's interest in the records, and provided the written consent of the parties who had turned them over to the Government was obtained. (R. 40–41.) On November 14, 1951, peti-

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tioner filed a *motion under Rule 16,* Federal Rules of Criminal Procedure, to inspect and take copies of the records in the Government's possession. It was explained that a tremendous amount of accounting work would be required to prepare for trial and that petitioner had been without an accountant until he obtained the services of Semenza in September 1951.[2] A continuance of the trial was requested until April. (R. 16–34.) After a hearing (R. 157–198), the court denied the motion to inspect on the ground that petitioner had had ample opportunity, through Friedman, to inspect all records in the Government's possession (R. 194–198).

On November 27, 1951, the day before the trial, petitioner presented a *motion under Rule 17,* Federal Rules of Criminal Procedure, for production and inspection of the records in the Government's possession, together with a subpoena to produce the records. (R. 42–54.) After a hearing (R. 241–288), the subpoena was quashed and the motion was denied on the ground that, under the circumstances, it was unreasonable to delay making it until the day before the trial (R. 286–287). The court assured defense counsel that they would be allowed ample time during the trial

[2] Semenza had been accountant for Cal-Neva, Inc., since 1931. (R. 1600, 3243.) He had some connection with the present case as early as April 1948. (R. 926, 931.) The records were turned over to him on July 11, 1949. (R. 901.)

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to examine each document offered by the Government. (R. 287–288.)

A subpoena was issued to Semenza to produce the records in his possession, but he appeared at the trial and stated that they had again been taken by petitioner's attorneys. The court ordered them turned over to the clerk, and they were made available to both sides for the duration of the trial. (R. 912–929.) As to the records in the Government's possession, specific documents were promptly produced during the trial when requested by the defense. (R. 2008, 2020, 3182, 3470–3473.)

The Evidence.—The evidence to support the verdict may very briefly be summarized as follows:

There was evidence to warrant the conclusion that the so-called partnerships were actually sole proprietorships of petitioner. He supplied the funds to acquire and operate them. (R. 1290, 1348; 1313, 1456; 1383–1384, 1394; 1650–1651, 3582–3583.) The partnership agreements, typified by that with Kyne in the *Menlo Club,* expressly provided that the ostensible partner should not acquire an actual interest in the business until petitioner had been paid back in full from the profits. (R. 1514–1515, 1521, 3582–3583.) The profits were not actually distributed to anyone other than petitioner during the years involved, although the alleged partners were

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given credit for distributable shares and their taxes on such shares were paid by the enterprises. (R. 1313, 1315, 1340, 1386, 1391, 1495, 1516, 1707, 1856, 1860–1861, 2073, 2102–2103, 2292–2293.) Lando had nothing to say about the policy of the *B–R Smoke Shoppe* and was not called on to make up losses in a bad year. (R. 1293, 1329–1330, 1342.) Cavani and Turner were employees at *110 Eddy Street*. (R. 2107, 3588.) Kyne admitted that he paid taxes on profits from *110 Eddy Street* and the *Day-Night Cigar Store* which he did not receive. (R. 1386–1390, 1539.) All the San Francisco enterprises had a common headquarters at *50 Mason Street* (R. 1481, 1535, 1680) and were financed from a common fund which consisted of profits from the various enterprises as well as money petitioner had acquired from other sources (R. 1412, 1484, 1496, 1539, 1544–1545).

There was evidence that the records of some of the enterprises, particularly the gambling houses, were entirely inadequate. Special Agent Weaver, who had been in charge of the investigation, qualified as an expert and testified that the records were not adequately kept. (R. 2453–2461, 2564, 2715.) The *Menlo Club* books did not show liabilities or disbursements; there were no records for 1945; the bank accounts could not be reconciled with the poker sheets; a trial balance could not be drawn from the books and records alone. (R. 2492–2494, 2519, 2766, 2795–2797,

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2815–2816.) The books of the *B–R Smoke Shoppe* contained only one entry a day whether it was a win or a loss, and the figure represented a net after all expenses and salaries had been paid. (R. 1349, 1358.) A somewhat similar situation was found in the *186 Club*. (R. 2382, 2403–2404.) The books of the *San Diego Social Club* and the *21 Club* had been turned over to petitioner prior to trial and were not available. (R. 1102–1103.) The examining revenue agent never saw any books for the *San Diego Social Club*. (R. 1275.) The daily records of the gambling houses were systematically destroyed. (R. 1966, 2380, 2628.)

In view of this inadequacy of the records the Government determined petitioner's correct income for the period in question by computing the yearly increases in his net worth. The starting point date for this computation was December 31, 1943. Special Agent Weaver described the widespread and exhaustive investigation undertaken to determine petitioner's assets as of that date. (R. 2458–2465, 2534–2547, 2558–2559, 2566–2567, 2801–2802.) The Government credited petitioner with the full net worth of the *B–R Smoke Shoppe,* the *Day-Night Cigar Store,* and the bar at *110 Eddy Street,* on the ground that these were sole proprietorships instead of partnerships. Aside from these three items, and two other immaterial omissions, the Government's schedule of assets and liabilities was the same as that submitted by peti-

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tioner. (Compare Ex. 183, R. 3612–3613, with Ex. M–1, R. 3626–3628.) The agents were unable to determine the amount of cash in safety deposit Box 48 in the Day and Night Branch of the Bank of America, which box was used as a depository for the funds of all the petitioner's enterprises.[3] As noted above, the agents could not talk to petitioner; they were refused access to the box by Kyne; and they were told by Kyne that he had no recollection of the amounts in the box at any particular time and that the only record left was no longer available. (R. 1559, 2559–2560, 2566–2567, 2572.) Consequently, the Government's computation shows a question mark for this item. However, the evidence showed that the only income tax returns filed by petitioner prior to 1944 were for the years 1934, 1942, and 1943 (R. 567–568); that in 1937 he was unable to pay an income tax and penalty of $178.10 due for 1934 (R. 2849–2852); that during his employment by *Cal-Neva, Inc.*, beginning in 1930, he received no salary and only one dividend which he lost by gambling (R. 1912, 2850); that an $1,800 judgment obtained

[3] A second safety deposit box held on December 31, 1943, was used for overnight storage of the *B–R Smoke Shoppe* bank roll, of which a record was available, and sometimes as much as $700 in addition. (R. 1369, 1373–1374, 1939–1942; cf. 1357–1360, 1537.) A third box was not acquired until later. (R. 1369–1370, 1536.) The safe at *110 Eddy Street* was used only to keep the previous day's receipts overnight. (R. 1536, 2076, 2096–2097.) The safe in the main office at *50–52 Mason Street* was not acquired until 1944. (R. 1709–1711, 2515, 3607–3608.)

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against him in 1938 was still outstanding in 1945 (R. 1282–1285); that he was still in debt to his brother at the end of 1943, although the brother had written off one amount as a bad debt at the end of 1942 (R. 2992, 3395); that he was expanding his interests rapidly during 1941, 1942, and 1943 by investing cash in the *B–R Smoke Shoppe, 110 Eddy Street,* the *186 Club,* and the *San Diego Social Club* (*supra,* pp. 7–8); and that most of the money used to purchase the *186 Club* was, in effect, borrowed from Nealis and Kopstick (R. 1425–1428). The only evidence of the amount of cash in Box 48 at the end of 1943[4] was Kyne's testimony that the amount there varied from day to day, sometimes being considerable and sometimes less (R. 1536), and that about $17,700 was placed in the box on December 3, 1943 (R. 1483–1484). However, the money in the box was used as needed in the various enterprises, particularly to purchase cashiers' checks to pay lay-off bets of the *B–R Smoke Shoppe,* and during that month of December cashiers' checks in excess of $20,000 were purchased. (R. 1416–1423, 1484; Ex. 116.)

In the Government's computation, the amount of federal income taxes paid was added to the increase in net worth in order to determine peti-

[4] Petitioner offered no evidence on the point, but contented himself with arguing that the Government's net worth proof was unreliable because it had failed to establish accurately the amount of cash in the box. (R. 2942–2984.)

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tioner's true net income. Nothing was charged against petitioner for non-deductible living expenses, although the evidence clearly indicated that these were considerable. (Cf. R. 2923–2939.) For 1944 the computation showed a net income of $50,747.91, of which $31,747.91 was unreported. For 1945, the net income was $71,065.40, of which $11,747.04 was unreported. (Ex. 183, R. 3612–3613.)

The Motion for New Trial.—The jury's verdict was returned on February 22, 1952, and on February 29 a motion for a new trial was filed, together with an affidavit of defense counsel. (R. 106–120.) The affidavit alleged that on February 23 counsel had learned, through newspaper articles, of a probable attempt to influence a juror during the trial. No affidavits of anyone having first-hand knowledge of the incident were presented, but the newspaper articles attached to the affidavit of counsel reported that during the trial one of the jurors, an insurance and real estate man, was visited by one of his former clients who worked in a Reno gambling casino; that during their conversation the former client made a remark to the effect that the juror could get a lot of money out of the trial through the defense; that the juror told the judge that he thought the former client was kidding but, in view of the judge's admonitions not to discuss the case, had decided to report the incident; that the judge

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informed the prosecution, but not the defense, and had the Reno office of the FBI check on the story; that the FBI report confirmed the judge's belief that the remark was not meant seriously; that the judge had stated that the incident turned out to be harmless but, if there had been anything to it and the defense had been informed, it would have stifled the investigation. (R. 111–120.)

The motion asked that there be a trial to investigate the matter fully and to determine to what extent it had any effect on the jury and was prejudicial to the defendant, and that subpoenas be issued for the attendance at such trial, as witnesses, of the jurors, trial judge, members of the United States Attorney's office and other prosecuting counsel, the agents of the FBI, the person who communicated with the juror and others who participated in the incident. (R. 109–110.) When the motion for a new trial came on for argument, defense counsel in effect stated that he did not care to argue it (R. 93–94) and the motion was denied (R. 94, 120).

ARGUMENT

1. Petitioner contends (Pet. 17–21) that the Government's net worth computation failed to account for the amount of cash he had on hand at the starting point, December 31, 1943; that the computation is, therefore, meaningless as a measure of his net income for 1944 and 1945; and

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that, accordingly, the case should not have been permitted to go to the jury. The argument is without merit.

The ultimate question here is whether a reasonable mind could conclude that there was, beyond a reasonable doubt, no such amount of cash in safety deposit Box 48[5] on December 31, 1943, as would throw the Government's net worth computation substantially out of line. If so, the case was a proper one for the jury. Here, the Government made an exhaustive investigation from New York to Honolulu and over a period extending back to 1930. It was determined that petitioner was "broke" in 1937 and still had debts at the end of 1943. Furthermore, during 1941, 1942, and 1943 he had been rapidly sinking cash into the foundations of his gambling empire, and had borrowed $16,000 from Nealis and Kopstick in the process. See also *supra,* pp. 18–19. Neither petitioner nor Kyne would give the agents any explanation of the amount in the box, and this, of course, is an element a reasonable mind could and would consider. *Bell* v. *United States,* 185 F. 2d 302, 309 (C. A. 4th), certiorari denied, 340 U. S. 930. Indeed, the only affirmative evidence of its contents is Kyne's testimony that about $17,000 was placed there December 3, 1943; but

[5] Petitioner mistakenly implies (Pet. 19–20) that the contents of the two safes are also material here. (See fn. 3, *supra,* p. 18.)

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even if this amount were added to petitioner's net worth at the end of 1943, the Government's computation would still show unreported income in excess of $14,000 for 1944.

It would seem without dispute that a reasonable mind could fairly have concluded beyond a reasonable doubt that the amount in the box at the end of 1943 was immaterial, so far as the Government's net worth computation was concerned. The case was, therefore, properly submitted to the jury. *Curley* v. *United States,* 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C. A. 9th), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States,* 183 F. 2d 391 (C. A. 9th), certiorari denied, 340 U. S. 864. As the Court of Appeals said in its opinion (R. 3765):

> If a defendant could prevent a case of this type from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated. Skillful concealment cannot be made an invincible barrier to proof. *United States* v. *Johnson* [319 U. S. 503], at 518.

Here, where the probative force of the Government's evidence has the support of both courts

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below and of the jury, there is no occasion for further review by this Court. Cf. *United States* v. *Johnson*, 319 U. S. 503, 518.

Nor is there any direct conflict on this point with either *Bryan* v. *United States*, 175 F. 2d 223 (C. A. 5),[6] or *United States* v. *Fenwick*, 177 F. 2d 488 (C. A. 7). In each of these cases there was a defective investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226; 177 F. 2d at 491. But here the agents' investigation was as complete as it could be, and, though barred from direct information as to one asset by petitioner himself, they were able to develop enough evidence to negative the probability of any considerable accumulation of cash.

2. Petitioner contends (Pet. 21–23) that it was error to permit the Government to determine his net income for the years in question by computing the annual increases in the net worth of all his enterprises. He argues that Section 41 of the Internal Revenue Code (*supra*, pp. 3–4) permits the Government to determine net taxable income by computing the annual increase in net worth only in the case where the "method of accounting" employed by the taxpayer does not clearly reflect

[6] Affirmed without consideration of this point when Bryan himself petitioned for a writ of certiorari from the refusal of the Court of Appeals to order the District Court to enter a judgment of acquittal instead of an order for a new trial, *Bryan* v. *United States*, 338 U. S. 552.

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his income; that the evidence in this case established clearly inadequate books only in respect of the *B-R Smoke Shoppe;* that the errors in the books of the other enterprises "amounted to no more than normal accounting errors"; and that, therefore, a net worth computation was not permissible as to these other enterprises. There is no merit in this contention.

In the first place, assuming *arguendo* that Section 41 has any application to criminal cases,[7] neither the trial court nor the Court of Appeals was asked to make any such distinction between the *B-R Smoke Shoppe* and the other enterprises. To the contrary, the Government's net worth computation was objected to, and a directed verdict was requested, on the ground that, since the Government still retained some of petitioner's books and records, it should not be heard to say that the books of any of the enterprises were inadequate. (R. 2910–2916, 3465–3492; see also

[7] The Government does not concede this. Criminal evasion of income taxes may be established by circumstantial evidence, and the circumstantial evidence provided by a solidly based net worth computation may be sufficient, in itself, to establish guilt, even though the taxpayer's method of accounting appears, on the face of his books, to reflect clearly his income. The civil case cited by petitioner, *United States* v. *American Can Co.*, 280 U. S. 412, has nothing to do with net worth computations, which are, as the petitioner points out (Pet. 23), only approximations of net income. That case discusses "general methods of bookkeeping" (280 U. S., at 419), *i. e.*, cash and accrual "methods of accounting".

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R. 515–538, 2856, 2861.) And this was the theory of the requested instructions. (R. 79–87.) Secondly, the record is replete with evidence that the books of the gambling enterprises were utterly inadequate to reflect income. The books of the *B-R Smoke Shoppe* had only one entry a day representing profit or loss after all expenses; much the same situation prevailed at the *186 Club;* the *San Diego Social Club* apparently had no records (R. 1275); daily records were systematically destroyed (R. 1966, 2380, 2628); the *Menlo Club* had no records for 1945, and for 1946 the daily receipts could not be reconciled with the bank accounts (R. 2794–2797).

The objection which petitioner did raise in the trial court, and which appears as a subsidiary argument in the petition (Pet. 23), that the proof of inadequacy was insufficient because all of the books and records were not in evidence, is patently insubstantial. The Government made a clear prima facie showing of the inadequacy of the records which petitioner was unable to rebut. In rejecting the motion for acquittal (R. 3469–3475), the trial court said (R. 3473):

> If you had pointed out during the course of the trial any specific book or record, I would have been inclined to consider with some thought the request, but there has been no request for any specific book or record and I believe the records of these different enterprises were kept with the

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knowledge of the defendant or his agents and if there was any record anywhere that would have been of service to the defendant in this case, they would have been able to point it out and ask the Court to have it produced and that wasn't done at any time in the course of this trial or in any proceeding prior to this trial.

3. In the 1945 net worth computation for the *B–R Smoke Shoppe* (R. 3601) the Government included a bank roll of $20,000. The witness Fritchitt had testified that $15,000 of this sum was "markers". (R. 1949, 1962, 1968.) Petitioner contends (Pet. 23–26) that the "markers" were accounts receivable; that they should have been excluded from the computation, since the *B–R Smoke Shoppe* was on a cash, not an accrual, basis; and that, since the Government's computation showed unreported income of only $11,747.04 for 1945, the conviction on the third and fourth counts has no substantial basis. It should be noted that this argument can affect only the fine, since the general prison sentence of five years would still be supported by either of the first two counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642.

These "markers" were of two kinds. Some were deposited in the bank roll by petitioner and his associates when they withdrew cash from it. (R. 1298–1300, 1374–1375.) Others were IOU's

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from bettors who had lost. (R. 1360–1362, 1962.) Petitioner's argument is directed against "markers" of the latter type, since the former were obviously loans. (Pet. 25.) There is no direct evidence as to the proportion of either type contained in the $15,000 collection at the end of 1945, for Fritchitt made no distinction. (R. 1949, 1961, 1962, 1965, 1968.) But the jury could have inferred that the amount of bettors' "markers" was smaller, since there appear to have been a comparatively small amount of this type outstanding at the end of 1943 (R. 1360–1362), and since the business was closed for a large part of 1945 (R. 1297–1299, 1939). Furthermore, there was evidence in the record that bettors' "markers" were treated as cash assets (R. 1298–1300, 1375), and the Government's expert, Weaver, testified at length that they were in the nature of cash advances to bettors[8] (R. 2619–2626, 2722–2724, 2772–2782). Finally, it should be noted that, although the Government included no living expenses in its net worth computation (R. 3612–3613), it was actually proved that petitioner spent approximately $4,300 during 1945 for such items as clothing, jewelry and hotel bills (R. 586, 615, 619, 824, 843, 986, 1202–1204, 1212). In view of the nec-

[8] The accounts of a betting commissioner, representing the commissions he earns for acting as intermediary between bettor and taker, are of a different nature. See *Goldbaum* v. *United States*, No. 164, this Term, certiorari denied, October 12, 1953.

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essary conclusion that he must have spent some substantial additional sum for ordinary living expenses, the jury would be warranted in finding a substantial understatement of income for 1945 even though the "markers" were excluded from consideration.

4. Petitioner contends (Pet. 16, 26–31) that the courts below erred in applying the rule of *Commissioner* v. *Culbertson,* 337 U. S. 733. That case holds that the test for recognition of a partnership for income tax purposes is the good faith intent of the partners. We find difficulty in understanding the basis of petitioner's present complaint, since this is exactly the test which he himself proposed to the trial court. Defendant's Requested Instruction No. 111 (R. 83–84), after describing in some detail the alleged agreements between petitioner and his associates, concludes with the following paragraph:

> Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates *did not intend to operate* said businesses *as profit-sharing partners,* you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year. [Emphasis supplied.]

The trial court, while refusing to go into the specific details, gave what was, in effect, the same instruction. (R. 142, 143–144.) Petitioner ob-

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jected to the refusal to give his requested instruction (R. 3495–3496), and in the Court of Appeals he simply argued that the charge as given was too general and that the trial court should have told the jury that the particular agreements in this case *could* have been partnerships, if so intended.

Moreover, the vice of the present contention rests in its confusion of two distinct issues, the bona fide intent to form a partnership and the wilfull intent to evade payment of income taxes. It may well be that associates frankly and openly enter into an agreement in which their intent, though insufficient to create partnership status, has no tinge of criminal evasion. Here, the jury was instructed on both these issues: the nature of partnerships, and criminal intent. (R. 133, 134–135, 140–141.) In other words, the jury necessarily found that petitioner had never intended to form a valid partnership and that he had wilfully intended to evade the payment of his income taxes by reporting only a portion of the partnership income. According to the petitioner,[9] the formation of a nominal partnership would prevent a jury from ever convicting a taxpayer, even though the purpose of the partnership form was

[9] "Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that *there is no basis on which a jury could properly convict him* of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue." (Emphasis supplied.) (Pet. 29–30.)

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for the very purpose of evading taxes. It seems quite obvious that tax evaders cannot be afforded such a ready device to avoid criminal penalties.

5. Petitioner contends (Pet. 3, 17, 31–34) that the trial court erred in denying his motions under Rules 16 and 17 of the Federal Rules of Criminal Procedure. An attempt is made to raise questions involving the scope of these rules in the light of this Court's decision in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214. In reality, however, petitioner's argument simply is that the rulings constitute an abuse of discretion. The language of the rules specifically reposes a large measure of discretion in the trial court. The facts have been set forth at some length in the Statement (*supra,* pp. 10–15), and we think they furnish ample justification for the denial of the motions.

At least as early as April 8, 1948, when his attorney refused to let him be interviewed by the agents, petitioner knew that criminal proceedings were a possibility. On July 11, 1949, his accountant, Semenza, was allowed by the agents to take all the records he wished. A second accountant, Friedman, was hired in March, 1950, for the specific purpose of looking into the criminal aspects of the case; he obtained the records Semenza had; he was allowed to examine all other records still in the Government's hands; and he remained in the case until November, 1950. Peti-

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tioner was indicted on April 9, 1951, and trial was set for November 7. In June, defense counsel were told to apply to the court if they could not get information they wanted from the Government. (R. 194.) Not until October 22 did they ask to see the records held by the Government. Although the conditions attached to the reply could easily have been complied with, on November 14 [10] petitioner filed a motion to inspect, coupled with a request for a four-month continuance to enable him to examine and collate the records. On November 27, the day before the trial, he presented a motion to produce the records.[11] The trial court denied both motions on the ground that Friedman had had ample opportunity to inspect the records and, under the circumstances, a request at this late date was unreasonable. (R. 194–198, 286–288.) As the *Bowman Dairy* case points out, the object of Rules 16 and 17 is to *expedite* trials. 341 U. S. at 220. Clearly, the trial judge was exercising his discretion in a reasonable manner.

---

[10] The trial had meanwhile been postponed to November 28 because of the congestion of the court's calendar. (R. 180, 264.)

[11] The Court of Appeals pointed out that petitioner had had ample prior opportunity to examine the records. The petition states (Pet. 32) that this was in connection with his civil liability, obviously referring to Semenza's examination in 1949. But Friedman's examination was in 1950, after petitioner had been officially told that criminal proceedings were contemplated, and Friedman was specifically retained to look into the criminal aspect.

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There is no conflict with decisions cited by petitioner. The *Bowman Dairy* case involved the scope of the rules, *i. e.*, the types of documents to which they apply. The same is true of *Fryer* v. *United States* (C. A. D. C.), decided July 7, 1953.[12] *Gordon* v. *United States,* 344 U. S. 414, involved a motion to produce a specific document made during the trial. Whenever petitioner made such a request for specific documents during this trial, there was immediate compliance (*supra,* p. 15), and, as the trial court pointed out at the end of the trial, petitioner certainly would have known if any essential record was still in the Government's possession. (R. 3470–3474.) At no time in the Court of Appeals, or in the present petition, has petitioner been able to show that the rulings on these motions were prejudicial.

6. Petitioner contends (Pet. 3–4, 17, 34–37) that it was error to deny his motion for a new trial or for a hearing to determine whether there had been a prejudicial outside contact with a juror during the trial. There is no basis for this contention.

In the first place, although petitioner states (Pet. 34) that his "affidavit was filed promptly upon learning of the incident after the jury had returned its verdict," the verdict was actually returned on February 22; the affidavit states that

[12] A petition for a writ of certiorari has been filed by the United States. *United States* v. *Fryer*, No. 311, this Term.

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the facts were discovered on February 23; yet the affidavit and the motion were not filed until February 29. Petitioner complains (Pet. 34) that the only thing in the record on the juror incident is his own affidavit "calling to the attention of the District Court the stories which had appeared *in two newspapers.*" (Emphasis added.) But petitioner fails to explain why, with six days at his disposal, he furnished no affidavits from persons who might have had knowledge of the alleged incident, or why he was content to rest his motion on two newspaper clippings, or, indeed, why he failed to avail himself of the opportunity in the District Court to argue the matter orally. (R. 93–94.) These facts alone warranted the District Court, in its discretion, to deny the motion on the grounds that petitioner had not shown the requisite prejudice.

Moreover, as the Court of Appeals held, the allegations of the affidavit and the motion were insufficient to show that there had in fact been the necessary outside contact with a juror. Thus, assuming that outside contact with a juror is presumptively prejudicial, there must be at least a prima facie showing that there was such a contact in order to warrant a hearing. As the court below stated (R. 3777):

> Appellant relied solely upon the affidavit of defense counsel stating what counsel had learned through the newspapers. If any jurors had received communications from

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> the trial court or the Federal Bureau of Investigation of a nature which would tend to prejudice them against appellant, or had been subjected to other extraneous influences, such fact could have been appropriately presented by submitting affidavits of the jurors themselves.

Where petitioner, with six days to obtain affidavits to make such a showing, based his request on two newspaper clippings and chose not to argue the question in open court, it seems quite clear that the District Court did not abuse its discretion in denying the motion.

CONCLUSION

The points raised by the petition are largely factual. They have been determined adversely to petitioner by the jury, the trial court, and the unanimous Court of Appeals. No question of general importance is presented and no further review by this Court is required. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 304

ELMER F. REMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 3748–3777) is reported at 205 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778), and a petition for rehearing was denied June 30, 1953 (R. 3779). On July 17, 1953, by order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to August 29, 1953. The petition was filed August 28, 1953, and was granted on November 16, 1953 (R. 3781). The jurisdiction

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of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Petitioner was convicted of wilfully attempting to evade income taxes for the years 1944 and 1945. The Government's proof of unreported income was based mainly upon evidence of annual increases in his net worth. The questions presented are:

1. Whether it was proper for the Government to present evidence of unexplained annual increases in petitioner's net worth in order to show that he had not reported all of his taxable income for the years concerned.

2. Whether the evidence was sufficient to warrant submission of the case to the jury and to support the verdict. The following specific factual issues are raised: (a) as to the "starting point" of the Government's net worth computation; (b) as to the inclusion of $15,000 in so-called "markers" in the net worth computation for the year 1945; (c) as to whether certain enterprises were owned by petitioner solely or in partnership with others. A question is also presented as to whether the jury was properly instructed on the latter issue.

3. Whether the trial court abused its discretion in denying petitioner's motions to inspect certain of his records held by the Government, in view of

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his prior opportunities to examine these records and the belated filing of the motions.

4. Whether the case should be remanded to the district court for the purpose of holding a hearing to inquire into the facts concerning an alleged improper contact between one of the jurors and a third person.[1]

STATUTE AND RULES INVOLVED

Internal Revenue Code:

> SEC. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of calendar year.
>
> (26 U. S. C. 1946 ed., Sec. 41.)

[1] On this issue, the Government does not oppose petitioner. See pp. 92–98, *infra*.

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SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 16. *Discovery and Inspection*

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The

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order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

* * * * *

Rule 17. *Subpoena*

* * * * *

(c) For Production of Documentary Evidence and of Objects

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

On April 3, 1951, an indictment in six counts was filed against petitioner in the United States District Court for the District of Nevada, charging violations of Section 145 (b) of the Internal Revenue Code. The first and second counts alleged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself

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and his wife for the year 1944 in the amount of $27,379.08. The third and fourth counts charged evasion of his own and his wife's income taxes for the year 1945 in the amount of $11,090.34. The fifth and sixth counts charged similar evasion for the year 1946 in the amount of $117,129.62 (R. 3–8.) The trial began November 28, 1951, and lasted approximately three months. Petitioner was convicted on the first four counts, the jury failing to agree as to the counts involving the year 1946. (R. 88, 3667.) On February 29, 1952, he was sentenced to imprisonment for five years and fined $5,000 on each of the first four counts. The terms of imprisonment were made to run concurrently, but the fines were cumulative. (R. 89–91.) The conviction was affirmed unanimously by the Court of Appeals for the Ninth Circuit. (R. 3748–3777.)

A. THEORY OF THE GOVERNMENT'S CASE

The indictment charged that petitioner had attempted to evade income taxes by underreporting his and his wife's net taxable income. The theory of the evidence presented by the Government at the trial was that there were large annual increases in petitioner's net worth in 1944, 1945 and 1946; that the only reasonable explanation of these increases was that they represented current taxable income; and that the amounts of taxable income thus proved were considerably greater than the amounts reported by petitioner in his

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own and his wife's returns. Petitioner was on a cash basis, and the net worth computation was made on the same basis. (R. 2621–2628, 2719–2728, 2760–2780; Br. 20.) The starting point of the net worth computation was December 31, 1943. According to the computation, petitioner's income for 1944, 1945 and 1946 was, respectively, $50,747.91, $71,065.40, and $254,285.42. In the respective returns for those years petitioner reported income of $19,000, $59,318.36 and $22,489.58.[2] (R. 3612–3613; Ex. 183.)

In the trial court petitioner moved for a judgment of acquittal on the ground that the net worth computation was an insufficient basis from which the jury could find that he had failed to report substantial portions of his taxable income for the years involved. The sufficiency of the computation was challenged on two principal grounds: (1) that the Government failed to prove that all of petitioner's assets as of December 31, 1943, were included in the computation, thus failing to establish a solid starting point (R. 2942–2970, 2982–2984, 3476–3477); and (2) that the Government failed to prove that certain ostensible partnerships were mere shams and were, in reality, sole proprietorships of petitioner[3]

[2] Petitioner and his wife split this income on the community property basis and filed individual returns. (R. 3519–3528.)

[3] In addition to his attack upon the computation as insufficient evidence of unreported income, petitioner also contended that the Gove nment had failed to show that his books

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(R. 2970–2976, 3478–3483). The motion for acquittal was denied by the district court. (R. 3492). Both contentions were renewed, unsuccessfully, in the Court of Appeals. (R. 3762–3770.) In this Court petitioner again urges (Br. 26–31) that the evidence was insufficient to establish the starting point of the computation. He also now renews his attack (Br. 37–41) upon the sufficiency of the evidence as to the sole proprietorships, although this point appeared to have been abandoned in the petition for a writ of certiorari. (See Pet. pp. 2–4, 16–17, 26–31.)

B. EVIDENCE TO SUPPORT THE GOVERNMENT'S CASE

The evidence to support the conclusion that petitioner failed to report all his taxable income may be summarized as follows:

1. *Businesses in which petitioner had interests.*—During the taxable years involved in this case petitioner had business interests in the following enterprises:

NEVADA:

Cal-Neva, Inc., a lodge and gambling room astride the Nevada-California state line at the shore of Lake Tahoe (R. 1595);

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and records were inadequate, and that the use of the net worth method was, therefore, improper. (R. 2910–2916, 3465–3476.) This contention was renewed in the Court of Appeals (R. 3762–3763), and is one of the points raised in this Court (Br. 20–26).

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SAN FRANCISCO:

B-R Smoke Shoppe, a horse race bookmaking establishment at 50 Mason Street (R. 1287–1288)—across the front of the building were general offices for all the San Francisco enterprises (R. 1662, 1667);

110 Eddy Street, a bar located at that address (R. 1382, 2076);

186 Club, a gambling room at 186 Eddy Street, devoted to draw poker and operating twenty-four hours a day (R. 643, 1970–1973);

Day-Night Cigar and Liquor Store, a cigar, liquor and magazine store located in the front of the building which housed the *186 Club* (R. 1451);

Menlo Club, a gambling house not far from the offices at 50 Mason Street, open twenty-four hours a day and operated in conjunction with a bar and restaurant[4] (R. 768–772, 1405, 3582);

Transit Smoke Shop, a combined gambling house, cigar and liquor store (R. 1478);

EL CERRITO:[5]

San Diego Social Club, a gambling casino (R. 1055);

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[4] The bar and restaurant are referred to in the record as "Tiny's Bar" or "Menlo Bar", and "Tiny's Restaurant" or "Tiny's Waffle Shop".

[5] This is a town located across the bay from San Francisco. (R. 742.)

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21 Club, a restaurant and bar occupying the front of the building housing the gambling casino (R. 1055);

311 Club, another gambling club located across the street (R. 1117–1118).

As petitioner points out (Br. 34), the paramount issue at the trial was whether four of the San Francisco enterprises—*B-R Smoke Shoppe, 110 Eddy Street, Day-Night Cigar and Liquor Store* and *Menlo Club*—were his own sole proprietorships, or were bona fide partnerships between petitioner and his associates.

2. *Acquisition of the businesses.*—The majority of the businesses were acquired prior to 1944, the first of the years involved in this case. However, the amount of cash used to purchase these earlier interests was small in comparison with the sums similarly expended during 1944, 1945 and 1946.

In 1926 Graham, McKay and Hall borrowed money from a bank and bought the Cal-Neva Lodge. Petitioner contributed no money, but he was the active manager and he was given an equal share in the business. The lodge was incorporated in 1929 as *Cal-Neva, Inc.*, all four associates receiving about the same amount of stock. When Hall died around 1940 the corporation bought in his shares. (R. 1903–1906, 1929.)

Petitioner began to acquire his interests in San Francisco late in 1941. In December of that

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year the *B-R Smoke Shoppe* was purchased as a going concern, petitioner paying the purchase price of $2,500 and supplying the original bank roll of $7,500 necessary for operation of the horse race book. (R. 1288–1290, 1347–1348.) Around August 1942 petitioner and his associates took over the tavern at *110 Eddy Street* in order to protect a $4,000 debt owed to petitioner by the proprietor, Clarence Bent, and petitioner spent a considerable sum on improvements. No one else put up any money except Arthur Pratt, who turned over $3,400 to petitioner after the two had reached an oral agreement that Pratt would receive a one-third interest. This money was used to pay some of the improvement bills. (R. 1383–1384, 1398, 2242–2246.) In March 1943 petitioner and his associates bought the combined *186 Club* and *Day-Night Cigar and Liquor Store* as a going concern. The sum of $16,000 needed for the purchase of the gambling club was obtained from Nealis and Kopstick and they were given a one-sixth interest in the business. Petitioner supplied about $6,000 for the purchase of the cigar and liquor store. Details of the transaction were handled by William Kyne, who acted as general manager for all the San Francisco enterprises. (R. 643–647, 1424–1427, 1451.)

Meanwhile, petitioner had begun to acquire interests across the bay in El Cerrito. In April or May 1943 he purchased the property which housed the *San Diego Social Club* and the *21*

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Club. He provided the $25,000 required for the purchase, but the property was put in the name of his attorney because of the jealousy of other gamblers in that area. He operated the two businesses jointly with Pechart and Kessel, but there is no evidence that they provided any of the initial investment. (R. 742–746, 1109–1110.) In 1944 Pechart and Kessel set up another gambling house across the street, the *311 Club.* There is no evidence that petitioner contributed anything to this enterprise, but the 1944 partnership return shows him as a partner, and Pechart and Kessel testified that they gave him a five or ten percent "friendship bonus" because he did not approve of the new club. (R. 1115–1121, 1143–1147, 1161–1162.)

Acquisitions during the taxable years with which this case is concerned, 1944, 1945 and 1946, involved the outlay of considerable sums by petitioner. Arthur Pratt, not being able to discover how the tavern business at *110 Eddy Street* was being conducted, sold his interest to petitioner for $6,800 in March 1944.[6] (R. 2245–2270.) The $16,000 invested by Nealis and Kopstick in the *186 Club* was returned to them in installments as promptly as the money came in to the club, payment being completed early in 1944. The money was turned over to them by Kyne who got it from

[6] Pratt had borrowed $2,000 from petitioner in the latter part of 1943. He received an additional $4,800 when he sold his interest to petitioner in March 1944. (R. 2250–2252.)

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a bank safe deposit box (Box 48) which was used as a general depository for the funds of all the San Francisco enterprises. (R. 1427–1428, 1518.) In 1945 petitioner purchased additional property contiguous to the *San Diego Social Club* in El Cerrito for approximately $12,000, and again title was transferred to his attorney. (R. 746–749, 754–756.) In April 1945 petitioner contracted with Gene Schriber to purchase the *Menlo Club* for $175,000 and took a ten year lease on the premises at a total rent of $219,000. Most of the El Cerrito property was used as security for the notes given by petitioner. The lease was put in the name of Billington, a boyhood friend and employee. Schriber received $75,000 of the purchase price during 1945,—a cash payment of $25,000 from petitioner at the time the contract was signed, and checks on the *Menlo Club* account amounting to $50,000 later in the year.[7] Cash for deposits to cover these checks was given to Maundrell, the club bookkeeper, either by petitioner or

[7] Schriber and Maundrell, both friendly to petitioner, testified that the total paid to Schriber in 1945 was only $50,000 instead of $75,000. Schriber himself had no record of the payments he had received. A page from the *Menlo Club* ledger, Exhibit 140, supported the testimony. However, there was evidence that Exhibit 140 had been substituted, prior to trial and while the ledger was in petitioner's possession, for the original record of the transaction, Exhibit 125C, which showed payment of $75,000 in 1945. (R. 1719–1740, 1796–1802, 1816–1824, 2466–2476, 2689–2715, particularly 1722–1729, 2689–2705.)

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by the club manager. A further payment was made in 1946. (R. 749–756, 768–784, 799–800, 1732–1733, 1817–1822, 2469–2478.) In November 1946 Gordon Partee asked petitioner to buy the *Transit Smoke Shop.* Petitioner told him to talk to Kyne, and Kyne gave him approximately $32,000 to complete the purchase. Petitioner supplied the money and Kyne obtained it from safe deposit Box 48, mentioned above. The business was ostensibly a partnership between petitioner, Partee and Kyne. Partee put up no money, but Kyne borrowed a little over $16,000 from the *Menlo Club* account to pay for his share and put this money into Box 48. (R. 1183–1193, 1474–1478, 1495–1496, 1523, 1566, 1586–1587, 1762–1763.)

In July 1946 petitioner entered into an agreement to buy all the stock of *Cal-Neva, Inc.,* from Graham and McKay for $466,666.66. Although there was at that time only $75,000 in the corporation, petitioner made a payment of $100,000 in September. (R. 1905–1910, 1917.) In November 1945 petitioner bought an interest in a New York night club for $12,000. Checks were drawn on the *Menlo Club* account for this amount and Maundrell, the bookkeeper, was given the cash for deposit. Petitioner told Kyne, who was then stationed in an army camp in North Carolina, to take a look at the place because Kyne had a "piece" of it. This was news to Kyne. The venture shortly failed and $8,000 of the original investment was returned, not to the *Menlo Club,*

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but to petitioner. (R. 1379–1382, 1668–1669, 1836–1838.)

3. *Operation of the businesses.*—The San Francisco enterprises were purchased and launched, as has been seen, almost entirely with money supplied by petitioner. These businesses had a main office and a general manager. The books and records were, for the most part, kept by a single bookkeeper. And a common fund was maintained for the operation of all of them.

Kyne was the general manager of the San Francisco enterprises.[8] He handled the money and the records; he engaged the clerks and the bookkeepers, with the exception of Maundrell; and the managers of the various individual businesses were subordinate to him. (R. 1494, 1552, 1557–1558.) Most of his time was spent in the management of the *B-R Smoke Shoppe,* the bookmaking establishment. (R. 1290–1291, 1295–1297, 1349, 1356.) Each day, however, he visited the other locations for a few minutes to pick up the receipts and the gambling records. The records he stored in the main offices at 50 Mason Street; the receipts he placed either in the safe in the main offices or in safe deposit Box 48, to which

[8] The managers of the individual businesses were: *186 Club*, Busterna (R. 1971); *110 Eddy Street*, Cavani and Turner (R. 1385); *Menlo Club*, Ditto and Nelson in the gambling room, Maundrell in the office and restaurant (R. 1597, 1693, 1769); *Transit Smoke Shop*, Partee (R. 1196). Kyne, himself, managed the *B–R Smoke Shoppe* (R. 1356) and, apparently, the *Day-Night Cigar and Liquor Store* (R. 1452).

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reference has already been made. (R. 1406, 1411, 1430–1432, 1694–1698.) If the money he had collected in one location was needed for the expenses of another, he used it for that purpose. (R. 1412.) He supplied data on the San Francisco enterprises to the person who prepared petitioner's individual income tax returns.[9] (R. 1533–1534.)

Slater was the original bookkeeper. (R. 1384, 1985, 2076, 2096.) Maundrell, who had been in charge of the dining room and hotel accommodations at *Cal-Neva, Inc.*, was brought to San Francisco in 1945 upon purchase of the *Menlo Club* and put in charge of the books of that establishment. He was described by Kyne as petitioner's bookkeeper. (R. 1392.) After Kyne's departure for the army [10] and the death of Slater, Maundrell became bookkeeper for all the San Francisco businesses with an office at 50 Mason Street.[11] (R. 1392, 1593–1601, 1637–1638.)

The main offices were located at 50–52 Mason Street, the same building which housed the *B-R Smoke Shoppe*. During 1944, 1945 and 1946 close to $10,000 was spent in remodeling the front of

[9] These returns were prepared by Mooney, a deputy collector in the Internal Revenue office in Nevada. Mooney took vacations in San Francisco, at petitioner's expense, and obtained the figures while there. (R. 876–892, 956, 1534.)

[10] Kyne was in the service from February 1945 to June 1946. (R. 1379.)

[11] The *B–R Smoke Shoppe* records were handled by Kyne, and during Kyne's absence by Pritchett (referred to in the record as Fritchett). (R. 1938, 1946–1947.)

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this building into offices for petitioner, Kyne and Maundrell. The improvements were paid for by checks drawn on an account in the names of petitioner and Maundrell, in which Maundrell deposited receipts from the *Menlo Club* bar and restaurant and other funds given him by petitioner for particular purposes. These particular checks given in payment for the construction of the offices were covered by deposits of cash given to Maundrell for that specific purpose either by petitioner or by the manager of the gambling room at the *Menlo Club*. No account was set up on the *Menlo Club* books to reflect these transactions. (R. 1432, 1650–1657, 1662–1683, 1694–1699, 1744–1753, 2513–2518, 2660–2673.) A large safe was placed in the main office during 1944. Only petitioner, Kyne and Maundrell knew the combination, and there was a combination lock box inside to which only petitioner and Kyne had access.[12] (R. 1535–1537, 1696–1699, 1709–1714, 1943–1945, 2515, 3607–3608.) There was also a storeroom in the building which was used as a warehouse to keep whiskey for the San Francisco bars. (R. 1481–1482.)

Safe deposit Box 48, to which several references have already been made, was maintained in the names of petitioner and Kyne. It was used by Kyne as a depository for cash from all

[12] There were also safes at *110 Eddy Street* and at the *Menlo Club* which were used for overnight storage of the day's receipts. (R. 1411, 1536, 1716–1717, 2076, 2096–2097.)

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the enterprises, and this cash was treated as a common fund and was used by Kyne wherever needed. (R. 1368–1369, 1411–1412, 1431, 1475, 1536, 1544–1545.) Other funds belonging to petitioner, not derived from any of the San Francisco enterprises, were also placed in Box 48 and were used by Kyne in the San Francisco enterprises as the need arose. (R. 1484.) This common treatment of the funds of all the businesses is further exemplified in the acquisition of the *Transit Smoke Shop* (*supra,* p. 13); in the use of the *Menlo Club* account standing in the names of petitioner and Maundrell to pay expenses at other locations and to pay petitioner's personal expenses (*supra,* p. 16; see R. 1650–1686); in the withdrawal of large sums from the *Menlo Club* by petitioner (R. 1414–1415, 1455); and in the transfer of equipment from one enterprise to another (R. 2071–2072). Kyne could not remember the amounts kept in Box 48. He said that he had kept a daily record but that he had given it to Slater. No record was available at the trial.[13] (R. 1536, 1559–1560.)

Petitioner himself was in Nevada each year during the period between April and October,

[13] In addition to Box 48, two other bank safe deposit boxes are mentioned in the record. Box 39813, acquired on February 24, 1943, in the names of Kyne and Pritchett, was used for overnight storage of the *B–R Smoke Shoppe* bankroll. (R. 1369, 1373–1374, 1939–1942.) Box 730, acquired in 1944 in the names of Kyne and Henry Clay (an alias for petitioner), was used only for storage of papers. (R. 1369–1370, 1536, 1558–1559.)

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since Graham and McKay were absent from the state and had to leave the management of *Cal-Neva, Inc.,* entirely in his hands. (R. 1325–1326, 1906.) The gambling club in El Cerrito, the *San Diego Social Club,* was managed chiefly by men who were also employed by petitioner at *Cal-Neva, Inc.* Kessel, who testified that petitioner and Pechart were his partners in the business, said that he and Pechart were the active managers. However, Pechart said that he took no active part and that the management was in the hands of petitioner's men, and Kessel also admitted that these men were managers in the gambling room. The bookkeeper for Pechart and Kessel also testified that petitioner's men were operating managers. (R. 1063–1067, 1112–1114, 1128, 1135–1136, 1139, 1596.) The restaurant and bar in the same building, the *21 Club,* was managed by Billington, the boyhood friend of petitioner in whose name the *Menlo Club* lease was placed and who had also worked at the *110 Eddy Street* bar in San Francisco. (R. 787–792.) Cavani, who had originally been selected by petitioner as manager of the *21 Club* was switched to *110 Eddy Street* by petitioner upon the death of Clarence Bent.[14] (R. 2067–2071, 2083–2084.) The other gambling club in El Cerrito, the *311 Club,* was operated by Pechart and Kessel and the evidence does not indicate that

[14] Cavani had worked for petitioner as a bartender at *Cal-Neva Inc.*, for many years. (R. 2067.)

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petitioner had any active part in the management, although the 1944 income tax return of the club listed him as a partner. The records of all three El Cerrito businesses had, however, been delivered to petitioner by Pechart about two weeks after the indictment in this case, and they were not available at the trial. (R. 1103–1104, 1138, 1142.)

4. *Ownership of the businesses.*—We have already referred (*supra,* p. 10), to the fact that at the trial the paramount issue was whether four of the San Francisco enterprises were bona fide partnerships, or sole proprietorships of petitioner. These were the *B–R Smoke Shoppe,* the bar at *110 Eddy Street,* the *Day-Night Cigar and Liquor Store,* and the *Menlo Club.* We shall summarize the evidence as to the ownership of these four, and reference will also be made to the similar treatment of some of the other enterprises.

The Government was forced to present its case through the testimony of the men who operated the San Francisco businesses, Kyne, Maundrell, Lando, Cavani, Busterna, Casselini and Partee, all of whom testified that they held partnership status in the particular businesses with which they were associated. With the exception of the *Transit Smoke Shop,* all of the so-called partnerships began, according to these witnesses, with oral agreements. All the oral agreements were between petitioner and *one* of the so-called part-

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ners, and there is no evidence of any three or four way agreements. (R. 1400, 1513–1523, 1635.) Petitioner had, as we have seen above, contributed almost all the original capital as each new venture was launched. His associates testified that petitioner gave them "working interests" in return for the services they were to contribute. Each associate was assigned a certain percentage of the profits of each business in which he had received a share. These profits were not to be withdrawn, however, but were to be left in the business until a sufficient sum had been accumulated to repay petitioner the amount of his original investment. Meanwhile the profits were to be credited to the individual partners on the books, thus building up their "equities" in the business.[15] (R. 1341–1342, 1382, 1497–1523, 1634–1635.)

None of these oral agreements were reduced to writing until November 4, 1946, after internal revenue agents had already begun the investigation which led to the present prosecution.[16] On that date petitioner signed agreements with Kyne and Maundrell as to the *Menlo Club,* effective retroactively to May 1, 1945, the date the property

[15] Several of the so-called partners, Busterna, Casselini and Cavani, were extremely vague about their "working interests". (R. 1976, 1986, 2011–2016, 2026, 2078–2081, 2109–2110.)

[16] A written agreement was also drawn up between petitioner, Kyne and Partee for the *Transit Smoke Shop*, which was acquired November 21, 1946. (R. 1189–1190.)

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was acquired by petitioner.[17] (R. 2115, 2123, 2152, 2163, 2454–2457, 3582–3583, 3585–3586.) Both Kyne and Maundrell stated that the written agreements were the same as their prior oral agreements. (R. 1503–1504, 1635.) The most pertinent portions of Kyne's agreement, substantially identical with Maundrell's, are as follows (R. 3582–3583; Ex. 113):

> Whereas, it is the desire of First Party to sell, assign and convey to said Second Party a 15% interest in and to said social room business and in and to said restaurant business; and
>
> Whereas, said Second Party is desirous of acquiring a 15% interest in and to said social room business and in and to said restaurant business; and
>
> Whereas, said 15% interest of Second Party in and to said social room and restaurant businesses shall not come into being until there shall have been paid to said First Party out of the profits of said businesses the sum of $175,000, the original purchase price of said businesses;
>
> * * * * *
>
> Effective as of May 1, 1945, First Party hereby does assign, transfer, set over and convey to William E. Kyne, Second Party herein, a 15% working interest in and to the profits derived from the operation of

[17] Maundrell testified that the other partners in the *Menlo Club* signed similar written agreements at the same time. These were not in evidence. (R. 1802.)

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the aforesaid social room and restaurant businesses situated as aforesaid;

It is understood and agreed between the parties hereto that said working interest does not represent an actual interest in and to the assets of said business or in or to the leasehold in said premises; that is to say, all moneys credited to the account of Second Party pursuant to said working interest shall be applied on account of Second Party's payment for an actual interest in and to said social club business and restaurant business;

It is further understood and agreed between the parties hereto that an actual interest in and to said businesses and their assets shall not be acquired by Second Party until First Party has been fully reimbursed in the sum of $175,000;

First Party does hereby sell, assign, set over, transfer and convey to Second Party a 15% interest in and to said social club business and restaurant business and their assets upon the receipt by First Party of the sum of $175,000 representing the purchase price expended by First Party as more particularly hereinabove appears;

* * * * *

The following facts appear as to the treatment of the so-called partners' shares in the various businesses:

The supposed partners in the *B-R Smoke Shoppe* were petitioner, Kyne and Lando, and

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it was petitioner who supplied all the capital. (R. 1346–1348.) Lando's duties were to fix the odds on horse races. (R. 1291, 1323.) He testified that he received no salary. (R. 1298.) The partnership return for 1944 showed that he was entitled to only $300 as his share of net income, and he testified that he thought 1945 was a loss year. (R. 1329–1330, 3530.) He stated that the partners had an accounting at the end of each year, but that he had never seen the partnership returns, and that he could not recall how much of an "equity" he had acquired by the end of 1946. (R. 1298, 1301, 1318.) Kyne was in charge of the records, the layoff bets, and the money. (R. 1295, 1349, 1356.) He received a salary of $10 a day before he entered the army but not after he returned. (R. 1355.) He stated that he believed 1946 was a losing year. (R. 1562.) It was impossible to tell from the records how much of an "equity" Kyne and Lando had built up, since the records contained no capital accounts and consisted of only one figure a day, win or lose, and most of those for 1945 had been destroyed on petitioner's orders.[18] (R. 1349–1352, 1946, 1964–1966.) Kyne could not recall whether petitioner's original investment had been returned to him out of earnings. (R. 1567.) The size of the business appears from the fact that it issued cashier's

[18] The records did contain notations of certain amounts, but Kyne could not recall whether they represented money owing to or by the partnership. (R. 1366.)

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checks in the amount of $428,000 to other bookmakers during 1943.[19] (R. 1416–1424, 1954.)

The original partners at *110 Eddy Street,* which petitioner took over to protect $4,000 owed him by Bent, were Bent, Pratt, petitioner, and Kyne, the two latter holding a joint one-third interest. (R. 1383, 1389.) After the death of Bent and the purchase of Pratt's interest by petitioner, the equal partners were petitioner, Kyne, Cavani and Turner. (R. 1385.) Kyne testified that he had never received any profits from the business, but said that he had reported his proportionate share of the income each year and had received money from the bookkeeper to pay the taxes due on such share.[20] (R. 1386–1392, 1515–1516; cf. 3531–3535.) He was unable to say what his "equity" in the business was. (R. 2236.) During his period in the army Kyne had made affidavit that he and petitioner owned the equipment and that Cavani and Turner "do not own any interest in the business, except a working interest, that is, they work for us for a salary and a cut of the profits." (R. 3588; Ex. 153.) This distinction between partners he sought to explain away at the trial. (R. 2235–2239, 2271–2293.) Cavani received a weekly salary. The only share of profits he received was

[19] Kyne did state that the majority of these resulted from layoff bets on which the partnership received no profit. (R. 1581.)

[20] In 1943 in fact he reported two-thirds of the income as his own, although it actually belonged to petitioner. (R. 1386–1390.)

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$1,500 in 1946. The books showed that he had received money each year to pay income taxes on his proportionate share of the net income and he admitted that the bookkeeper had brought him such checks to sign. He had no idea what his "equity" was at the end of 1946. (R. 2073, 2079–2081, 2090–2095, 2100–2104, 2106–2107.) Petitioner, it appeared, had withdrawn $9,000 at one time and $3,000 at another. (R. 2077–2078, 2110.) When Bent died in 1943 his sister was paid $3,500 which Kyne obtained from Box 48. (R. 1569–1570.) Pratt, the only one who had contributed capital aside from petitioner, was bought out by petitioner early in 1944 for $6,800. (*Supra*, p. 12.)

The purported partners in the *Day-Night Cigar and Liquor Store* were petitioner, Kyne and Lando. Lando made no investment, was informed by petitioner that he had a one-third interest, took no part in the operation, received no profits, and apparently did not know how much of an "equity" he had acquired. He was credited in the returns with a share of the profits and received money to pay his income taxes on that share, but said that he understood the profits were to be left in the business to build up the inventory. (R. 1312–1315, 1338–1342.) Kyne's wife received $10 a day from the business while he was in the service and he received $12.50 a day after he returned. He received no other share of the profits. Yet for 1943 he reported a net profit of

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about $8,500 from the business on his individual income tax return. This was the total profit of the business and he paid the tax on all of it. Slater and Maundrell kept the books and took inventory. Kyne also stated that he understood that the profits were being put into increased inventory and that petitioner was to be repaid his investment before profits were to be drawn by himself and Lando. (R. 1451–1473, 1520–1523, 1540–1541.)

The original purported partners in the *Menlo Club* were petitioner, 40%; Kyne, 15%; Ditto, Nelson, Maundrell and Fricker, 10% apiece; and Turner, 5%.[21] After 1945 Ditto and Fricker dropped out. Petitioner's share was increased to 55% and Nelson's, to 15%. (R. 1703–1705.) Kyne was in the army when the business was acquired in April 1945, and he was not advised of his interest by petitioner until he returned in June 1946. He drew neither salary nor profits, he did not know whether petitioner's original investment had been returned, and he did not know the amount of his own "equity" at the end of 1946. (R. 1400, 1403–1404, 1509–1513.) Maundrell received a salary but no profits during 1945 and 1946. His share was recorded in his capital account on the books and he drew a sufficient amount to pay income taxes on his annual

[21] Ditto, Nelson, Fricker and Turner were not available as witnesses at the trial. (R. 2106, 2919–2921.) It may also be noted that Slater, Nealis and Kopstick were dead. (R. 2004, 2175.)

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share,[22] but it was not until 1948, shortly before he left the club, that his account reveals withdrawals of accrued profits for other than tax purposes. At the time of his departure he drew out $12,000, leaving him a balance on the books of about $1,750.[23] (R. 1705–1708, 1806–1810.) There was a wide discrepancy between the partners' capital accounts as they appeared in the books and as they appeared in the partnership return. (R. 1856–1857.) The club books did not reveal that Ditto and Fricker received any of their accumulated profits when they left after 1945 or how these profits were disposed of.[24] (R. 1708–1709, 1858–1860, 1883–1886.) In November 1946 Kyne withdrew $65,000 from the *Menlo Club* account at petitioner's request and turned it over to petitioner in thousand dollar bills. (R. 1414–1415.)

The *186 Club* began as an ostensible partnership between petitioner, Kyne, Lando, Busterna, Casselini, Nealis and Kopstick. (R. 1303–1304,

[22] The purported shares of all the partners were similarly recorded in the *Menlo Club* books, and all of them drew on their accounts to pay taxes. (R. 1808, 1833.) Nelson's account revealed some withdrawals of cash, not for taxes, beginning with March 1947. (R. 1828–1836.)

[23] This was, of course, long after the revenue agents had begun the investigation.

[24] In answer to a question by defense counsel Maundrell stated that he had seen an acknowledgment by Ditto that he had received $14,000 on leaving. It then appeared that Maundrell had never heard of this until defense counsel showed him the acknowledgment the previous evening. (R. 1897, 1901.)

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1426.) Later, upon orders of Deputy Collector Mooser, who had investigated the business,[25] a corporate form was assumed and Busterna, Casselini, Kyne and Lando became officers. (R. 1303, 1331–1332, 1553–1555, 2011–2015.) There were no officers' meetings and no shares of stock. (R. 1305, 1981, 2034.) Kyne received neither salary nor profits, although the corporate return apparently stated that he was a salaried officer. (R. 1431.) The same was true of Casselini and Lando, although they were given money to pay income taxes on the salary they were supposed to get. (R. 1305, 1334, 1431, 2030, 2034, 2044–2048.) Neither received anything upon withdrawal from the business in 1945. (R. 1337–1338, 1428–1429, 2031.) Busterna, the president, was not even aware that there was a corporation and had little understanding of the nature of the business. (R. 1976–1982, 2023–2024.) He received $25 a day and $5,000 each Christmas, but he was uncertain what this latter amount represented. (R. 1976, 1982–1983, 2011, 2015–2016.) According to the corporate returns he received a salary of $6,000 in one year and $4,500 in the other. (R. 3556, 3575.) Nealis and Kopstick, the only ones who had originally contributed capital other than petitioner, were repaid by

[25] Mooser impressed upon Kyne that the records of the club, which, like the *B-R Smoke Shoppe* records, contained but one figure each day representing a gain or loss, were altogether inadequate. (R. 1436, 1568, 2378–2379, 2392–2393.)

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early 1944 as promptly as the money came in. (R. 1427–1428, 1518.)

The partners in the *Transit Smoke Shop* were Partee, Kyne and petitioner. This business was acquired in November 1946 after the investigation of petitioner's returns had begun, and there appears to have been a distribution of profits to partners. However, Kyne put the $1,000 he received into Box 48 and may have used it for one of the other enterprises. (R. 1191–1192, 1477–1478.)

5. *Starting point of net worth computation.*— As has been noted (*supra,* p. 30), the second challenge to the sufficiency of the Government's computation of increases in petitioner's net worth was that the Government had failed to establish that all of his assets as of December 31, 1943, had been taken into account.

The Government conducted a widespread and exhaustive investigation to determine petitioner's assets as of that date. (R. 2458–2465, 2534–2547, 2558–2559, 2566–2567, 2801–2802.) As a result, the items in the Government's schedule of assets and liabilities were essentially the same as those submitted by petitioner (compare Ex. 183 with Ex. M–1; R. 3612–3613, 3626–3628), and the dispute as to the accuracy of the Government's starting point net worth narrowed to two issues: (1) whether the San Francisco businesses acquired prior to December 31, 1943, were bona fide partnerships; and (2) whether the amount of cash

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in Box 48 was insufficient to make any substantial difference in the net worth starting point. As to the first issue, the Government, on the strength of the evidence set out above, credited petitioner with all the assets of the San Francisco businesses acquired prior to December 31, 1943. As to the second, the Government reasoned that the amount of cash in Box 48 at the starting point was too small to make any difference and simply marked this item in the computation with a question mark.[26] The evidence to support this reasoning is as follows:

Prior to 1944 petitioner reported taxable income only for the years 1934, 1942 and 1943. (R. 567–568.) In 1937 he was "broke" and unable to pay a tax and delinquent penalty in the amount of $178.10 still owing for the year 1934. (R. 2849–2852.) During all the period he managed *Cal-Neva, Inc.*, beginning in 1930, he received no salary and only one dividend which he promptly gambled away. (R. 1912, 2850.) An $1,800 judgment obtained against him in 1938 remained un-

[26] Box 39813 (*supra*, p. 18) was also in use on December 31, 1943, but it was used only for overnight storage of the *B–R Smoke Shoppe* bank roll, and this had already been included in the computation among the assets of that business. (R. 1369, 1373–1374, 1939–1942, 3601; cf. 1357–1360, 1537.) Box 730 (*supra*, p. 18) was not acquired until later. (R. 1369–1370, 1536.) The safe at *110 Eddy Street* (*supra*, p. 17) was used only to keep the previous day's receipts overnight. (R. 1536, 2076, 2096–2097.) The safe in the main office at 50–52 Mason Street was not acquired until 1944. (R. 1709–1711, 2515, 3607–3608.)

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paid until September 1945. (R. 1282–1285.) He was still in debt to his brother at the end of 1943, although the brother had written off one amount as a bad debt at the end of 1942.[27] (R. 2992, 3395.) And he owed *Cal-Neva, Inc.*, $23,152.77 as of December 31, 1943. (R. 2507.)

In December 1941, however, he began to invest cash in the acquisition of business interests. These cash payments, at first comparatively small, grew larger and larger, as we have seen (*supra*, pp. 10–14), during the period up to the end of 1946. The *B-R Smoke Shoppe* was acquired and put into operation in December 1941 for $10,000. In July or August 1942 petitioner took over the tavern at *110 Eddy Street*, spent a considerable sum in improvements, and obtained $3,400 from Pratt to meet part of the cost.[28] On the death of Clarence Bent, early in 1943, the claim of his estate was settled by payment of $3,500 taken from Box 48. (R. 1569–1570.) In March 1943 petitioner acquired the *186 Club* and the *Day-Night Cigar and Liquor Store* with $6,000 of his own and $16,000 obtained from Nealis and Kopstick.

[27] When Mooney, in preparing petitioner's 1942 income tax return, asked what his income was petitioner said he had made $10,915 on the Kentucky Derby. This was the total amount of net taxable income reported for 1942. (R. 879–880.)

[28] The sum expended by petitioner appears to have been about $24,000. A trustee account in that amount in the name of Kyne is recognized as belonging to petitioner. (R. 3636–3637.) Some of this was drawn from *Cal-Neva, Inc.*, by petitioner. (R. 2508.)

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In May 1943 he purchased the El Cerrito property in which the *21 Club* and the *San Diego Social Club* were located for $25,000. Nealis and Kopstick were repaid their $16,000 in installments as fast as the money came in; the payments were made from Box 48 and were completed early in 1944. Pratt, who was becoming restive when not informed of progress at *110 Eddy Street,* was given $2,000 in the latter part of 1943 and was finally bought out for an additional $4,800 in March 1944.

Box 48 was used as a depository for the funds of the San Francisco enterprises and for other funds belonging to petitioner (*supra,* p. 17). There is no direct evidence as to the amount it contained on December 31, 1943. Kyne testified that the amount varied, and answered "Yes" when asked by defense counsel if it was sometimes considerable and sometimes less. (R. 1536.) He stated that he had kept a daily record but that he had given it to Slater and had not seen it since. (R. 1559–1560.) He testified that approximately $17,700 was placed in the box on December 3, 1943. However, this was an abnormal transaction, representing the return of a portion of a deposit petitioner had made on the purchase of two carloads of whiskey. (R. 859–860, 875, 1482–1490.) Furthermore, Kyne testified that this money was to be used as needed in the San Francisco businesses, that money from the box was used to purchase cashier's checks to pay lay-off bets of the *B-R Smoke Shoppe,* and that during that same month

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of December checks in excess of $20,000 were purchased. (R. 1416–1423, 1484; Ex. 116.)

During the investigation petitioner and his associates refused to give any indication of the amount of cash in Box 48, although the revenue agents repeatedly pointed out to Kyne, Slater and Maundrell that the records of the San Francisco businesses were inadequate and asked for information as to the contents of safe deposit boxes and safes. (R. 2154, 2177, 2199, 2463, 2563–2566.) The agents were never able to obtain access to, or information concerning, the contents of any of the safes or boxes. (R. 2547, 2558, 2566, 2797–2798.) With specific reference to Box 48, Kyne refused the agents access and told them that he could give no information as to the amount of cash it contained at any particular date and that, contrary to his later statement at the trial, there was no record of its contents. (R. 2566–2567.) Kyne arranged an interview between petitioner and the agents on April 8, 1948, after the investigation had been in progress for almost two years, but petitioner, on advice of his attorney, refused to give any information on the ground that the agents would not tell him what charges they intended to bring or in what particulars he had failed to report taxable income.[29] (R. 2558–2572, 3072.) In 1949 the

[29] A written statement to this effect, handed to the agents at the conclusion of the abortive interview, had been dictated by petitioner's attorney and typed before the agents arrived. (R. 3068, 3619; Ex. G–1.)

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Bureau of the Internal Revenue sent petitioner a notice (commonly known as a 90-day letter) stating that the Commissioner had determined that his income tax returns for the years 1944, 1945 and 1946 were deficient. The notice specified the amount of unreported income for each year, and it specified that this income had been received from the same enterprises which we have enumerated above. (R. 30, 32.) In February 1950 petitioner was officially notified that criminal proceedings were being considered. (R. 3210.) There were numerous conferences between petitioner's attorneys and accountants on the one hand and representatives of the Government on the other, and on May 25, 1950, almost a year prior to the indictment, the Government offered to submit its net worth computation ~~for computation~~ for comparison if petitioner's representatives would prepare a similar computation on his behalf. This offer was never accepted. (R. 36–39.) At the trial petitioner offered no evidence as to the amount of cash in Box 48 at the starting point, or at any other time, and contented himself with arguing that the Government's net worth computation was fatally defective because it had failed to establish this item accurately. (R. 2942–2984.)

6. *Results of net worth computation.*—In the Government's computation the amount of federal income taxes paid by petitioner was added to the annual increase in net worth in order to

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determine his taxable net income. Although the evidence clearly indicated that his nondeductible living expenses were considerable, this item was simply marked with a question mark in the computation of his net worth at the end of the period, since he had refused information on the subject. (R. 2560–2562, 2566; cf. 2923–2939.) For 1944 the computation showed a net income of $50,747.91, of which $31,747.91 was unreported. For 1945, the net income was $71,065.40, of which $11,747.04 was unreported. For 1946, the year on which the jury failed to agree, the net income was $254,285.42, of which $231,795.84 was unreported. (R. 88, 3612–3613; Ex. 183.)

SUMMARY OF ARGUMENT

I

Petitioner was convicted of attempting to evade income taxes by failure to report large portions of his taxable income. The Government presented circumstantial proof of unreported income by showing large increases in petitioner's net worth in excess of his reported taxable income, and by showing that the only reasonable source of this excess was current taxable income.

The use of the net worth method of proof was justified by the fact—established by the jury's verdict—that petitioner's books and records were completely inadequate. There were no available records of petitioner's personal finances. Some of the business records were missing. Others had

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only one entry a day, showing the amount won or lost. Important items were not entered on the books and no proper trial balance could be drawn. Petitioner filed his returns on the cash basis. But his books failed to reveal all his income. The Government accordingly determined the amount of his taxable income by a net worth computation on the cash basis.

In any event, Section 41 of the Internal Revenue Code does not require that the Government, before introducing net worth proof of income in a criminal case, must first make a showing of the inadequacy of the taxpayer's method of accounting or obtain a prior determination of such inadequacy by the Commissioner. A net worth computation is not an alternative or substitute method of accounting, but a reconstruction of income. It affords circumstantial proof of income; and Section 41 imposes no restriction on the Government's choice of its method of proof in criminal cases.

II

The evidence was sufficient to warrant leaving the case to the jury, and to support the verdict of guilt. The Government established the starting point of its net worth computation by evidence from which a reasonable man could have concluded beyond a reasonable doubt that the increases in net worth reflected unreported taxable income.

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(a) The Government showed, by direct and circumstantial evidence, that there could have been no substantial amount of cash in petitioner's safe deposit box at the starting point, principally because petitioner was spending cash as rapidly as he acquired it at that time.

(b) The Government did not use a hybrid method of accounting in its net worth computation, but adhered strictly to the cash method which had been used by petitioner in his returns. The evidence indicates that the "markers" representing unpaid bets due the *B-R Smoke Shoppe* were the equivalent of advances from cash on hand, and were treated as cash items by petitioner and his associates. Furthermore, there was evidence to support the verdict on the 1945 counts even if the $15,000 in markers were excluded from consideration.

(c) The evidence clearly established that the so-called partnerships were shams, used by petitioner for tax evasion purposes. The question was properly submitted to the jury, under instructions which made it clear that petitioner could not be convicted unless the jury found that he wilfully filed false and fraudulent returns with the intent to evade income tax. Since the evidence supports the conclusion, necessarily established by the verdict, that the partnerships were not real but were actually sole proprietorships of petitioner, and that petitioner acted with fraudulent intent to defeat and evade the tax, there

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is no basis for disturbing the conviction in this regard.

III

The trial court did not err in denying petitioner's requests for inspection or production of documents under Rules 16 and 17 of the Federal Rules of Criminal Procedure. Petitioner had ample opportunity before the indictment and trial to examine the records in question and to prepare his defense. Petitioner's motions were not made until shortly before the trial was scheduled to begin, and if granted would have required a further lengthy continuance of the trial. Since petitioner failed to explain his delay in making the motions, the trial court was justified in its action. In any event, there is no showing of possible prejudice. Records specifically requested by the defense during the trial were promptly made available to it. In the circumstances of this case, the trial court clearly acted within its discretion in denying petitioner's motions.

IV

In his motion for a new trial petitioner alleged that in the course of the trial an improper conversation occurred between one of the jurors and an unidentified third person. Petitioner renews in this Court his request, denied by the district court, for a hearing to inquire into the facts concerning the alleged incident to ascertain whether he was prejudiced thereby. The

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Government agrees that, where it is shown on a motion for a new trial that a potentially prejudicial outside contact with a juror has occurred, the appropriate procedure is to probe the matter by a hearing on the record. Accordingly, the Government does not oppose remand of the case to the district court for that purpose.

ARGUMENT

I

THE USE OF THE "NET WORTH" METHOD OF PROOF TO ESTABLISH UNREPORTED INCOME WAS PROPER

The indictment charged that petitioner had attempted to evade and defeat his income taxes by failure to report large portions of his net taxable income. As the petition for certiorari pointed out (p. 18), there are several methods by which the Government may proceed to prove the truth of such an allegation in a criminal tax case. The most obvious is by direct evidence that the defendant received specific items of income which he did not report in his returns. The same result may, however, be reached by circumstantial evidence. Thus, unreported income may be shown by unexplained increases in the defendant's net worth, and expenditures in excess of reported income. Such circumstantial evidence, showing that the defendant's increase in assets and non-deductible expenditures during the year are substantially in excess of his reported income, justifies the conclusion that the

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excess represents current taxable income, if the Government has established that it could not have come from nontaxable income or funds accumulated prior to the taxable period. The Government is not required to prove the exact amount of unreported income in a criminal tax evasion case. *United States* v. *Johnson,* 319 U. S. 503, 517.

As the Court of Appeals stated (R. 3762), the Government's case against petitioner was "based upon the net worth method, the underlying theory of which is that where a person's net worth at the end of a particular year is greater than his net worth at the beginning of that year, and such increment is not attributable to gifts, devises, loans, or other non-income sources, an inference may be drawn that the increase in net worth represents income to the taxpayer." The validity of this method of proof, which is essentially indistinguishable from the so-called "expenditures" method of proof sustained by this Court in *United States* v. *Johnson, supra,* has long been recognized in the lower federal courts. *Banks* v. *United States,* 204 F. 2d 666 (C. A. 8), certiorari denied, 346 U. S. 857; *Schuermann* v. *United States,* 174 F. 2d 397 (C. A. 8), certiorari denied, 338 U. S. 831; *Bell* v. *United States,* 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930; *Dawley* v. *United States,* 186 F. 2d 978 (C. A. 4); *United States* v. *Potson,* 171 F. 2d 495 (C. A. 7); *United States* v. *Chapman,* 168 F. 2d 997 (C. A.

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7), certiorari denied, 335 U. S. 853; *Gendelman* v. *United States,* 191 F. 2d 993 (C. A. 9), certiorari denied, 342 U. S. 909; *Clawson* v. *United States,* 198 F. 2d 792 (C. A. 9); *Barrow* v. *United States,* 171 F. 2d 286 (C. A. 5); *Gariepy* v. *United States,* 189 F. 2d 459 (C. A. 6); *Kirsch* v. *United States,* 174 F. 2d 595 (C. A. 8); *Leeby* v. *United States,* 192 F. 2d 331 (C. A. 8); *Pollock* v. *United States,* 202 F. 2d 281 (C. A. 5); *United States* v. *Yeoman-Henderson, Inc.,* 193 F. 2d 867 (C. A. 7); *Brodella* v. *United States,* 184 F. 2d 823 (C. A. 6).

In this case the Government undertook to prove that petitioner had failed to report substantial portions of his taxable income for 1944, 1945, and 1946, by showing annual increases in his net worth, the only reasonable source of which was current taxable income. Petitioner urges here, as he unsuccessfully did in both courts below (*supra,* p. 7, fn. 3), that such a method of proof should not have been allowed in this case. The argument, repeated in this Court (Br. 20–26), is that Section 41 of the Internal Revenue Code (*supra,* p. 3) permits the Government to prove unreported taxable income by showing increases in net worth only in a case where the "method of accounting" employed by the taxpayer does not clearly reflect his income; that the evidence in this case established clearly inadequate books only with respect to the *B-R Smoke Shoppe,* the errors in the books of the other enterprises amounting to no more than normal accounting errors; and

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that the use of the net worth method of proof was, therefore, improper. Petitioner makes two further arguments to this Court which were not made or considered in the courts below. He argues that, before the net worth method of proof of unreported income can be employed by the Government in a criminal tax case, the Commissioner of Internal Revenue must make a preliminary determination that the method of accounting employed by the defendant is inadequate. And he argues that there can be no prosecution for wilful attempted evasion of income taxes under Section 145 (b) (*supra,* p. 4) of the Internal Revenue Code, until the Commissioner has first determined officially how much taxes the defendant owes. We submit that none of these arguments has merit.

(a) Assuming for the moment that Section 41 has application to a criminal prosecution for tax evasion—and we shall argue, pp. 48–54, *infra,* that it has not—, the jury in this case was instructed that the Government's use of the net worth method of proof was authorized only "if the books of the taxpayer are found to be inadequate" (R. 136–137),[30] and, as the Court of Appeals expressly held (R. 3762), the evidence is

[30] While we believe this instruction was erroneous, see pp. 48–54, *infra*, petitioner can hardly complain that such an instruction was given, since its only effect was to increase the burden of proof imposed on the prosecution in order to convince the jury of petitioner's guilt.

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sufficient to sustain a finding that petitioner's records were inadequate. The testimony here presents overwhelming evidence of the utter inadequacy of petitioner's "cash" method of accounting, since there were no books and records upon which an adequate cash accounting could be made.

In the first place, there were no available records of petitioner's personal finances.[31] His right hand man, Kyne, and his bookkeepers and accountants, Maundrell, Slater and Ayton, turned over to the agents numerous business records, but they denied knowledge of petitioner's personal finances and petitioner himself refused all requests for information. (R. 2559, 2563–2566, 2572). His personal funds appear to have been commingled in Box 48 with cash belonging to the various businesses, but Kyne had no recollection of the amounts in the box and there was no available record. (*Supra,* pp. 18, 33, 34.) The absence of personal records,[32] together with the

[31] With the exception of two small bank accounts and such personal purchases and expenditures as the agents were able to unearth from the records of third parties.

[32] Petitioner was required to keep such records as would enable the Commissioner to determine the correct amount of his taxable income. Section 54 (a) (26 U. S. C., 1946 ed., Sec. 54) of the Internal Revenue Code provides:

> Every person * * * shall keep such records * * * as the Commissioner * * * may from time to time prescribe.

Treasury Regulations 111, Sec. 29.54–1, under the Internal Revenue Code, in effect during the years involved in this case, provided:

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indiscriminate and unrecorded use of the funds in Box 48 as needed in any of the San Francisco businesses, would alone have been sufficient to justify the use of the net worth computation.

Nor were the books of the various enterprises such as would have enabled the Commissioner to determine the taxable income they earned. Weaver, the Government's expert accountant, testified that in his opinion the books were entirely inadequate, and he had expressed this criticism to petitioner's associates during the investigation. (R. 2564, 2715, 2766–2767.) The inadequacy of the *B-R Smoke Shoppe* books was admitted in the petition for certiorari (p. 22). The only records of this enterprise were a series of books which contained one single figure for each day representing the amount won or lost that day, and this was a net figure from which all expenses had already been deducted. Not even this was available for the eighteen month period of Kyne's absence in the army, since petitioner had ordered the destruction of all records kept during that time. (R. 1349–1352, 1358, 1946, 1964–1967). The records of the *186 Club* were examined by a deputy collector during 1944. The club op-

Every person * * * shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records * * * as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return * * *.

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erated 24 hours a day with three eight-hour shifts, and the only records consisted of poker sheets made out at the end of each shift, and a book in which a single figure, representing either win or loss, was entered for each shift. The deputy collector discovered that the entries in the book did not correspond with the figures on the sheets and he directed Kyne, orally and in writing, to keep adequate books of account. (R. 2372–2393.) At the trial, however, the only records available to the Government were some of the daily poker sheets.[33] (R. 1436–1437, 1640–1650, 2421–2422.)

There were no 1945 books whatsoever for the *Menlo Club*. (R. 1778–1780, 2795–2796.) The 1946 books consisted of a record of receipts and disbursements and a few ledger accounts, and no proper trial balance could be prepared from them. (R. 2518–2519.) Money was put into the restaurant account standing in the name of petitioner and Maundrell and checks were drawn upon it for particular purposes, such as the construction of the general offices at 50 Mason Street, but there

[33] No figure was included in the net worth computation for the *186 Club* (R. 3612) since petitioner had made no original investment and since it was operated as a corporation. However, Busterna, the "president", testified that there was a profit every year, and although on cross-examination by defense counsel he attempted to modify this statement, the jury would clearly have been justified in inferring that the club was a source of considerable income which went into Box 48. (R. 1430–1431, 1986, 1999, 2011.)

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was nothing in the books to indicate where this cash came from or whether it represented a credit of the club. (R. 1743–1753.) A bank account opened in October 1946 did not appear on the books, and they contained no record of two checks drawn by Kyne, both previously mentioned (*supra,* pp. 14, 28), in the amounts of $65,000 and $16,000. (R. 2794–2795.) There was no record of cash and the bank accounts could not be reconciled with cash receipts shown on the poker sheets from the gambling room. (R. 2797.) There was no record of the supposed payment of $14,000 to Ditto at the time he withdrew from the business. (R. 2799–2800; *supra,* p. 28, fn. 24.) The general ledger at *110 Eddy Street* was posted only up to October 31, 1945; the inventory account was missing until sometime in 1945; no trial balance could be drawn from the books. (R. 2333.) The revenue agent who examined the El Cerrito businesses never saw any books for the *San Diego Social Club* (R. 1275), and the books of all three El Cerrito businesses were turned over to petitioner by Pechart two weeks after the filing of the indictment in this case and were not available at the trial. (R. 1102–1104, 1137–1138.)

But petitioner urges (Br. 22) that the Government should not be heard to say that the books of any of the enterprises were inadequate because it still retained some of these books at the time of trial and did not introduce them in evidence. Petitioner, of course, knew which of his records

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were essential to the presentation of a correct picture of his income, and there is not a shred of evidence to indicate that any record of any value was withheld from him. Whenever during the trial the defense requested the production of specific documents in the Government's possession, they were promptly produced. (R. 813–814, 1794, 2008, 2020, 3182, 3470–3473.)

(b) We have assumed up to this point that Section 41 of the Internal Revenue Code requires the Government to make some independent showing of the inadequacy of a taxpayer's books before it may be permitted to use the net worth method in a criminal case. That section provides:

> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

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The Court of Appeals stated in its opinion (R. 3762):

> The net worth method of computing income may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income. See 26 U. S. C. A. Sec. 41.

While it is unnecessary for this Court to reach the question—since, as has been shown, petitioner's books and method of accounting *were* inadequate, as was found in both courts below—we believe the Court of Appeals erred in regarding Section 41 as imposing a limitation on use of the net worth method of proof in a criminal tax evasion presentation. The net worth method is not a method of accounting; its purpose in a criminal case is not to recompute the taxpayer's actual income, in order to determine his exact civil liability in dollars and cents. It is a method of proving, by relevant circumstantial evidence having probative value, that there is a substantial understatement in the taxpayer's reported income and tax.[34] Even though a taxpayer's method of accounting appears, on the face of his books, to reflect clearly his income, the Government is not precluded from showing that some items of income

[34] "While the government had the burden of proof, it was not required to make a perfect case or to prove the defendant guilty to a mathematical certainty. The government did not have to establish the exact amount of unreported income of the defendant. *United States v. Johnson*, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546." *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C. A. 8), certiorari denied, 338 U. S. 831.

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have not been reported. The net worth method is not, as petitioner assumes, a substitute for the cash, accrual, or installment method of accounting. It is simply a means for proving that a taxpayer, whatever his method of keeping books, has failed to show items of taxable income.

Section 41 deals with whether a taxpayer, in view of the character of his business and the nature of his activities and transactions, should be on one or the other basis of accounting or on a calendar or fiscal year basis. Treasury Regulations 118, Sec. 39.41–2. That is a problem of accounting, the kind of problem involved in cases like *Lucas* v. *American Code Co.,* 280 U. S. 45; *Dixie Pine Co.* v. *Commissioner,* 320 U. S. 516, 518–519; and *Security Mills Co.* v. *Commissioner,* 321 U. S. 281. But where a taxpayer either keeps no books, or books which are incomplete, inaccurate, or otherwise unsatisfactory, the Commissioner is authorized to use such means for reconstructing his income (including the net worth method) as may establish the correct amount. Treasury Regulations 118, Sec. 39.41–1; *Halle* v. *Commissioner,* 175 F. 2d 500, 502–503 (C. A. 2); *Harris* v. *Commissioner,* 174 F. 2d 70, 72–73 (C. A. 4); *Cohen* v. *Commissioner,* 176 F. 2d 394, 397 (C. A. 10); *Richards* v. *Commissioner,* 111 F. 2d 374, 375 (C. A. 5); *Bishoff* v. *Commissioner,* 27 F. 2d 91, 93 (C. A. 3). The computation of income by examining increases in net worth involves no change of method of

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accounting from that employed by taxpayer. As has been noted (*supra,* p. 7), petitioner was on the cash basis, and the net worth computation was made on the same basis. It is not his method or basis of accounting, but the income not accounted for and reported, which forms the basis of this prosecution.

A solidly based net worth computation may provide sufficient evidence in itself that the taxpayer's method of keeping his books does not clearly reflect his income. For if the Government establishes both the totality of the taxpayer's assets at the starting point, and excessive increases in his net worth, by evidence which, if believed, would leave no room for a reasonable doubt, the only reasonable inference must be that his books do not properly reflect all of his transactions. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 187; *Del Marcelle* v. *Kuhl,* 80 F. Supp. 616, 618 (E. D. Wis.).

Section 41 cannot be construed, therefore, to require the Government to prove the inadequacy of a defendant's *method* of accounting before it may proceed to prove its case by circumstantial evidence. There is no such rule in criminal law,[35] and neither the language of Section

[35] Truth may be established just as solidly by circumstantial evidence as by direct. In each case the determination depends, not upon the type of the evidence, but by its convincing quality. *United States* v. *Becker,* 62 F. 2d 1007, 1010

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41 nor anything that we have been able to find in its legislative history indicates a Congressional intent to make it applicable to criminal cases. It should be noted that the statute refers to computations made by the Commissioner. But the Commissioner is not a party to a criminal case. Civil tax cases are disputes between the taxpayer and the Commissioner, the question is the *exact* amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's computation is erroneous. In criminal cases, however, the issue is whether the taxpayer fraudulently evaded *some* of his income taxes, and the burden of proof is on the Government. The Government must prove, by competent evidence and beyond a reasonable doubt, that the defendant has violated Section 145 (b) of the Internal Revenue Code, *supra,* which punishes "any person who willfully attempts in any manner to evade or defeat" his tax liability.

The breadth of this provision has frequently been noted by the Court. *Spies* v. *United States,* 317 U. S. 492, 499; *United States* v. *Johnson,* 319 U. S. 503, 515; *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 45–46. The choice of methods of proof rests with the Government; and Section 41 has reference, not to methods of proof in criminal cases, but to the various recognized basic

(C. A. 2); *McCoy* v. *United States,* 169 F. 2d 776, 784–786 (C. A. 9), certiorari denied, 335 U. S. 898; I and IX *Wigmore, Evidence,* Secs. 25–26, 2497; II Wharton, *Criminal Evidence* (11th ed., 1935), Sec. 926.

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"methods of accounting", e. g. cash, accrual, or installment, used in computing civil tax liability. See *Healy* v. *Commissioner,* 345 U. S. 278, 281.[36] Section 41 simply gives the Commissioner authority to change the taxpayer's method of accounting, where it does not clearly reflect the income, from one basis to another. It does not deal with a situation like this, where the taxpayer, even though his method of accounting may be proper, has wilfully concealed items of taxable income. Petitioner's method of accounting is not challenged here; the gist of the offense of which he was convicted is the failure to report income and pay the tax due thereon. The net worth method of proof in a criminal case is thus used to test the verity of the books, and not the adequacy (from an accounting standpoint) of the basis on which they are kept.

Section 41, as petitioner points out (Br. 21), has been held by this Court to refer "to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books." *United States* v. *American Can Co.,* 280 U. S. 412, 419; and see *Schram* v. *United States,* 118

[36] See Avakian, *Net Worth Method of Establishing Fraud,* 11 Institute on Federal Taxation 707, 709 (1952):

> Since different methods of basic accounting (such as cash, accrual, or installment) will produce different results, it is essential that the net worth statement reflect the correct method for the particular case (which ordinarily would be the method chosen by the taxpayer).

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F. 2d 541, 543–544 (C. A. 6). But a criminal prosecution for tax evasion *is* concerned with an inquiry into the accuracy and proper disclosure of individual items of income, and not with the accounting problem of which method of keeping books—cash or accrual, fiscal or calendar year, etc.—is more appropriate in clearly reflecting the income shown by such books.

This same confusion appears in the two arguments raised for the first time in this Court. Petitioner argues (Br. 20–21, 25) that the Government may not use the net worth method in a criminal case until the Commissioner has made a preliminary determination under Section 41 that the taxpayer's method of accounting is inadequate. No such objection was raised in the trial court or in the Court of Appeals.[37] The first hint of it appears in a doubtful form in the petition for a writ of certiorari.[38] Questions not presented in the petition are not open for consideration in this Court. *Helvering* v. *Taylor,* 293 U. S. 507, 511; *Gunning* v. *Cooley,* 281 U. S. 90, 98. Even if the argument had been properly raised in the lower courts and in this Court, it is based on a misconception of Section 41 and of the relation between the collection of taxes and prose-

[37] One of petitioner's requested instructions left the determination of the issue to the jury. (R. 87.) No objection was made to the instructions given on the issue. (R. 136–137, 142, 3495.)

[38] The question was stated in an alternative and ambiguous manner in the specifications of error. (Pet. 17.)

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cution for evasion of taxes, and for the reasons stated above, is without merit.

The second new argument (Br. 23–26) is that no prosecution for wilful attempted evasion of taxes can be brought under Section 145 (b) of the Internal Revenue Code unless the correct amount of the taxes due has first been determined officially by the Commissioner. This was not raised in either of the lower courts or in the petition for the writ. Furthermore, it ignores the fact that our system of income taxation is based largely on self-assessment. *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, 223. The Commissioner does not impose taxes, as petitioner implies. The tax is imposed by the statute. For purposes of determining civil liability, the Commissioner determines and assesses the correct amount when the taxpayer files no return or one which is erroneous or fraudulent.[39] Determination and assessment by the Commissioner is, however, not a prerequisite to criminal prosecution. *Guzik* v. *United States*, 54 F. 2d 618, 619 (C. A. 7), certiorari denied, 285 U. S. 545; *United States* v. *Commerford*, 64 F. 2d 28, 30 (C. A. 2), certiorari denied, 289 U. S. 759.

[39] Petitioner argues (Br. 24) that a criminal tax evasion case under Section 145 (b) cannot be brought unless the Collector has prepared a substitute return under Section 3612. However, since 1939, when the practice was formally discontinued by order of the Commissioner, no substitute returns are prepared by Collectors even in civil cases. (Mimeograph No. 4939, dated July 19, 1939.)

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II

THE EVIDENCE WAS SUFFICIENT TO WARRANT SUBMISSION OF THE CASE TO THE JURY AND TO SUPPORT THE VERDICT

Petitioner challenges the sufficiency of the evidence principally on the grounds that the Government failed to establish a solid starting point and that the partnerships were sham. He also challenges the validity of the computation as to the year 1945 because the Government treated "markers" for unpaid gambling debts as cash items.

1. The starting point was established

The burden of proof, of course, lay upon the Government to show that petitioner had received taxable income in 1944, 1945, and 1946 which he failed to report. And since the Government chose to sustain this burden by showing increases in net worth which could only have come from current taxable income, the Government had to establish petitioner's net worth at the starting point, December 31, 1943. Without this fixed term the whole computation would necessarily fail.

However, it was unnecessary that petitioner's absolute net worth be shown. Capital assets held throughout the taxable period could have no effect upon the determination of his income. Furthermore, since the Government was not required to prove the exact amount of unreported income (*United States* v. *Johnson, supra*), other assets

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held by petitioner at the starting point did not have to be given an exact dollars and cents value in the computation, provided the Government, even though unable to determine their exact value, could show that they were insufficient to account for the unexplained increases in net worth. The burden rested originally upon the Government, and the burden remained upon the Government, to establish a fixed starting point. But what this means is that the Government had to prove that petitioner did not have sufficient assets at the starting point, plus his reported income for the years involved, to account for the increases in his net worth.[40] The theory of such net worth computations was carefully and clearly explained by the Government's expert, Weaver (R. 2554–2558, 2591–2594, 2611–2612, 2805, 2820–2825; cf. 3270–3271, 3291–3293), and the essential elements were repeated in the court's charge to the jury (R. 131–133, 136–138, 155).

Petitioner contends (Br. 17, 26–31) that the Court of Appeals missed the vital significance of the starting point and shifted the burden of proof to the defense by holding that the Government had established a *prima facie* case despite the fact that it could not determine exactly the amount of cash in safe deposit Box 48. He appears to argue both that the Court of Appeals

[40] Petitioner does not claim that the increases were attributable to nontaxable receipts such as gifts, bequests, or loans. The investigation on this point was exhaustive. (R. 2458–2465, 2534–2547, 2558–2559, 2800–2802.)

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applied an improper test of the sufficiency of the evidence, and that the evidence was insufficient even if the proper test had been applied.

The pertinent passages of the opinion of the Court of Appeals (R. 3762–3767) clearly indicate, however, that that court understood the significance of the starting point and did not apply an improper test of the sufficiency of the evidence. After briefly outlining the theory of the net worth computation in income tax cases (R. 3762) and noting petitioner's attack on the accuracy of the starting point, the court said (R. 3763):

> It was necessary for the Government to establish appellant's net worth at the beginning of the period during which the alleged evasion occurred in order to compare his increment in net worth with the income actually reported by appellant on his and his wife's tax returns.

The court pointed out that the test of the sufficiency of the Government's evidence was whether reasonable minds, regarding that evidence in the light most favorable to the Government, could conclude beyond a reasonable doubt that petitioner had wilfully failed to report substantial portions of his taxable income.[41] (R. 3763–3764,

[41] For the test to be applied in determining the sufficiency of the evidence, see *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251–252; *Stilson* v. *United States*, 250 U. S. 583, 588–589; *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Gen-*

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3766–3767.) Applying this test to the starting point of the Government's computation the court pointed out that, while petitioner contended that there was a *possibility* that Box 48 contained a substantial amount of cash on December 31, 1943, there was no evidence in the record of such substantial cash funds, and that there was, in fact, evidence which "tended to show that [he] did not have substantial cash at the beginning of 1944." (R. 3765.) It is clear that the court held that the burden of proof is on the Government to establish a *prima facie* case, and that when the net worth method is used in an income tax case the Government must establish a fixed starting point, but that possible "assets" which are shown to be either nonexistent or too insubstantial in amount to affect the computation may be disregarded.

The question remains whether the evidence to establish the starting point in this case actually was sufficient under the test applied by the Court of Appeals—i. e., whether, as petitioner contends, the Government's evidence was so inherently weak and unreliable that the case should not have been permitted to go to the jury. Since the only item about which there can be any dispute is the amount of cash in Box 48,[42] the ultimate question is whether

delman v. *United States*, 191 F. 2d 993, 995 (C. A. 9), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States*, 183 F. 2d 391 (C. A. 9), certiorari denied, 340 U. S. 864.

[42] As to petitioner's intimation (Br. 6, 31) that there could have been substantial sums in safes or other safety deposit boxes, see *supra*, p. 31, fn. 26.

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the jury could reasonably have concluded that the amount in the box on December 31, 1943, was insufficient to make any substantial difference in the results of the Government's computation. That computation showed an unexplained increase in petitioner's net worth totaling almost $33,000 for the first of the three years involved alone.[43] It would, therefore, require a considerable sum to deprive the Government's case of substantiality. We have set forth in the Statement (*supra*, pp. 30–35) the evidence upon which reasonable jurors could conclude that the cash in the box at the end of 1943 was only an inconsiderable fraction of $33,000. That evidence falls into two categories: (a) direct evidence of the cash in the box; (b) evidence that petitioner did not have enough cash to satisfy his needs at the close of 1943.

(a) The direct evidence was slight. Kyne testified that the amount in the box was sometimes considerable and sometimes less. He also testified that he put $17,000 in on December 3, 1943, but this was offset by cashier's checks in the amount of $20,000 purchased with funds from the box during the same month.

(b) There was considerable and cogent evidence to show that petitioner did not have, at that time, enough cash to meet his requirements. Unable to pay $178.10 in delinquent federal income taxes in 1937, petitioner did not begin to file returns

[43] The unexplained increases for the three years involved totaled almost $275,000.

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showing taxable income until 1942. Yet, beginning with the purchase of the *B-R Smoke Shoppe* in December 1941, he rapidly poured cash into new acquisitions. The comparatively small amounts of income reported in 1942 and 1943 were obviously disposed of in this manner, and petitioner had to obtain money from other sources to make the purchases he desired. During 1943 he obtained $16,000 from Nealis and Kopstick to acquire the *186 Club,* and he repaid them in installments as fast as the money came in, the payments being completed early in 1944. He obtained $3,400 from Arthur Pratt to help finance improvements at *110 Eddy Street,* and soon bought him out for $6,800, part of which was paid late in 1943 and the remainder in March 1944. He bought a $19,000 home in August 1942, borrowing $5,000 from a bank to complete the purchase. (R. 699–700, 713–720, 3613.) He still owed $4,000 on this loan at the end of 1943; he was still in debt to his brother, although one loan had previously been charged off as a bad debt; he still had not paid the $1,800 Monahan judgment dating back to 1938; and his account at *Cal-Neva, Inc.,* showed a debit of $23,152.77. Petitioner was investing cash as rapidly as he acquired it. Surely, under such circumstances, it could reasonably be inferred that the cash in the box was no more than a small fraction of $33,000, much less $275,000.

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Although petitioner conceivably might have had a considerable amount of cash in the safe deposit box, the defense failed to present evidence to that effect during the trial. On the contrary, he refused to permit examination of the box by the Treasury agents (*supra*, pp. 33–35). Information as to the existence of such cash was peculiarly within the knowledge of petitioner and could easily have been presented by him. He contends, nevertheless, that the *possible* existence of considerable cash creates a fatal defect in the Government's case. This Court has stated, however, that "The general rule * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could readily be disproved by the production of documents or other evidence probably within the defendant's possession or control." *Rossi* v. *United States*, 289 U. S. 89, 91–92, and cases cited; *Guzik* v. *United States*, 54 F. 2d 618, 629 (C. A. 7); VIII Wigmore, *Evidence* (3d ed., 1940), Sec. 2273; II *id.*, Secs. 285–291. Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[44] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[45] it may also give weight to the failure

[44] *Wilson* v. *United States*, 162 U. S. 613, 619.

[45] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252–253 (C. A. D. C.).

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of an accused taxpayer to produce evidence of the value of assets which he claims are sufficient to deprive the Government's case of substance.[46] The force of a *prima facie* case may not be defeated by "skillful concealment" (*United States* v. *Johnson, supra,* pp. 517–518), or by mere conjecture and speculation as to the possible existence of undisclosed assets. *Banks* v. *United States,* 204 F. 2d 666, 672 (C. A. 8), certiorari denied, 346 U. S. 857.[47]

It is clear from the foregoing that the Court of Appeals applied the proper test of the sufficiency of the evidence, and applied it properly to the facts of this case. It held that in a net worth case the accuracy of the Government's starting point must be established beyond a reasonable doubt, but it also held that the amount of cash in Box 48 could be disregarded because the Government's evidence permitted the jury to conclude that it was too small to have any substantial effect on the results of the net worth computation. The case was, therefore, properly submitted to the jury. *Curley* v. *United States,* 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari

[46] Cf. *Bell* v. *United States,* 185 F. 2d 302, 309 (C. A. 4), certiorari denied, 340 U. S. 930.

[47] In any event, under the instructions given in this case, petitioner cannot complain that the jury may have attached undue significance to his failure to testify. The trial judge expressly charged (R. 152) that "no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of, or on account of, his failure to testify as a witness in the case."

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denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C. A. 9), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States,* 183 F. 2d 391 (C. A. 9), certiorari denied, 340 U. S. 864. As the Court of Appeals said in its opinion (R. 3765):

> If a defendant could prevent a case of this type from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated. Skillful concealment cannot be made an invincible barrier to proof. *United States* v. *Johnson* [319 U. S. 503], at 518.

Here, where the probative force of the Government's evidence has the support of both courts below and of the jury, the latter's verdict should not be set aside by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518.[48]

[48] "Evidence which, if unexplained and uncontradicted, will justify a conclusion that a taxpayer had income which he deliberately failed to include in his return, is enough to take a case such as this to the jury. * * * If the skill of the tax evader in concealing income is not to become 'an invincible barrier to proof,' *United States* v. *Johnson*, *supra*, 319 U. S. at page 518, 63 S. Ct. at page 1240, 87 L. Ed. 1546, the federal appellate courts will have to rely heavily upon the sound judgment of the trial courts in appraising the sufficiency of the evidence to warrant submission of a tax evasion case to a jury, and upon the fairness and common sense of juries in determining guilt or innocence when such cases are submitted to them." *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C. A. 8), certiorari denied, 338 U. S. 831.

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Nor is there any direct conflict on this point with either *Bryan* v. *United States*, 175 F. 2d 223 (C. A. 5),[49] or *United States* v. *Fenwick*, 177 F. 2d 488 (C. A. 7). In each of these cases there was an incomplete investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226; 177 F. 2d at 491. But here the agents' investigation was as complete as it could be, and though barred from direct information as to one asset by petitioner himself, they were able to develop enough evidence to negative the probability of any significant accumulation of cash.

2. The "markers" were properly included among petitioner's assets

One of petitioner's objections to the Government's net worth computation affects only the year 1945. Recognizing that the net worth method of proving income belongs in a different category from the cash and accrual methods of accounting, petitioner argues (Br. 17, 31–33) that, since the Government built up its net worth computation on the theory that he was a cash basis taxpayer, it erred in including alleged accrual items in the computation for the year 1945. For that year the Government included a bank roll of $20,000 among the assets of the *B-R Smoke Shoppe* (R. 3601), based on the testimony of

[49] Affirmed on another ground in *Bryan* v. *United States*, 338 U. S. 552.

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Pritchett that at the end of 1945 there was $5,000 cash on hand and $15,000 in "markers" representing unpaid bets (R. 1949, 1961, 1962, 1968). Petitioner insists that the markers were accounts receivable, and hence were accrual items which should not have been included in a computation based on cash receipts. Arguing that the $15,000 was improperly included, he points to the fact that the Government's computation showed unreported income of only $11,747.04 for 1945 (R. 3601–3613) and concludes that the conviction cannot be sustained as to the third and fourth counts.

It should be noted that this argument, even if valid, could result only in a cancellation of the $5,000 fines imposed under the third and fourth counts. The general prison sentence of five years (*supra*, p. 6) would still be supported by either of the first two counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642.

We agree with petitioner that when the Government sets out to prove a taxpayer's income by computing the increases in his net worth, it should, in determining how much of this income is attributable to the taxable year in question, stick consistently either to the cash method or to the accrual method of accounting. We do not agree with petitioner that the markers in this case were accrual items. On the contrary there was evidence from which the jury could properly have concluded that they were the equivalent of

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cash on hand and were so treated by petitioner and his associates. During the cross-examination of the Government's expert accountant, Weaver, by defense counsel the following occurred:

> Q. In computing net income on net worth method is it important to determine whether you are using the cash receipts and disbursements method of accounting rather than the accrual method of accounting?
>
> A. Yes. [R. 2615.]
>
> * * * * *
>
> Q. In computing the net income of a taxpayer on the net worth method, if there was money owed to him on account of business transactions which he had had at the end of the period covered by your net worth computation, the result which you would reach would be different if you used the cash method than if you used the accrual method, would it not?
>
> A. Yes, the result in the two methods should be different. It might turn out to be the same in some instances. [R. 2618.]
>
> * * * * *
>
> Q. As to any particular time that you were making the net worth computation, you would include the accounts receivable if the taxpayer were on accrual method?
>
> A. Yes.
>
> Q. But you exclude accounts receivable if the taxpayer were on the cash method, would you not?

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A. Not necessarily. It depends what the accounts receivable arose from. [R. 2619.]

* * * * *

Q. If accounts receivable arose from the credit extended to customers in the course of a business, then on the cash method you would exclude those accounts receivable in computing the net worth as of that time?

A. If they arose from extension of credit for the sale of merchandise. *If they arose from the extension of cash loans, the situation would be different.* [R. 2620.] [Italics added.]

Petitioner apparently recognizes (Pet. 25; Br. 33) that accounts receivable which arise from loans or advances of cash are not accrual items, but are actually cash items. Weaver testified repeatedly that all the markers in this case were treated by petitioner and his associates as cash and that they represented advances of cash, i. e., loans of cash on hand. He based his conclusion on testimony which indicated that it was the custom in petitioner's gambling enterprises to advance loans from cash on hand, and to count markers as a part of the bank roll of the particular enterprise and to treat them as cash at the year's end. (R. 2494–2498, 2619–2626, 2722–2724, 2772–2782).[20]

[20] Weaver, the Government's accountant, made it abundantly clear, on cross-examination by defense counsel, that he recognized the distinction between (a) an account receivable representing a mere promise to pay by a bettor who has lost—which is not treated as income to a cash-

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Thus, Lando testified that when any of the so-called partners in the *B-R Smoke Shoppe* wanted to withdraw funds during the year they deposited a marker in the amount withdrawn, and that when accounts were settled at the end of the year

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basis taxpayer until actually paid, and (b) an account receivable representing an exchange of one asset for another, *e. g.*, a loan of cash to a bettor in exchange for a promise to repay—which does not result in taxable income to the lender upon repayment of the loan. He testified (R. 2723–2724):

> A. To explain the difference between accounts receivable that arise as the result of exchange of one asset for another. For example, if you had ten thousand dollars cash on hand at the beginning of the year. During the year some one borrowed that money from you, you would no longer have ten thousand dollars cash in hand at the end of the year, but if we had to show any asset at the end of the year, our statement would reflect a loss of ten thousand dollars, which obviously would be incorrect, since your assets have not changed at all in amount, they have only changed in character. You have substituted ten thousand dollars cash and got ten thousand dollars accounts receivable. *That is exactly the same situation with respect to these markers. They have been exchanged for cash.* Now if the asset arises as the result of the receipt of income, or if the liability arises as the result of payment [or] in incurrence of an expense, then you have items which are not properly taken into account on net worth basis, if the taxpayer is reporting—
>
> Mr. AVAKIAN. This is no explanation. This is a lecture on unrelated matters.
>
> The COURT. Your point is not well taken. You may proceed if you have any further explanation you want to make.
>
> A. I merely wanted to say finally that this is the reason you must make a distinction between cash re-

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the markers were considered part of the bank roll and the accumulated profits. (R. 1298–1300; cf. 1333, 1343–1344.) Kyne also testified that such markers were treated as cash. (R. 1374–1375.) Pritchett testified concerning the markers of bettors who lost to the *B-R Smoke Shoppe* without indicating how they were treated accounting-wise.[51] (R. 1949, 1961, 1962, 1968.) Both Maundrell and Busterna testified that the markers of losing bettors at the *Menlo Club* and the *186 Club* represented loans of cash, and were treated as cash and included in the amount of the bank roll. (R. 1627–1629, 1751, 1775–1776, 1886–1887, 1895–1896, 2018, 2021–2022; cf. 1445–1449.) Lando testified that bets were sometimes placed at the race track, and that "lay-off" bets were placed with and received from other bookmakers throughout the country (R. 1294–1295). The bets accepted by the *B-R Smoke Shoppe* itself formed a "pool" in which the amount paid the winners depended on the total amount bet. (R. 1289–1292.) Consequently, as Weaver testified,

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ceivable accounts and cash payable as to the source from which they arise, and you can not take into account, in determining net income under the net worth method, where the cash basis of reporting is used, any assets or liabilities that arise as the result of the receipt of income or the incurrence of expense, because to do so would give you an incorrect result. [Italics added.]

[51] At petitioner's orders, Pritchett had destroyed all records made while he was in charge of the business. (R. 1946, 1965–1966.)

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the house advanced the amount of cash required to complete the "pool." (R. 2772–2782.) The jury, we submit, were thus amply justified in concluding from the evidence that it was customary in the gambling enterprises to treat markers as cash, and that they were items properly to be included in petitioner's assets, in computing increases in his net worth, as equivalent to cash on hand.

In any event, the evidence establishes a substantial amount of unreported income for the year 1945, even if the $15,000 in markers were eliminated entirely from the computation. There are several reasons for this:

1. Since the Government's computation showed an understatement of $11,747.04, elimination of the $15,000 would result in an overstatement of approximately $3,200. The Government included no figure at all for living expenses in its computation. On the other hand, the Government specifically proved that petitioner spent approximately $3,200 during 1945 for such nondeductible items as clothing, jewelry and hotel bills (R. 615, 619, 824, 843, 986, 1202–1204, 1212), and there was considerable evidence to indicate that his style of living was lavish (R. 615). In view of the necessary conclusion that petitioner must have spent a substantial sum for ordinary living expenses in addition to the $3,200 proved, there was still enough evidence to support the

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verdict even if the markers are excluded from the computation.

2. Petitioner himself submitted a net worth computation for the *B-R Smoke Shoppe* which showed essentially the same net worth increase as that submitted by the Government. (R. 3628–3629.) He eliminated the $15,000 bank roll entirely at the starting point on the ground that the Government merely assumed its existence, and he eliminated $15,000 of the $20,000 shown by the Government at the end of 1945. The result is a net worth increase for the *B-R Smoke Shoppe* of approximately $5,000, almost exactly that shown by the Government's computation. If petitioner's figures for the *B-R Smoke Shoppe* were substituted in the Government's computation of petitioner's net worth increases, there would be no appreciable difference in the end result. (Compare R. 3601, 3612–3613 with 3626–3629; and cf. 3287–3289, 3322–3334.) Consequently, even on petitioner's own figures, the jury's finding was warranted.

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3. The evidence that the partnerships were shams was sufficient and the issue was properly submitted to the jury

The chief underlying factual issue at the trial was the ownership of four of the San Francisco enterprises, *B-R Smoke Shoppe, 110 Eddy Street, Day-Night Cigar and Liquor Store* and *Menlo Club*. The amounts ascribed to these enterprises make the essential difference between the Government's net worth computation (R. 3612–3613) and that submitted by petitioner (R. 3626–3628). The Government contended that the businesses were sham partnerships and that they actually belonged to petitioner alone. Petitioner contended that the evidence was insufficient to establish that the partnerships were mere shams (*supra*, p. 7), and he objected to the trial court's refusal to give his proposed instruction on the issue. (R. 83–84, 3496.) Both arguments were renewed in the Court of Appeals. (R. 3768–3769, 3775.) In this Court petitioner renews his attack (Br. 37–39) upon the sufficiency of the evidence. And he also argues (Br. 17–18, 33–41), for the first time, that the test for determining whether a partnership actually exists is so doubtful and uncertain that the issue should never have been submitted to the jury.

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We shall address ourselves first to the latter contention, not raised in the courts below. To begin with, petitioner himself recognized in the trial court that the nature of the so-called partnerships was a question to be decided by the jury. During the argument on the motion for acquittal, while defense counsel was urging that there was no substantial evidence that the partnerships were shams, the following occurred (R. 3480):

> The COURT. The question of whether the partnership is a real partnership would be left to this jury.
>
> Mr. AVAKIAN. Your Honor, that should be left to the jury only if there is some reasonable basis upon which they could infer that the partnerships are phony.

And petitioner's proposed instruction on the issue contained the following language (R. 84):

> Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates did not intend to operate said businesses as profit-sharing partners, you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year.

Furthermore, petitioner's contention that the determination of the existence of a partnership is too difficult a question for a jury is squarely in conflict with this Court's holding that the issue simply involves the application of long settled principles of partnership law and is the type of

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question which triers of fact are constantly called upon to decide. In *Commissioner* v. *Tower,* 327 U. S. 280, 287, this Court said that the question is—

> whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their "agreement, considered as a whole, and by their conduct in execution of its provisions." *Drennen* v. *London Assurance Co.,* 113 U. S. 51, 56; *Cox* v. *Hickman,* 8 H. L. Cas. 268. We see no reason why this general rule should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes.

Three years later, in *Commissioner* v. *Culbertson,* 337 U. S. 733, 741–743, this Court repeated the above quotation from the *Tower* case and said:[22]

> The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light

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> on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. *There is nothing new or particularly difficult about such a test. Triers of fact are constantly called upon to determine the intent* with which a person acted. * * * Whether the parties really intended to carry on business as partners is not, we think, any more difficult of determination or the manifestations of such intent any less perceptible than is ordinarily true of inquiries into the subjective.[53]

In this respect again, petitioner fails to give proper effect to the distinction between a civil action for recovery of taxes and a criminal prosecution for willful attempted evasion of taxes. In the criminal case, the burden is on the Government, if the prosecution is based on a sham partnership, to show absence of intent to form a partnership. Furthermore, even after it establishes the invalidity of the partnership, the Government must still show that the taxpayer knew the partnership was a sham and deliberately used it in an attempt to evade taxes. The basic assumption of petitioner's argument is that the offense with which he was charged was based upon his erroneous and mistaken interpretation of technical statutory provisions.[54] Obviously this was

[52] See also the concurring opinion of Mr. Justice Frankfurter, 337 U. S., pp. 749–754.

[53] Footnote omitted and emphasis supplied.

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not the theory of the prosecution. The jury were instructed on the nature and effects of a partnership (R. 142, 143–144); they were instructed that bona fide mistakes should not be held against petitioner (R. 133); and they were instructed that they could not find him guilty unless they found beyond a reasonable doubt that he consciously, knowingly and intentionally attempted to evade his taxes and knew that he was doing wrong (R. 134–135, 139–141, 142–143, 146, 151–152, 155). The jury must have found against petitioner in all these respects so far as the years 1944 and 1945 were concerned. The issues submitted to the jury were no more difficult than those which must be decided in many criminal cases. *Spies* v. *United States,* 317 U. S. 492, 499–500.

The instructions actually given on the partnership issue (R. 142, 143–144), and the rejection of petitioner's proposed instruction (R. 83–84), were

[54] According to petitioner, the formation of a nominal partnership would prevent a jury from ever convicting any taxpayer, even though the very purpose for the adoption of the partnership form was evasion of taxes. Petitioner says (Br. 36), "Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that *there is no basis on which a jury could properly convict him* of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue." [Emphasis supplied.] It seems obvious that taxpayers cannot be afforded such a blanket immunity from prosecution where a willful and fraudulent intent to evade tax is proved, as in this case.

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correct. The jury must, of course, be instructed on all the essentials of the offense alleged to have been committed, and there can be no doubt that the defendant is entitled to a clear instruction on the law pertaining to his theory of the defense.[55] On the other hand, the trial judge is under no affirmative obligation to state what the evidence is or to make any comments on the facts whatsoever,[56] and if he does so he should avoid undue emphasis upon any particular phase of the evidence.[57]

The trial court's action was clearly correct in the light of these principles. The jury's attention was specifically called to the partnership theory of the defense, and they were told how to deter-

[55] *Bird* v. *United States*, 180 U. S. 356, 361–362; *United States* v. *Marcus*, 166 F. 2d 497, 503–504 (C. A. 3); *Jones* v. *United States*, 164 F. 2d 398, 400 (C. A. 5); *Little* v. *United States*, 73 F. 2d 861, 867 (C. A. 10); *Fay* v. *United States*, 22 F. 2d 740, 742 (C. A. 9).

[56] *Stilson* v. *United States*, 250 U. S. 583, 588; *Todorow* v. *United States*, 173 F. 2d 439, 446 (C. A. 9), certiorari denied, 337 U. S. 925; *United States* v. *Cohen*, 145 F. 2d 82, 92–93 (C. A. 2), certiorari denied, 323 U. S. 799; *Arwood* v. *United States*, 134 F. 2d 1007, 1011 (C. A. 6), certiorari denied, 319 U. S. 776; *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); cf. *Quercia* v. *United States*, 289 U. S. 466, 469–470.

[57] *Perovich* v. *United States*, 205 U. S. 86, 92; *Bird* v. *United States*, 187 U. S. 118, 130–131; *Coffin* v. *United States*, 162 U. S. 664, 674–675; *United States* v. *Pannell*, 178 F. 2d 98, 99 (C. A. 3), certiorari dismissed, 339 U. S. 927; *Boatright* v. *United States*, 105 F. 2d 737, 739 (C. A. 8); *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); *Meadows* v. *United States*, 82 F. 2d 881, 884 (C. A. D. C.); *Urban* v. *United States*, 46 F. 2d 291, 293 (C. A. 10).

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mine under the law whether a partnership actually existed and what the effects would be, tax-wise, if it did exist. There was no need to further particularize by describing the special type of partnership claimed by petitioner, and by telling the jury that this *would* be a partnership *if* they found that it met the test. This would have put emphasis upon the evidence for the defense without mention of the overwhelming evidence to show that no true partnership relationship was ever intended.[58] We submit that the Court of Appeals was correct in saying (R. 3775):

> The instruction requested by appellant, requiring the jury to find a valid partnership if certain testimony was believed, unduly emphasized particular phases of the evidence and would violate the rule that the question is one of fact to be decided from all the evidence.

Petitioner asserts (Br. 18, 37–39) that there is no evidence in the record that the four businesses were sham partnerships. He calls attention to the written agreements, the book entries of partners' equities, the withdrawal of cash by some of the partners other than petitioner. The written agreements were drawn up after the Government's

[58] It should be noted, in addition, that petitioner's proposed instruction does not fully reflect the written agreements which petitioner subscribed with Kyne and Maundrell in late 1946, after the investigation had begun. (R. 3582–3583, 3585–3586; Exs. 113 and 130.)

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investigation had been instituted, and no partner, other than petitioner, withdrew any cash prior to that time except for the purpose of paying taxes or expenses of the businesses. Petitioner does not mention the voluminous evidence supporting the Government's position. We have summarized it in the Statement (*supra,* pp. 10–30), and there is no need to repeat it here. All the so-called partnership businesses were purchased with funds furnished by petitioner. Pratt, Nealis and Kopstick, the only others who contributed capital, were squeezed out at the earliest opportunity. There was a general manager, a main office, and Box 48 in which the funds of all the businesses were indiscriminately mingled with petitioner's personal funds. The so-called partners were told of their interests by petitioner, received no profits, and had no idea of the amount of "equities" credited to them. They were given only enough to pay the taxes on their supposed shares. Some of them did not even know who their fellow partners were. Cavani and Turner were supposed to be partners in *110 Eddy Street,* but Kyne had admitted prior to trial that they were simply employees. Petitioner, on the other hand, drew large sums from the businesses and from Box 48, and no record was kept of these withdrawals. The evidence is overwhelming that the so-called partners were simply employees of petitioner and that the "equities" credited to

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them were a scheme designed to enable petitioner to evade a large part of his income taxes.[50]

III

THERE WAS NO ABUSE OF DISCRETION IN THE DENIAL OF PETITIONER'S MOTIONS UNDER RULES 16 AND 17

Petitioner contends (Br. 18–19, 41–45) that the trial court erred in denying his motions under Rules 16 and 17 of the Federal Rules of Criminal Procedure. (*Supra*, pp. 4–5.) An attempt is made to raise questions involving the scope of these rules in the light of this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214. However, the trial court did not deny the motions because of the nature of the documents requested but because of the circumstances under which the motions were made, and the argument is, in essence, that the rulings constituted an abuse of discretion. The *Bowman Dairy* case, however, did not concern itself with

[50] Petitioner makes much of the proceeding in the Tax Court, *Remmer* v. *Commissioner*, Docket No. 23486. (Br. 6, 25, 39.) That proceeding has no bearing whatever on the criminal case. The deficiency notices which gave rise to the civil proceeding were issued by the Commissioner early in 1949, and the last Government pleading of any moment was filed in February 1950. As will be seen (*infra*, pp. 85–86), the investigation continued thereafter, and the indictment in this case was not filed until April 1951. Regardless of the earlier proceedings in the Tax Court, the Commissioner may always send out further 90-day letters asserting additional deficiencies in the case of fraud on the part of the taxpayer. See Section 272 (f), Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 272).

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questions of discretion but with the power of the District Court under the rules.[60]

The language of the rules specifically reposes a large measure of discretion in the trial court in dealing with requests for the discovery and inspection, or production, of books, papers, and other objects in possession of the Government.[61] Rule 16 provides that the court "may" allow inspection of such evidence "upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." Rule 17 provides that the court "may" issue a subpoena directing the production of such material, but that the subpoena may be quashed "if compliance would be unreasonable or oppressive". We think a review of the circumstances which preceded these motions will satisfy the Court that the trial judge was well within his discretion in denying the motion to inspect and in quashing the subpoena.

As early as the first half of 1946, Internal Revenue agents began an investigation of the income tax returns of the *B–R Smoke Shoppe.* (R. 2115, 2123, 2152, 2163.) In the latter part of 1946 a special agent, whose duty it was to inves-

[60] The same is true of *Fryer* v. *United States*, 207 F. 2d 134 (C. A. D. C.), certiorari denied, 346 U. S. 885. *Gordon* v. *United States*, 344 U. S. 414, involved a motion to produce a specific document made during the course of the trial.

[61] See *Webb* v. *United States*, 191 F. 2d 512, 515 (C. A. 10); *United States* v. *Schiller*, 187 F. 2d 572, 575 (C. A. 2); *United States* v. *Schneiderman*, 104 F. Supp. 405 (S. D. Cal.).

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tigate possible criminal tax evasion, was assigned to the case, and by July 1947 the agents were examining the returns of petitioner and of all the above-named enterprises. (R. 1249, 2423, 2454–2458.) The agents had numerous interviews during 1946 and 1947 with Kyne and with the two bookkeepers, Slater and Maundrell. Kyne, Slater, and Maundrell gave considerable oral information and turned over, freely and voluntarily, a large quantity of business records, although they were unwilling or unable, as has been stated (*supra,* pp. 18, 19–20, 33–34, 35), to give any information about petitioner's personal finances. The agents took the records to their own offices for study, promising that they would be returned when the investigation was complete and that Kyne and Maundrell could have access to them in the meanwhile. On several occasions Kyne and Maundrell obtained some of the records and then brought them back to the agents. As has been shown (*supra,* p. 13), a page in one of the *Menlo Club* books was altered before it was returned. In addition, Maundrell did not return some of the records of the *186 Club.* (R. 1528–1530, 1640–1643, 1813–1815, 2123–2126, 2154–2155, 2165–2166, 2199–2200, 2449–2451, 2695–2698, 2783.)

The agents repeatedly pointed out to Kyne that the records of the enterprises were inadequate in many respects, but Kyne could not enlighten them. They sought permission to examine the

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contents of the safety deposit boxes, but this was refused by Kyne. Finally, at the agents' request, Kyne arranged an interview with petitioner on April 8, 1948, in the office of petitioner's then attorney, Thatcher. Thatcher asked whether the agents had any specific charges and whether they intended to recommend criminal prosecution. He did not ask what accounting problems they were concerned with. When the agents said that they had no authority to make charges and could make no recommendation until they had completed their investigation, Thatcher instructed petitioner not to answer any questions, terminated the interview, and handed to the agents a statement which he had prepared before the agents arrived. There was no claim of self-incrimination. Thereafter, Thatcher, of his own accord, turned over further records of petitioner to the agents. The agents were never able to communicate with petitioner himself during the course of the investigation. (R. 2496, 2558–2572, 3045, 3067–3068, 3619; Ex. G–1.) The special agent did not complete his investigation and submit his report recommending criminal prosecution until November 10, 1949. (R. 2577.)

Several months previously, however, the Bureau of Internal Revenue had begun a civil proceeding for recovery of income taxes, and had issued 90-day letters alleging an understatement of net income for 1944, 1945, and 1946 in the approximate amount of $487,000 and specifying the

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businesses from which this arose. (R. 30–32.) A jeopardy assessment was levied against petitioner's assets in March 1949. (R. 3059.) On June 2, 1949, Lawrence Semenza, a certified public accountant, filed a power of attorney with the Treasury Department authorizing him to represent petitioner. (R. 37, 909–910.) On July 11, 1949, Semenza, at his own request, was taken into a room where the agents were keeping the records which had been turned over to them; he was told he could take away anything he wanted; he selected those which he thought were pertinent to petitioner's civil liability for underpayment of taxes; and he signed a receipt and agreed to return the records to the agents. (R. 39, 901, 908–910, 919–920, 922.)

On February 14, 1950, petitioner was officially notified by the Bureau of Internal Revenue that criminal proceedings were being contemplated. (R. 3210.) In March he employed two of the attorneys who represented him at the trial, Messrs. Golden and Gillen, together with a second certified public accountant, Friedman. (R. 37.) There was a conference on the contemplated criminal proceeding on May 25, 1950, at which petitioner's representatives were informed that if they prepared a net worth statement they would be allowed to compare it with the one already prepared by the Bureau. (R. 38–39.) Friedman was allowed to see all the records remaining in the hands of the agents; he spent some time ex-

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amining them and was allowed to take some of them. (R. 39, 184–185, 3212–3213.) Furthermore, petitioner's attorneys instructed Semenza to turn over to Friedman all records pertaining to the San Francisco enterprises, and as late as October 30, 1950, the Government was told that Friedman was making an audit. (R. 39, 910.) In November 1950 Friedman withdrew from the case and left all the records in the hands of petitioner's attorneys. (R. 37, 910, 3224.) Shortly before the case was presented to the grand jury in April 1951, Semenza was asked by the agents to return the records in accordance with his agreement. He appeared before the grand jury and stated that petitioner's attorneys would not return them to him. (R. 911–912.) Petitioner's attorneys refused to give them up on the ground that they were petitioner's property. (R. 173–176.) The indictment was returned on April 9, 1951, and trial was set for November 7, 1951. (R. 8, 447.) Shortly after the indictment petitioner, as has been shown (*supra,* pp. 19–20), obtained the books of the El Cerrito businesses and they were not available at the trial.

On June 15, 1951, during the course of a hearing on a motion for a bill of particulars, the question of examination by petitioner of the records in the Government's hands was discussed informally, and counsel for petitioner were told to apply to the court if they failed to receive cooperation from the Government. (R. 194, 285.)

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But no action was taken on the court's suggestion until October 22, 1951, when defense counsel asked the prosecutor, Mr. Campbell, that they be allowed to examine the records which still remained in the agents' hands. (R. 26–28.) The prosecutor agreed to do this, provided a showing was made of petitioner's interest in the records, and provided the written consent of the parties who had turned them over to the Government was obtained. (R. 40–41.) Meanwhile, the records which had been given by Friedman to petitioner's attorneys were returned by them to Semenza. (R. 912.)

On November 14, 1951,[62] petitioner filed a motion under Rule 16, Federal Rules of Criminal Procedure, to inspect and take copies of the records in the Government's possession. It was alleged that a tremendous amount of accounting work would be required to prepare for trial, and that petitioner had been without an accountant until he obtained the services of Semenza in September 1951. A continuance of the trial was requested until April. (R. 16–34.) After a hearing (R. 157–198), the court denied the motion to inspect on the ground that petitioner had had ample opportunity since May 1950, through Friedman, to inspect all records in the Government's possession (R. 194–198). Referring to Friedman's examination, the court said, "The defendant has

[62] The trial date had been postponed to November 28, because the judge was engaged in other matters. (R. 180, 264.)

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had all the benefits that the Court could give, the benefit by an order under Rule 16." (R. 196.) He also pointed out that petitioner had given no satisfactory explanation for withholding until the last minute a request which purportedly would cause a long delay in the proceedings.[63] (R. 197–198.)

On November 27, 1951, the day before the trial, petitioner presented a motion under Rule 17, Federal Rules of Criminal Procedure, for production and inspection of the records in the Government's possession, together with a subpoena to produce the records. (R. 42–54.) After a hearing (R. 241–288), the subpoena was quashed and the motion was denied on the ground that, under the circumstances, it was unreasonable to delay making it until the day before the trial (R. 286–287). The court assured defense counsel that they would be allowed ample time during the trial to examine each document offered by the Government. (R. 287–288.)

Upon request by the Government a subpoena was issued to Semenza to produce the records in his possession, but he appeared at the trial and stated that they had again been taken from him by petitioner's attorneys. The court ordered them turned over to the clerk, and they were made available to both sides for the duration of

[63] The explanation was that petitioner was without funds to pay for an audit by Friedman. There was no evidence whatsoever to support this assertion. (R. 197–198.) It was merely asserted by counsel.

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the trial. (R. 912–929.) As to the records in the Government's possession, specific documents were, as we have already shown (*supra,* p. 48), promptly produced during the trial when requested by the defense.

In summary, petitioner knew, at least as early as April 1948, that a criminal proceeding was possible. Two of his accountants, Semenza in July 1949 and Friedman in May 1950, examined the records in the Government's hands, and Friedman had been specifically retained to look into the criminal aspect of petitioner's tax problems. Defense counsel were told five months before the date set for trial to request a court order if the Government would not cooperate with them, but Government counsel were not approached until about two weeks before the original trial date. Then, instead of complying with the simple conditions imposed by the Government, petitioner filed the two motions shortly before trial and asked a continuance of four months. Under these circumstances the Court of Appeals was clearly correct in holding that there had been no abuse of discretion in the denial of the motions. (R. 3752–3758.)

Under Rule 16 the trial court may, upon the making of a reasonable request, permit a defendant to inspect documents in the hands of the Government which belong to him. Petitioner, as the trial court pointed out, had already had the benefits of an order under the rule since all the

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documents in the Government's possession had been examined by Semenza and Friedman. Moreover, it is quite clear that a further inspection would have been permitted had any reasonable request been made therefor, yet, although seven months intervened between indictment and the date set for trial, petitioner waited until the eleventh hour to approach the Government. Counsel conceded that access to the records had never been denied before November 7, 1951. (R. 2975.) But, instead of complying with the reasonable conditions imposed by the Government at that time,[64] petitioner informed the trial court that a four months' continuance would be necessary to enable him to examine and analyze all the documents. By no stretch of the imagination can this be called compliance with the spirit of Rules 16 and 17 which, as this Court pointed out in the *Bowman Dairy* case, were adopted in the interest of orderly and expeditious trial procedure. (341 U. S., pp. 219, 220.) See Note, 67 Harv. L. Rev. 492 (1954).

Rule 17 was destined to establish a more liberal policy for the production of evidentiary materials held by the Government, in order to enable

[64] Since the records had been turned over voluntarily by Kyne and Maundrell, and since it appeared that they claimed partnership interests, the Government properly requested that their written consent to the inspection be obtained. It is obvious that petitioner knew who his associates were and who had turned the records over to the Government.

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the defendant to put them in evidence should the Government fail to do so. *Bowman Dairy Co.* v. *United States,* 341 U. S., pp. 219–221. "Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." 341 U. S., p. 220. If, however, the defendant's action is not a "good-faith effort" to obtain evidence, the trial court may quash the subpoena. *Ibid.* Petitioner waited until the very day before trial, already delayed for three weeks, to file his motion for production, and he coupled with it a request that a time and place be appointed for inspection of the produced material by his attorneys and accountants. This would of necessity have interfered with the voluminous exhibits already prepared by the Government for the trial. Furthermore, in view of the considerable quantity of the records in the Government's possession (R. 48), petitioner would certainly have insisted that a proper inspection could not be made without a further lengthy continuance. We do not see how such belated maneuvers can profess to be a "good-faith effort" to obtain evidence. The inference is justified that petitioner's object was not to obtain evidence or to prepare a legitimate defense, but rather to cause delay and to sow the seeds of possible error for later harvest on appeal.

This conclusion is fortified by the complete absence of the slightest showing of prejudice. Professing not to know what records the prosecution

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had (R. 272, 317), petitioner assumes the existence of something beneficial to the defense (R. 3469). His accountants had twice examined the records. Every record specifically requested during the trial was promptly produced by the Government. And surely petitioner would have known, as the trial judge pointed out (R. 3469–3475), what specific records were to his advantage. But there is nothing to indicate that petitioner was deprived of anything that would have materially aided his defense. We submit that both motions were properly denied as unreasonable under the circumstances.

IV

THE GOVERNMENT DOES NOT OPPOSE REMAND OF THE CASE TO THE DISTRICT COURT FOR THE PURPOSE OF HOLDING A HEARING TO INQUIRE INTO THE FACTS CONCERNING THE ALLEGED IMPROPER CONTACT BETWEEN ONE OF THE JURORS AND A THIRD PERSON

In his motion for a new trial filed February 29, 1952 (R. 106–110), petitioner alleged that he "was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the jury, the Court, the prosecuting attorneys and the Agents of the Federal Bureau of Investigation" regarding an alleged incident described in the accompanying affidavit of petitioner's counsel.

This affidavit (R. 111–120) contained the following allegations: That the trial of this case commenced on November 28, 1951; that the jury reached its verdicts on February 22, 1952; that on

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February 23, 1952, petitioner's counsel first learned of the facts averred; that in December 1951, or January 1952, an unidentified person had a conversation with one of the jurors; that in the course of this conversation it was stated to the juror that he could profit by bringing in a verdict favorable to the defendant; that the juror promptly reported the substance of the conversation to the trial judge, who conferred with the prosecuting attorneys concerning the matter; that as a result the Federal Bureau of Investigation was requested to and did make an investigation of the incident and made a report thereon; that neither the judge nor the prosecuting attorneys related the incident to any of defendant's counsel, and the latter were kept in complete ignorance of the matter until the verdicts had been reached, and thereafter learned thereof only through the press; that, if defendant's counsel had been apprised of the situation, they would have moved for a mistrial and further would have requested that the juror involved be replaced by an alternate juror, for the reason that said juror, having had such conversation, would be apprehensive of being suspected and criticized were he to vote and attempt to have the other jurors vote for a verdict in favor of the defendant, and thus would be and was prejudiced against the defendant by reason of such conversation; and that the omission of the trial judge to bring the facts of this incident to the attention of defendant's counsel at the time

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criminal cases that "Private communications, possibly prejudicial, between jurors and third persons * * * are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox* v. *United States,* 146 U. S. 140, 150. Evidence of such communication gives rise to a presumption of prejudice, and the burden is on the Government to establish that the communication was harmless. *Wheaton* v. *United States,* 133 F. 2d 522 (C. A. 8). Where it is shown that a possibly prejudicial conversation has taken place during the trial between a juror and a third person, the Government believes that the appropriate procedure is for the trial court to probe the matter by a hearing, so that the question of possible prejudice can be determined on the basis of facts on the record. See *Ryan* v. *United States,* 191 F. 2d 779, 781 (C. A. D. C.) and cases cited.

In *Glasser* v. *United States,* 315 U. S. 60, this Court held that an affidavit in support of a new trial, alleging improper constitution of a jury, although not formally controverted, need not be taken as true in the absence of implied or actuai stipulation that it may be accepted as proof; and that it is incumbent upon the moving party to "introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough." (315 U. S. at p. 87.) In the instant case there was no "stipulation" that the facts set forth in the affi-

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davit in support of the motion might be accepted as true. Nor was there any offer of "distinct evidence" by the petitioner. His counsel offered, as did Glasser, to prove their allegations, but made no actual tender of proof. Although, according to their affidavit, they learned of the alleged events six days prior to the filing of the motion, the record is barren of any indication that they attempted to secure affidavits from anyone personally acquainted with the facts. Instead, they appeared on the day set for imposition of sentence and requested the court to issue subpoenas for them, including a subpoena to the trial judge himself. (R. 109.)

However, we do not believe that the *Glasser* rule is controlling in the circumstances of this case. Under the *Mattox* doctrine, evidence of potentially prejudicial contact with a juror would alone suffice to shift to the Government the burden of establishing that prejudice was lacking. Although there was no stipulation that any contact took place, it was alleged in the affidavit that there was such contact, that it had been called to the attention of the prosecutor and the judge, and that the judge had caused an investigation of the incident to be made by an official investigative agency of the Government. (R. 111–120.) The silence of both the prosecutor and the court in the face of such allegations results in a situation not present in the *Glasser* case, where it was not alleged and there was no reason to assume that

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either had knowledge of the facts set forth in the affidavit. Cf. *Wolf* v. *United States,* 292 Fed. 673, 678 (C. A. 6); *Hindman* v. *United States,* 292 Fed. 679 (C. A. 6).

In view of these circumstances, the Government does not oppose remand of the case to the district court for the purpose of holding a hearing to inquire into the facts concerning the alleged incident.

CONCLUSION

Petitioner was properly convicted and the evidence was sufficient to warrant submission of the case to the jury and to support the verdict. The judgment of conviction should not be set aside. However, the Government does not oppose remand of the case to the district court for the purpose of holding a hearing, in connection with petitioner's motion for a new trial, to inquire into the facts concerning the alleged improper contact between one of the jurors and a third person.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 304.—October Term, 1953.

Elmer F. Remmer, Petitioner, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 8, 1954.]

Mr. Justice Minton delivered the opinion of the Court.

The petitioner was convicted by a jury on several counts charging willful evasion of the payment of federal income taxes. A matter admitted by the Government to have been handled by the trial court in a manner that may have been prejudicial to the petitioner, and therefore confessed as error, is presented at the threshold and must be disposed of first.

After the jury had returned its verdict, the petitioner learned for the first time that during the trial a person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to the petitioner. The juror reported the incident to the judge, who informed the prosecuting attorneys and advised with them. As a result, the Federal Bureau of Investigation was requested to make an investigation and report, which was accordingly done. The F. B. I. report was considered by the judge and prosecutors alone, and they apparently concluded that the statement to the juror was made in jest, and nothing further was done or said about the matter. Neither the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict.

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The above-stated facts were alleged in a motion for a new trial, together with an allegation that the petitioner was substantially prejudiced, thereby depriving him of a fair trial, and a request for a hearing to determine the circumstances surrounding the incident and its effect on the jury.* A supporting affidavit of the petitioner's attorneys recited the alleged occurrences and stated that if they had known of the incident they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror. Two newspaper articles reporting the incident were attached to the affidavit. The Government did not file answering affidavits. The District Court, without holding the requested hearing, denied the motion for a new trial. The Court of Appeals held that the District Court had not abused its discretion, since the petitioner had shown no prejudice to him. 205 F. 2d 277, 291. The case is here on writ of certiorari. 346 U. S. 884.

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox* v. *United States,* 146 U. S. 140, 148–150; *Wheaton* v. *United States,* 133 F. 2d 522, 527.

*The motion for a new trial was also grounded on many other contentions, several of which have also been presented to this Court. Because of our disposition of the case on the issue treated herein, we do not pass upon these additional questions.

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We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F. B. I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.

Judgment vacated.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

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